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CALIFORNIA REPORTER

245 PACIFIC REPORTER

SECOND SERIES

39 Cal.2d 118

Ex parte LOPEZ.

Cr. 5304.

Supreme Court of California, in Bank.

June 17, 1952.

Rehearing Denied July 10, 1952.

Habeas corpus proceeding for dismissal of pending prosecution for lack of speedy trial as required by Penal Code, § 1302, subd. 2. The Supreme Court, Shenk, J., held that when agreed postponements had resulted in delay of trial beyond sixty day statutory period, further delay of trial from January 17 to February 7, despite fact that the defendant had three times been ready for trial when case was called, was not unreasonable, when court was engaged in trial of other causes at the time.

Writ denied.

Schauer, J., dissented.

1. Criminal Law 🔑576(5)

The defendant's consent to the postponement of his trial is equivalent to a postponement on his application, and is sufficient cause for the delay within meaning of provision of Penal Code that court, unless good cause to contrary is shown, must order prosecution dismissed if defendant, whose trial has not been postponed upon his application, is not brought to trial in Superior Court within 60 days after filing of information. Pen.Code, § 1382, subd. 2.

2. Criminal Law 🔑573, 576(5)

Consent of defendant to delay of trial beyond 60-day period prescribed by statute does not amount to a waiver of his constitutional right to a speedy trial, nor of requirement of statute that further delay be justified on grounds of reasonableness and good cause. Pen.Code, § 1382, subd. 2.

3. Criminal Law 🔑576(2)

Where defendant had consented to postponement of his trial beyond 60-day period from filing of information, defendant was not entitled to go to trial as matter of right on day to which he last consented, if good cause appeared for further delay. Pen.Code, § 1382, subd. 2.

4. Criminal Law 🔑576(2)

Whether there is good cause for delay of defendant's trial beyond 60-day statutory period is primarily dependent on circumstances of each case. Pen.Code, § 1382, subd. 2.

5. Criminal Law 🔑576(2)

Where defendant had consented to postponement of trial of charge against him beyond 60-day period from filing of information, and trial was thereafter thrice postponed without defendant's consent over period from January 17 to February 7, because court was engaged at time in trial of other cases, delay was not unreasonable and defendant was not entitled to discharge under statute. Pen.Code, § 1382, subd. 2.

Arthur D. Klang and Albert E. Polonsky, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Thomas C. Lynch, Dist. Atty., Cecil Poole, Asst. Dist. Atty., and Raymond D. Williamson, San Francisco, for respondents.

SHENK, Justice.

This is a petition for the writ of habeas corpus or other appropriate writ to obtain dismissal of a pending prosecution for lack of a speedy trial pursuant to section 1382 of the Penal Code.

The petitioner, referred to herein as the defendant, was informed against on November 9, 1951, on a charge of grand theft. He was arraigned on November 16th and pleaded not guilty. At that time the case was continued to November 26th to be set.

On that date the trial was set for December 20, 1951. When called for trial, the case was continued with the consent of the defendant to December 27th. On December 27th, again with his consent, the trial was continued to January 17, 1952. On that date the defendant announced that he was ready for trial. He objected to a further continuance requested by the District Attorney and moved for dismissal pursuant to section 1382. His motion was denied and the trial was continued to January 24th. On January 24th he again announced that he was ready, objected to a further continuance, and renewed his motion to dismiss. The motion was denied and the trial date reset for February 4th. When he appeared for trial he objected to a further continuance, and renewed his motion for dismissal. His motion was denied and over his objection the trial was continued to and commenced on February 7, 1952. On that day this court issued an order to show cause why the prosecution should not be dismissed. Upon the service of this order the trial court continued the further trial pending the determination of this proceeding. No writ has been issued.

The return to the order to show cause sets forth the reasons claimed to be good cause for the postponements. It is shown that each time when continuances were granted commencing on January 17, 1952, the last trial date to which the defendant had consented, the court was engaged in the trial of other cases. The defendant does not question that such was the condition of the court calendar, but contends that his trial should have preceded the trials in four cases where the information was filed after the date of filing in his case; that all of them were tried before his trial commenced on February 7th; and that in one the defendant was out on bail while this defendant was not on bail. It does not appear that the trial court without sufficient reason set the defendant's trial for a date later than the trial in any of such cases. Any contention in this respect is met by the answer to the question whether good cause existed for delay in the defendant's trial.

As applicable here subdivision 2 of section 1382 of the Penal Code provides that the court, unless good cause to the contrary is shown, must order the prosecution dismissed if a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within 60 days after the filing of the information.

[1] The defendant's consent to the postponement of his trial is equivalent to a postponement on his application and is sufficient cause for the delay. Ray v. Superior Court, 208 Cal. 357, 281 P. 391; People v. Santos, 134 Cal.App. 736, 744, 26 P.2d 522.

[2] As the record shows, the agreed continuances brought the postponement by the defendant's consent to January 17th, a date beyond the 60 day period from the filing of the information. On January 17th, therefore, the defendant had no good reason for insisting upon a dismissal. But his consent to delay beyond the 60 day period does not amount to a waiver of his constitutional right to a speedy trial nor of the requirement that further delay must be justified on grounds of reasonableness and good cause. People v. Duffy, 110 Cal. App. 631, 294 P. 496; People v. Santos, supra, 134 Cal.App. 736, 744, 26 P.2d 522.

[3] The defendant was not entitled to go to trial as of right on the day to which he last consented if good cause appeared for further delay. But the further delay must not be unreasonable and good cause is shown where the condition of the court's business would not permit the trial to proceed. People v. Benc, 130 Cal. 159, 162, 62 P. 404; Harris v. Municipal Court, 209 Cal. 55, 285 P. 699; People v. Fegelman, 66 Cal.App.2d 950, 153 P.2d 436; People v. George, 91 Cal.App.2d 537, 540–544, 205 P.2d 464; People v. Brower, 92 Cal.App.2d 562, 566–569, 207 P.2d 571.

[4] The foregoing cases define what is a speedy trial in the constitutional sense and as required by section 1382 of the Penal Code. They also indicate that the question depends on the circumstances of each case bearing on the factors of good cause and the reasonable exercise of discretion in allow-

ing postponements. See also People v. Godlewski, 22 Cal.2d 677, 682, 140 P.2d 381; People v. Burns, 128 Cal.App. 226, 16 P.2d 1015.

[5] As stated, the unquestioned fact that the trial court was engaged in the trial of other cases constituted good cause for the delay. The time intervening between January 17th, the last agreed trial date, and February 7th, when the trial actually commenced, was not unreasonable in view of that condition of court business. Therefore a sufficient answer to the defendant's motion and to his application here is that good cause appears for continuing the case beyond the sixty-day period (1) by the consent of the defendant to postponement of the trial beyond the sixty-day period, and (2) by the reasonableness of the delay thereafter due to the fact that the court was engaged in the trial of other cases.

The order to show cause is discharged and the petition for a writ is denied.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., dissents.

Rehearing denied; SCHAUER, J., dissenting.

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111 Cal.App.2d 751

NORDEN v. HARTMAN.

Civ. 4255.

District Court of Appeal, Fourth District, California.

June 18, 1952.

Action against orthopedic surgeon for malpractice in connection with treatment given to plaintiff's foot which had subsequently been partially amputated. The Superior Court of San Diego County, Arthur L. Mundo, J., granted new trial upon ground of insufficiency of evidence after verdict for plaintiff, and plaintiff appealed. The District Court of Appeals, Griffin, J., held that the evidence would have supported a verdict for the defendant and was such as to warrant grant of new trial.

Order affirmed.

1. Appeal and Error 🔑979(2)
New Trial 🔑70

It is the duty of the trial court to grant a new trial whenever in its opinion, the evidence on which the decision rests is insufficient to justify the decision, and court's action in granting new trial on such ground is discretionary to extent that if any appreciable conflict exists in evidence, such action may not be disturbed on appeal.

2. New Trial 🔑68

In malpractice action, wherein it appeared that defendant who was orthopedic surgeon had performed the third in a series of five operations and had been but one of nine doctors to treat plaintiff, and it was contended that infection to plaintiff's foot necessitating amputation had been caused by defendant's treatment, evidence was such as would have supported verdict in favor of defendant, and warranted grant of new trial to defendant after verdict for plaintiff.

3. Evidence 🔑507

Where plaintiff had suffered injury to his foot which necessitated five operations and treatment by nine different doctors, and infection developed which necessitated partial amputation, cause of infection and its spread in plaintiff's foot was matter within province of medical expert testimony, and was not subject of common knowledge.

4. Appeal and Error 🔑854(6)

If evidence supports order of trial court granting new trial, such order is not an abuse of discretion regardless of whether the reasons assigned by trial court for granting new trial are in harmony with order made.

5. Appeal and Error 🔑933(1)

Practice of trial court in granting new trial when weight of evidence appears to be contrary to jury's determination and when verdict appears to be excessive, will not be discouraged by appellate courts, but on appeal, all presumptions will be in favor of order granting new trial, and against the verdict.

6. New Trial ⚷70

Where contention was advanced in malpractice action that doctrine of res ipsa loquitur was applicable, and application of such doctrine would have merely created conflict in evidence, trial court might nevertheless have granted new trial on ground of insufficiency of evidence, and order granting new trial was not improper.

7. Evidence ⚷553(1)

Where plaintiff whose heel had been crushed brought action for malpractice against one of nine doctors who had attended him, answers to hypothetical question which misdesignated by a period of approximately a month the date when infection in foot became apparent were not, because of such misdesignation, without force and effect, when no objection was made to the form of question at time it was propounded, and when witnesses were thoroughly cross-examined on subject involved, and it did not appear that answers thereto would have been any different had date of infection been otherwise stated.

8. Evidence ⚷538

In malpractice action against orthopedic surgeon who had performed third in a series of five operations on plaintiff's foot and who had been but one of nine doctors to treat foot, wherein damages were sought on theory that treatment by defendant had resulted in infection which necessitated amputation of part of foot, testimony of doctor that the method pursued by him was according to the recognized standards of profession in locality was admissible.

◆

Nottbusch & Nottbusch, San Diego, for appellant.

Gray, Cary, Ames & Frye, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff recovered a jury verdict for $25,000 against defendant for claimed malpractice. The court granted a new trial upon the ground of insufficiency of the evidence to support the verdict.

On May 15, 1942, plaintiff, aged 55, as a result of a 12-foot fall, suffered a very severe comminuted (crushed or shattered) fracture of his right os calcis or heel bone. The injury was covered by Workmen's Compensation. Plaintiff was, after first aid, treated by Dr. Markey, who promptly had him hospitalized and referred the case to Dr. Redell, a specialist in industrial surgery. On May 25, 1942, he was, at the request of Dr. Redell, examined by Dr. West, a specialist in orthopedic surgery, and two days later, Drs. West and Redell undertook a reduction of the fracture. At the time he was hospitalized, and because of a rather extensive amount of swelling and ecchymosis, i. e., hemorrhage, black and blueness around the foot and ankle, the patient remained in bed, foot elevated, and in ice packs in an attempt to control the swelling and hemorrhage and to decrease the swelling. There was a local area about the size of a quarter just below and anterior to the medial malleolus where the skin was quite black and showed evidence of an intending slough, i. e., the tissue was devitalized and appeared like it was going to slough out. Under a general anæsthetic a wire was placed through the upper, posterior portion of the os calcis and one through the lower third of the leg bone in an attempt to pull the bone down to reduce the bad squashing effect. The foot was then placed in a cast.

On July 31, 1942, plaintiff was released from the hospital but remained under the care of Dr. Redell until August 28, 1942, when that doctor entered the military service and plaintiff's case was taken over by a Dr. West. On April 9, 1943, in an endeavor to obtain a usable foot rather than amputate, Dr. West performed what is known as a "triple arthrodesis", or a removal of the bearing surface between certain bones of the foot so that those bones would fuse together. On June 10, 1943, Dr. West entered the military service and plaintiff's case was referred to defendant, Dr. Hartman. Since plaintiff was still unable to use his foot, and since the bones did not heal in proper alignment, a new operation was performed on May 12, 1944, by defendant in order to reconstruct the foot. This operation consisted of an arthrodesis between tibia and astragalus, so as to freeze the ankle, and the breaking up and changing of the old arthrodesis. It was this operation and the following post operative treatment of which plaintiff complains. After the operation, a slough appeared at the site of the operation but not extending throughout the operated area, and an infection developed. This condition was treated by defendant until the middle of October. At the request of the insurance carrier, after a report of defendant's condition was made to it, plaintiff was sent to Los Angeles to be hospitalized. On November 29th, 1944, an operation was there performed by Dr. Early to remove certain bones of the foot that appeared devitalized. On January 25, 1945, Dr. Early removed the remaining bones of the foot and about one month later the foot was amputated above the ankle.

The main argument of counsel for plaintiff is that there is no substantial conflict in the testimony on the material issues, and the evidence as a whole would not support a verdict in favor of the defendant; that therefore the order granting defendant's motion for a new trial because of the insufficiency of the evidence cannot be sustained.

The first doctor who was consulted in reference to plaintiff's injury indicated that he desired to have the case referred to a specialist because of the seriousness of the injury. After the specialist endeavored to reduce the fracture he foresaw that additional surgery would be necessary; that in an effort to avoid an amputation and give the man a usuable foot, the additional operation was recommended. On July 25, 1942, additional X-rays showed a displacement and in September, 1942, it showed pronounced "decalcification * * * lack of circulation". In November, 1942, Dr. West reported plaintiff completely disabled, and after further X-rays, further surgery was recommended. Dr. West performed a second operation. Dr. Hartman first saw plaintiff on June 11, 1943. He removed the cast and started physiotherapy. Dr. Hartman was represented as being one of the leading orthopedic surgeons of the city at that time and he had taken over the practice of several other leading orthopedic surgeons who had entered the service. In July, 1943, the X-ray showed commencement of ankylosis. There also appeared to be considerable osteopetrosis and demineralization of the bones. During the balance of the year 1943, plaintiff suffered pain, and the heel did not remain in position due to the multiple fracture. The patient was sent to a staff of doctors in Los Angeles. In January, 1944, Dr. Hartman was instructed by them to give Mr. Norden further exercises, baths and massages and plaintiff was discharged from the hospital March 10, as somewhat improved although the pain still persisted. In April, 1944, at the suggestion of the insurance carrier and after X-rays, it was recommended that an attempt be made to improve the position of the bones in the foot and to fuse the joint and remove bony structure causing discomfort. On May 12, 1944, plaintiff was admitted to the hospital and a third operation was performed by Dr. Hartman. No infection was apparent, and the cast was placed on the foot and leg. He was discharged from the hospital on June 2. The time is indefinite, but soon after the operation plaintiff complained of swelling and pain in his foot. Plaintiff lived about 40 miles from the doctor's office and tried to visit it about every third day. At one of these first visits Dr. Hartman cut a window in the plaster cast and treated the foot for some infection. The infection was not at the site of the surgery. There is testimony that the infection was due to lack of proper circulation and to the patient's own systematic condition, and not a result of the surgery. According to the testimony, penicillin was not available to civilian population in 1944, but only to the Naval hospital. The evidence further shows that to avoid making daily trips to the doctor's office plaintiff was instructed by the doctor how to treat the infection and change the dressings for himself at home and he did this for a period of time. In September, the foot became worse and plaintiff discovered maggots and a bad odor at the site of the infection. Dr. Hartman accused plaintiff of allowing flies to lay eggs in the wound, and he thereafter continued to treat it over a period of time. He reported the condition to the insurance carrier and on October 14, 1944, it ordered the patient to its hospital in Los Angeles for further observation and treatment. Dr. Hartman did not see the patient thereafter. The patient was under observation at that place for 30 days and a Dr. Johnstone removed the affected portion of the foot. On December 25, the infection was reported as subsided and the plaintiff left for the home of relatives for Christmas. Immediately thereafter he returned to the Los Angeles hospital with a flare up of new infection and high temperature. One month's treatment ensued. Ultimately, in January, 1945, his foot was amputated. A total of nine doctors were engaged in rendering service to plaintiff over a period of three years. Out of the five operations had upon plaintiff's foot, plaintiff selected defendant's third operation and post operative treatment as the cause of his present condition, and on October 13, 1945, this action was filed against defendant and was tried in January, 1951. Seven doctors testified on behalf of the defendant and not one testified that in his opinion defendant failed to follow the accepted practice in San Diego County in operating upon and in treating plaintiff's foot, or that his conduct did not conform to the standards of propriety and care required. After reciting the method of treatment of plaintiff's foot by Dr. Hartman, whenever the question was asked, the experts expressed the opinion that defendant did not fail to use the degree of care required of him. They testified generally that his method "was customary and approved technique of top flight orthopedic surgeons in this area"; that "this infection which you have described in these series of events did not occur as an acute post-operative infection, that is, an introduction at the time of surgery"; that as to the presence of maggots, "* * * The significance would be to me that it had been contaminated in some way either as the dressings had been applied or directly to the local surface by flies"; that infection "is not at all uncommon in orthopedic cases where there is this type of bone involvement"; that in some cases in the past maggots were inserted into the wounds deliberately by doctors of medicine because they feed only on dead tissue, and they have been used in the treatment of osteomyelitis and upon infections to clear out the dead necrotic tissues; that "Dr. Hartman's post-operative treatment of Mr. Norden was in conformity with the accepted standard of procedure of orthopedic surgeons possessing and exercising a reasonable degree of learning, skill and care in this community at that time"; that the amputation was not due to Dr. Hartman's post operative care; that each successive operation increases chances of infection; that Dr. Hartman's post-operative care of plaintiff was not the producing cause of the amputation; and that the post-operative care given by him was in complete conformance to the highest standards of post-operative care of orthopedic specialists at the time; that infection is a hazard of surgery and that it is more hazardous where you have to do more than one operation because of the lack of circulation of blood to the foot.

No medical experts were called by plaintiff to testify that the care following defendant's third operation was not the standard degree of care that should have been given under the circumstances related. Plaintiff relies upon the testimony of the plaintiff, the deposition of defendant taken under section 2055 of the Code of Civil Procedure (in which he related the care he gave to plaintiff), the charts of the several doctors, and the facts above indicated to establish his case, and argues that no judgment in favor of defendant could have been predicated upon this evidence as a matter of law.

[1] As pointed out by defendant's counsel, we are not here confronted with the problem as to whether the evidence would support a judgment for plaintiff. An appeal from the order here involved turns essentially on one point firmly established

by the authorities in California, such as Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465, and Barcus v. Campbell, 90 Cal.App.2d 768, 204 P.2d 65, which recites that it is the duty of the trial court to grant a new trial whenever in its opinion the evidence on which the decision rests is insufficient to justify the decision, and the court's action in granting such new trial on this ground is discretionary to the extent that if any appreciable conflict exists in the evidence such action may not be disturbed on appeal.

[2, 3] A mere examination of the evidence, without any further discussion on the subject, clearly shows that it would support a verdict in favor of defendant.

Plaintiff relies primarily on certain claimed reasons set forth in a written opinion given by the trial judge in granting the motion. Therein plaintiff's contentions are set up, i. e., "that there is sufficient evidence in the record to indicate that the defendant failed to anticipate secondary infection, which is a constant hazard in operations such as that performed upon plaintiff's foot; that the defendant was negligent when he instructed the plaintiff to use his foot, whereas the better practice would have been to have the foot elevated in order to curb the infection; that the defendant was negligent in not taking X-rays; that the defendant was negligent in failing to prescribe and administer penicillin; that the defendant was negligent in failing honestly to deal with plaintiff in revealing the nature of plaintiff's condition with respect to infection; and that the defendant's negligence in allowing the infection to spread was the proximate cause of the partial amputation suffered by the plaintiff". The court advanced the argument that possible error might have resulted by introducing into evidence the amount of the lien of the compensation carrier. In answer to these questions the trial court stated: "The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances. It is never enough to show that he has not treated the patient in that mode nor used those measures which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment for which the defendant is not responsible as much as the want of reasonable care and skill for which he may be responsible", citing Hesler v. California Hospital Company, 178 Cal. 764, 174 P. 654. "The present case shows a situation where what was done lies outside the realm of the layman's experience. Neither the court nor any lay person connected with this case could say as a matter of common knowledge what caused the infection or what caused the spread of the infection in plaintiff's foot. This is a matter for medical expert testimony. Medical evidence is required to show not only what occurred but how and why it occurred", citing Sales v. Bacigalupi, 47 Cal.App.2d 82, 117 P.2d 399.

Certain exceptions are noted in reference to the res ipsa loquitur rule, such as is indicated in Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695. After some further dissertation the trial court concluded: "Because of the failure of proof to show that the defendant failed to exercise the requisite degree of care and that the proximate cause of the plaintiff's partial amputation was due to any act of malfeasance or nonfeasance on the part of the defendant, the motion for a new trial is granted."

[4] It is not necessary to determine whether the reasons assigned by the trial court for granting a new trial are in harmony with the order made, if the evidence does in fact support the order and there is no abuse of discretion. That order cannot be impeached by the judge's opinion. While it may aid the appellate court in ascertaining the process by which a judgment has been reached, it will not be conclusive in determining whether or not the order granting a new trial on the ground of the insufficiency of the evidence is supported by the evidence. Classen v.

Thomas, 164 Cal. 196, 128 P. 329; Stone v. Los Angeles County Flood Control District, 81 Cal.App.2d 902, 185 P.2d 396; In re Estate of Finkler, 7 Cal.2d 97, 59 P.2d 801; People v. Driggs, 111 Cal.App. 42, 44, 295 P. 51; Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P.2d 756.

[5] This court has on many occasions commended the trial courts in granting new trials when, in the opinion of the court, sitting as a thirteenth juror, the weight of the evidence appears to be contrary to the jury's determination, particularly where the verdict appears to be excessive. This practice should not be discouraged. Tice v. Kaiser Company, 102 Cal.App.2d 44, 226 P.2d 624, and cases cited; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213. On appeal all presumptions are in favor of the order and against the verdict. Scott v. Renz, 67 Cal.App.2d 428, 154 P.2d 738.

[6] Plaintiff insists that the doctrine of res ipsa loquitur, relative to the treatment rendered to the plaintiff subsequent to the operation of May 12, 1944, applies in this case. We see no merit to this argument. The parties admitted (according to the statement of the judge) that the doctrine was not applicable to the facts established. Even though such doctrine may have been applicable, which we do not conclude, any inference attempted to be raised thereby was rebutted and it would only create a conflict in the evidence, under which circumstances the trial court would be authorized to grant a new trial. Armstrong v. Pacific Greyhound Lines, 74 Cal. App.2d 367, 168 P.2d 457.

[7] It is next argued by plaintiff that no conflict was raised in the evidence since the testimony of certain doctors that defendant exercised the required skill ordinarily possessed by physicians of good standing and practice in this locality was predicated upon hypothetical questions propounded to them in which questions (consuming several pages) the date of July 18, 1944, was erroneously stated to be the date when the infection became apparent, when in fact the evidence showed that the discovery date was June 21, 1944; that accordingly the answers to the hypothetical questions were of no force and effect, being predicated upon an erroneous set of facts. We see little merit to this argument. No objection was made to the form of question at the time. The witnesses were thoroughly cross-examined on the subject involved. Considering the entire questions, as propounded, it does not appear that the answers thereto would have been any different. In addition, it might be pointed out that defendant testified that the method pursued by him was according to the recognized standard above mentioned. This testimony was admissible, and was not based upon a hypothetical question. Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604; Callahan v. Hahnemann Hospital, 1 Cal.2d 447, 35 P.2d 536.

[8] Lastly, it was argued before this court that it must have been the intention of the trial judge, who granted the new trial on the insufficiency of the evidence, to place the question of the necessity of expert testimony to fortify plaintiff's evidence before a verdict in his favor could be sustained, squarely before this court. We do not so conclude. At the completion of plaintiff's case, the court denied a motion for nonsuit. Accordingly, if the trial court was of the opinion indicated by counsel for defendant, it overlooked a very appropriate time to test the question. The same point was presented when defendant moved the court for a directed verdict predicated upon this ground. The discretionary powers given to a trial judge on a motion for new trial are much broader than that given in determining a motion for nonsuit or directed verdict. Ordinarily, where there is a conflict in the evidence, the determination of the trial judge on a motion for a new trial, predicated upon the ground of insufficiency of the evidence, will not be disturbed on appeal, in the absence of an abuse of discretion. No abuse of discretion here appears. Prescott v. City of Orange, 56 Cal.App.2d 144, 132 P.2d 523; Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

111 Cal.App.2d 574

MONROE v. EAST BAY RENTAL SERVICE et al.

Civ. 14769.

District Court of Appeal, First District, Division 2, California.

June 11, 1952.

Hearing Denied Aug. 7, 1952.

Ernest M. Monroe sued the East Bay Rental Service, a copartnership, and others for personal injuries sustained when a gasoline-driven plow, hired from defendants by plaintiff, fell on him while he was operating it. From a judgment of the Superior Court, County of Contra Costa, Homer W. Patterson, J., for defendants, plaintiff appealed. The District Court of Appeal, Goodell, J., held that defendants' first amended complaint was sufficient as against general and special demurrers.

Judgment reversed.

1. Statutes 🔑223.2(1)

The Civil Code section, declaring every one responsible for injury occasioned to another by his want of ordinary care or skill in management of his property, and section requiring one letting personal property to another to put it in condition fit for purpose of letting and repair all deteriorations thereof not occasioned by hirer's fault or natural result of its use, are not conflicting, each of them has equal force and dignity, and both must be read together. Civ.Code, §§ 1714, 1955.

2. Torts 🔑3

A tort-feasor is liable for injuries caused by his tort, notwithstanding existence of contract between him and injured person, and cause of action for injuries resulting from breach of duty growing out of contract is ex delicto.

3. Negligence 🔑2

The first requisite in establishing negligence is to show existence of duty, whereupon failure to observe such duty must be shown.

4. Bailment 🔑9

The basis of liability of owner of leased chattel, such as gasoline-driven plow, which is dangerous device in hands of persons unskilled in its proper management and control, for injuries to hirer thereof, is owner's superior knowledge of dangerous character of chattel.

5. Negligence 🔑2

The conclusion that certain conduct is negligent involves finding of both legal duty to use due care and breach of such duty by creation of unreasonable risk of harm.

6. Bailment 🔑30

In action for injuries sustained when gasoline-driven plow, hired by plaintiff from defendants, fell on plaintiff during his operation thereof, complaint alleging that plow was dangerous device when placed in hands and control of persons unskilled in proper management thereof, as defendants knew and plaintiff did not know, and that defendants negligently let plow to plaintiff without any inquiry or investigation concerning his ability to operate it safely or warning to him that it was dangerous instrumentality when operated by person ignorant of its proper management, was sufficient as against general and special demurrers, since it alleged duty owing plaintiff by defendants, breach thereof, and injury resulting from such negligence.

◆

Duggan, Smith & Lawlor, Oakland, for appellant.

Appelbaum & Mitchell, Oakland, John Jewett Earle, Oakland, for respondents.

GOODELL, Justice.

Appellant sued for $5,518, damages for bodily injuries.

A general and special demurrer to the first amended complaint was sustained with leave to amend, but after notice the plaintiff declined to amend and judgment was entered that he take nothing and that defendants should recover their costs. Plaintiff then appealed.

Defendants operate a business wherein they rent and lease to the public mechanical equipment including Roto-Tillers. A Roto-Tiller is a plow equipped with a gasoline-driven motor. The theory on which the action was brought, as indicated by the complaint, is that the Roto-Tiller which plaintiff hired from defendants was a dangerous instrumentality; that defendants had full knowledge of its inherent dangers and plaintiff had no knowledge of them; that it was delivered to him without inquiry by defendants as to how much or how little he knew of its functioning and hence its hazards, and that they did not instruct or warn him on the subject. The complaint alleged that while in operation the Roto-Tiller got out of control, raised from the ground, and fell on plaintiff.

[1] Respondents rely on § 1955, Civ. Code which reads:

> "One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use."

Their contention is that this section by its definition of the "Obligations of letter of personal property" excludes every other possible obligation or duty, under the familiar rule *expressio unius est exclusio alterius.* Appellant answers this argument by citing the Restatement of the Law of Torts, vol. 2, § 407, which deals with the tort liability of the lessor of a dangerous chattel. It is not necessary to invoke the Restatement since the statute law of this state covers the subject.

Section 1714, Civ.Code, which is simply a definition of negligence, Robinson v. Clemons, 46 Cal.App. 661, 664, 190 P. 203; Withey v. Hammond Lumber Co., 140 Cal.App. 587, 604, 35 P.2d 1080 reads: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill *in the management of his property* * * *." (Emphasis added.)

No possible conflict can be found between §§ 1714 and 1955, each of which defines different obligations of an owner of property. Each of them has equal force and dignity, and both necessarily must be read together. 23 Cal.Jur. p. 784.

[2] The court in Fisher v. Pennington, 116 Cal.App. 248, 250–251, 2 P.2d 518, 520, had occasion to discuss both sections and said: "Every person is responsible by his want of ordinary care in the management of his property for an injury sustained by the use of such property except in cases where the user has brought injury upon himself. See Civ.Code, § 1714. By the rental contract plaintiffs were conveyed an estate in the demised premises and they were entitled to the use and enjoyment of their habitation. A tort-feasor is liable notwithstanding the existence of a contract. If the cause of action arises from a breach of duty growing out of a contract it is *ex delicto.*"

The case of Johnstone v. Panama Pacific International Exposition Company, 187 Cal. 323, 202 P. 34 is in point. There a judgment entered on the sustaining of a demurrer was reversed. The plaintiff sued for injuries she received when an electric wheel chair steered and driven by another visitor at the exposition accidentally ran her down. The complaint alleged several grounds of negligence, but among them were grounds substantially the same as those pleaded herein. The motorized wheel chair had been let by a concessionaire of the exposition company, and the plaintiff alleged that the latter had not only negligently allowed the vehicle company to conduct its concession, but "negligently permitted it to allow visitors unskilled in the operation of the vehicles to operate them among the pedestrians * * *." It alleged "that the vehicles were dangerous appliances when placed in the hands of persons unskilled in their management; that respondent and its agent, the vehicle company, were aware of this; that on April 17, 1915, the vehicle company negligently intrusted one of the vehicles to a visitor who was unskilled in its management, without inquiring as to his competency to operate it upon the thoroughfares mentioned; that because of the driver's ignorance of the proper operation of the vehicle and lack of skill as to its proper management, and because of the negligence of respondent in putting the driver in charge of the vehicle without instructing him concerning its operation, the driver was unable to stop the vehicle; and that because of such negligence he ran into appellant, causing the injuries."

[3] At pages 326–327 of 187 Cal., at page 35 of 202 P., the court quotes 2 Cooley on Torts, 3d ed. p. 1410, as follows: "'1. The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed. * * * 2. The duty being pointed out, the failure to observe it is to be shown; in other words, the existence of negligence.'"

At pages 329–330, of 187 Cal., at page 36 of 202 P., the court said:

> "In support of respondent's contention that it is not liable in any event for appellant's injuries, for the reason that it was a bailor of an electric car, many authorities are cited to the effect that a bailor of a machine is not liable for injuries caused through its use by a bailee. However, these authorities are not in point for the reason that they relate to the ordinary case of bailment of a machine with a resulting injury to a third person, a stranger. In this case it was alleged that the bailor was under the duty to use ordinary care to protect appellant from injury. It may well have been, and it was so alleged in the complaint, that the mere fact of giving the machine to the bailee for operation among pedestrians was an act of negligence and a breach of the duty. It was further alleged that the cars were dangerous appliances when in the hands of one unskilled in their management; that respondent and the vehicle company knew this; that respondent negligently intrusted one of them to an unskilled person; and that by reason of his ignorance the accident in question resulted. In view of these allegations, whether or not the car was a dangerous machine became a question for the jury to decide. [Citation.] If it were found to be a dangerous machine, respondent would be liable * * *."

The applicability of the Johnstone case is manifest when the allegations of the two complaints are compared. This complaint alleged:

> "That a Roto-Tiller of the type supplied by defendants to plaintiff was a dangerous device when placed in the hands and control of persons unskilled in the proper management and control thereof, which fact said defendants well knew and of which fact plaintiff was ignorant."

It then alleged that the "defendants negligently and carelessly let for hire the said Roto-Tiller to the plaintiff without proper or any inquiry or investigation concerning his competency or ability to safely operate said device, and without any warning to the said plaintiff that the said device was a dangerous instrumentality when operated by a person ignorant of the proper management and control thereof."

[4, 5] The basis of the liability is the superior knowledge possessed by the owner, of the dangerous character of the leased chattel. McEvoy v. American Pool Corp., 32 Cal.2d 295, 195 P.2d 783, 786 was a case where jars containing dangerous chemicals were carried around in one of defendant's service cars. In a collision the jars broke and their contents injured the plaintiff who was riding in the car. There was evidence that defendants had failed to give the employee in charge of the car "adequate notice of the extremely dangerous character of the liquids and that he was unaware that they were dangerous." At page 298 of 32 Cal.2d, at page 785 of 195 P.2d the court said: "The conclusion that certain conduct is negligent involves the finding both of a legal duty to use due care and a breach of such duty by the creation of an unreasonable risk of harm", (citing the Johnstone case and others).

Rae v. California Equipment Co., 12 Cal.2d 563, 86 P.2d 352 was a case where a piece of equipment was leased by defendant for use in the making of a moving picture. It was unfit, in that it did not conform to certain safety orders. In reversing a judgment in favor of the lessor the court, 12 Cal.2d at page 569, 86 P.2d 352, cited § 408 of the Restatement of the Law of Torts.

[6] As was said in the Johnstone case:

> "The complaint having alleged that a duty was owing to appellant by respondent, that there was a breach thereof, and that the injury was the result of this negligence, it was sufficient."

The judgment is reversed.

NOURSE, P. J., concurs.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

111 Cal.App.2d 546

RAU v. REDWOOD CITY WOMAN'S CLUB.

No. 15127.

District Court of Appeal, First District,
Division 1, California.
June 9, 1952.

Action by Emma Rau against Redwood City Woman's Club for injuries sustained by plaintiff when she fell on stairway of defendant's premises at time plaintiff was invitee of defendant's lessee. The Superior Court, San Mateo County, Aylett R. Cotton, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Bray, J., held that defendant was liable to plaintiff for injuries due to a dangerous condition known, or which should have been known, to defendant.

Affirmed.

1. Landlord and Tenant 🔑167(2, 8)

Lessor of a building to be used for public or semi-public purposes is liable to third person for injuries due to a dangerous condition known, or which should have been known, to lessor, and lessor is bound to use reasonable care to see that building is properly constructed and is maintained in a safe condition for purpose for which it is used, and must keep stairways and general premises, which invitee is expressly or impliedly invited to use, in reasonably safe condition.

2. Landlord and Tenant 🔑169(11)

In action by lessee's invitee who fell on stairway of lessor's premises, whether invitee, with knowledge that stairs were slippery and had no banister, was contributorily negligent in using only stairway available, was for jury.

3. Municipal Corporations 🔑601(27, 28)

Under police power, city has right to enact requirements to make stairways in old as well as new buildings reasonably safe for patrons of public or semi-public buildings, and fact that a building was constructed prior to ordinance will not make provisions of ordinance inapplicable thereto.

4. Evidence 🔑32

Judicial notice is not taken of contents of ordinances.

5. Appeal and Error 🔑231(3)

Objection to evidence must be specific and state correct grounds of inadmissibility before complaint can be made on appeal of trial court's ruling.

6. Appeal and Error 🔑1066
Trial 🔑252(8)

In action by lessee's invitee who fell on stairway of lessor's premises, instruction that every stairway should have at least one hand rail and if stairway was 5 feet or more in width, it should have one hand rail on each side, was a quotation from health and safety code and was error in view of fact that such act was inapplicable to buildings of type of lessor's premises, but such error was without prejudice where under the instruction, only one hand rail would be required as stairway in question was less then 5 feet in width. Health and Safety Code, § 16413.

7. Appeal and Error 🔑1047(3)
Evidence 🔑471(1)
Witnesses 🔑248(1)

In action by lessee's invitee who fell on stairway of lessor's premises, failure of trial court to grant motions of defendant to strike certain nonresponsive or conclusion answers by witnesses was error but such error was without prejudice.

8. Trial ⚷28(1)

Fact that changes have occurred at scene of an accident does not necessarily prevent a view of scene by the jury.

9. Trial ⚷28(1)

In action by lessee's invitee who fell on stairway of lessor's premises, permitting jury to view place of accident at time premises were same as at time of accident, except that stairs were painted, was not error.

10. Trial ⚷28(1)

Knowledge acquired by jury by visiting scene of an accident is independent evidence in the case and is a part of the trial, and it is duty of judge to be present all times during the trial.

11. Appeal and Error ⚷1046(1)

In action by lessee's invitee who fell on stairway of lessor's premises, action of trial court in permitting jury to view premises in judge's absence, was not prejudicial where there was evidence before court as to condition of stairs at time jury saw them.

◆

F. E. Hoffman, San Mateo, Ropers & Majeski, Redwood City, for appellant.

Albert E. Deasy, J. Emmet Chapman, San Francisco, for respondent.

BRAY, Justice.

The jury awarded plaintiff $11,000 for personal injuries. A new trial was denied upon condition that plaintiff consent to a reduction of the amount to $9,000. Plaintiff consented. Defendant appeals from the judgment.

Questions Presented.

1. Primarily, the rule of liability to the public of a lessor of a semi-public place. This includes alleged error in giving and refusing instructions.
2. Was plaintiff guilty of contributory negligence as a matter of law?
3. Alleged erroneous rulings, particularly the admission of a portion of a city ordinance.
4. The effect of the judge permitting the jury to view the premises in his absence.

Facts.

Mrs. Jaski, a piano teacher, rented an auditorium from defendant for the purpose of having her pupils give a recital. She invited plaintiff, a violin teacher, to participate. The day before the recital plaintiff and others came to the auditorium to rehearse. There was only one stairway to the stage. It consisted of five or six steps. As plaintiff started up the stairs her foot slipped forward. She noticed that the stairs, apparently of hardwood, appeared worn and shiny, almost as though they had been waxed. She had no further difficulty going up. After the rehearsal, descending the stairs she noticed that each step was slippery and there was not any bannister to hold onto, so she stayed near the wall, touching it with her finger tips. Going up the stairs the next evening she noticed that the steps were very slippery. After the recital, she was preceded down the stairs by one person and followed by another. Plaintiff did not mention the slippery condition to anyone. She was carrying her violin, her music, the violin bow, and had gathered up her formal dress, all in her right hand. As she started down the stairs she was looking where she was going, but slipped, falling on her buttocks, sliding to the foot of the stairs, and was injured. A witness stated that plaintiff was at the top of the stairs and suddenly her foot "went right out from under her and down she went." Three witnesses other than plaintiff testified that the stairs were "worn" and two others than plaintiff that they were "slippery." There was evidence that they were neither worn nor slippery. The building was constructed about 1911 or 1912 and the stairs were in substantially the same condition as when built. The stairs were 33½ inches wide. On one side they were against the wall and without railings. The risers were about 6¼ inches and the treads about 9¾ inches. There was testimony that others had fallen on these stairs and testimony that no one had ever slipped before.

1. Duty of Lessor.

Defendant's theory of the case was that a lessor is not liable to the general public or an invitee of the tenant for obvious defects, and if the defects or dangers are such as would be apparent to a person on a reasonable inspection, such person if injured cannot recover. Defendant offered instructions to that effect, which the court refused. The authorities cited by defendant in support of this contention do not do so. They are Powell v. Stivers, 108 Cal.App.2d 72, 238 P.2d 34; Kearns v. Smith, 55 Cal.App. 2d 532, 131 P.2d 36; Zavalney v. Donovan, 70 Cal.App.2d 182, 160 P.2d 558. The cases all deal with the rule of liability between landlord and tenant.

[1] The court instructed the jury that the lessor of a building to be used for public or semi-public purposes is liable to a third person for injuries due to a dangerous condition known, or which should have been known, to the lessor; that the latter is bound to use reasonable care to see that such building is properly constructed and is maintained in a fit condition for the purpose for which it is used, and that the lessor must keep stairways and general premises, which the invitee is expressly or impliedly invited to use, in reasonably safe condition. This brings us to the question of what the defendant's duty towards plaintiff was. In King v. New Masonic Temple Ass'n, 51 Cal. App.2d 512, at page 515, 125 P.2d 559, 560, the court stated the rule: "Where property is leased for a public or semi-public purpose and at the time is not safe for the purpose for which it is leased or there is a dangerous condition on the premises known to the lessor or which by the exercise of reasonable diligence he should have known existed, the lessor is liable to a third person for damages resulting from the condition of the leased property." There the defect or danger was a difference in the height of a certain step from the other steps in such a position that that difference was not readily noticeable. The rule is stated a little differently in Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580, 583: "A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended and to exercise reasonable care to inspect and repair the property before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter." In that case the plaintiff, at night, fell into an open grease pit. The same rule was applied in Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 164 P.2d 897, where plaintiff at night fell into an areaway adjacent to a parking lot where he had left his automobile. See also Travis v. Metropolitan Theatres Corp., 91 Cal.App. 2d 664, 205 P.2d 475, and Moise v. Fairfax Markets, Inc., 106 Cal.App.2d 798, 236 P.2d 216.

Thus, the trial court was right in rejecting defendant's instructions as to the rule to be applied and in giving the instructions it gave.

2. Contributory Negligence.

[2] In a more or less offhanded manner defendant apparently contends that plaintiff was guilty of contributory negligence as a matter of law because plaintiff testified that she knew the stairs were slippery and had no bannister, and that the lack of bannister was obvious. While the subject is not discussed to any degree it is necessary for us to determine the question. A case in which the facts on this point were quite similar to those in our case is Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576. There plaintiff was injured on a stairway by striking her head against a protruding ceiling board. (There the relationship between the parties differed from that in our case as the defendant was the owner of the restaurant and plaintiff was his invitee.) As to the contention of obvious danger and contributory negligence the court stated, 19 Cal.2d at pages 655, 656, 122 P.2d at page 580: "The next question to be considered is whether plaintiff was as a matter of law guilty of contributory negligence. In this regard defendant relies on the rule that where one knows a condition to be dangerous and is injured because of failure to take heed thereof, such conduct will bar a recovery. But even though the evidence did establish that the alleged defect in the construction of defendant's premises was patent and observable to any one using the stairway, and that in addition plaintiff by reason of her past visits to the restaurant was familiar with the existing condition,

there would still be the question for the determination of the jury as to whether or not it was a want of ordinary care on the part of plaintiff not to have kept in mind such element of danger when stepping toward the wall rail to allow other persons descending the stairs to pass. [Citations.] * * * Whether plaintiff's action was reasonable and prudent under the circumstances was for the jury to decide as an issue of fact. [Citation.] As was said in McStay v. Citizens Nat. T. & S. Bank, supra, 5 Cal.App.2d [595] at page 600, 43 P.2d [560] at page 562: 'Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury.'" In Hayes v. Richfield Oil Corp., supra, 38 Cal. 2d 385, 240 P.2d 580, 585, the court discussed a similar contention: "Finally, Richfield contends that plaintiffs were guilty of contributory negligence as a matter of law. It is argued that Mr. Hayes, who knew of the location of the pit, was negligent in failing to warn his wife of its existence and that his negligence must be imputed to her. As to Mrs. Hayes, it is argued that she was negligent in proceeding over unfamiliar ground in the darkness instead of returning to the car over the better lighted route by which they had left the premises. The question of contributory negligence, however, was one of fact for the jury, and we cannot say that either plaintiff was negligent as a matter of law."

It is true that in our case plaintiff testified that she knew the slippery condition of the stairs at the time she started down them and that she went carefully, touching the side wall with the tips of the fingers of her free hand because of that fact. This was an auditorium to which the lessor knew the public was invited. We cannot say, as a matter of law, that a reasonable person knowing the slippery condition of the stairs in this public building would not have done as plaintiff claims she did, carefully endeavor to use the slippery stairs, nor that a reasonable person on discovering the condition would have refused to attend the recital or called the situation to the attention of the club people. Whether it was reasonable for her to use the only stairs to the stage under the circumstances and whether she was reasonably careful, were for the jury to determine. "We cannot say * * * that as a matter of law merely because plaintiff recognized a slippery condition of the floor which she felt to be dangerous and proceeded nevertheless to use the floor exercising the care and caution to which she testified, that she was contributorily negligent in so doing." Foster v. A. P. Jacobs & Associates, 85 Cal.App.2d 746, 754, 193 P.2d 971, 976. The court properly instructed the jury on the defense of contributory negligence. Our case differs from Fletter v. City and County of San Francisco, 110 Cal. App.2d 820, 244 P.2d 59, recently decided by this court, where we held that plaintiff was guilty of contributory negligence as a matter of law. There, as the plaintiff was an employee of the tenant, and the place of the accident was not a public one, a different rule of liability applied. But, more important, the evidence was susceptible of but one conclusion, that plaintiff, knowing of the presence of the opening between lifts, attempted to step across it and apparently without excuse misjudged the distance. There the cause of the fall was his misjudgment. Here the cause was the slippery condition of the steps.

3. Rulings. (a) Building Code.

[3–5] Plaintiff called the City Clerk of Redwood City, in which city defendant's building is located. He testified to the passage by the city council of ordinance 546 adopting the Uniform Building Code. Plaintiff then offered into evidence section 3305, subsection G thereof only. Defendant objected on the ground that it was irrelevant, incompetent and immaterial, no proper foundation laid, and that the ordinance was passed in 1946 while the building was erected long before that time. This section, in effect, required that defendant's building have handrails on the stairs in question. The mere fact that the building was constructed prior to the ordinance would not make its provisions inapplicable. Under the police power the city has the right to enact requirements to make stairways in old as well as new buildings reasonably safe for patrons of public or semi-public buildings. No objection was made to the introduction of a part only of the ordinance or code. Now defendant contends that there is another section of the ordinance, section 103, which expressly made the ordinance applicable only to buildings erected subsequent to the passage of the ordinance in 1946. As courts do not take judicial notice of the contents of ordinances (see 10 Cal.Jur. p. 705), this section was not before the trial court nor is it before this court. Moreover, this point not having been raised in the trial court, cannot be raised here for the first time. While defendant objected to the introduction of the section of the ordinance on the grounds that the building was built prior to the adoption of the ordinance (at that time there was no evidence of the fact), and that no foundation was laid, the attention of the court was not called to section 103 (obviously neither counsel knew, and certainly the court did not know, of the existence of this section). The record of the discussion between court and counsel shows that defendant's objection was on the erroneous theory that an ordinance of this kind could not be applied retroactively rather than that the ordinance itself provided that it was not to be retroactive. "Objections to evidence must be specific and state the correct grounds of inadmissibility before complaint can be made on appeal of the trial court's ruling." Hatfield v. Levy Brothers, 18 Cal.2d 798, 809, 117 P.2d 841, 847.

Defendant now contends that its objection that no foundation was laid meant that plaintiff had failed to prove that the admitted section was retroactive. If this was what was intended by that very general objection, the attention of the court should have been directed to that point. As the record stood (and still stands) there was before the court a section of the ordinance which on its face purported to require the stairway in question to have railings. The trial court was entitled to, and did, as do we, construe the section as applying to all buildings in existence at the date of its adoption. Thus cases like Watwood v. Fosdick, 212 Cal. 84, 297 P. 881, and Lee v. Dawson, 44 Cal.App.2d 362, 112 P.2d 683, where the ordinance clauses making their provisions nonretroactive were before the court, are not applicable here.

(b) Instructions.

[6] In addition to the instructions which we have heretofore considered in "Duty of Lessor," defendant contends that the court erred in giving the following instruction: "Every stairway shall have at least on[e] handrail. If a stairway is five feet or more in width, it shall have one handrail on each side." The court did not state whether or not the absence of a handrail would constitute negligence. This is the only reference to handrails in the instructions. The instruction was a quotation of section 16413 of the Health and Safety Code (State Housing Act) as it existed prior to its amendment in 1947. This act does not apply to buildings of the type of defendant's auditorium, nor to buildings constructed at the time defendant's building was constructed. It should not have been given. However, it was error without prejudice for the reason that under its language only one handrail would be required, as the stairs are less than 5 feet in width, while under the ordinance handrails are required on both sides. Thus, the instruction was more favorable to defendant than one using the language of the ordinance would have been. It is doubtful that where, as here, the evidence shows that even in the absence of an ordinance or other requirement of law it was negligence on the part of defendant to maintain the stairway without a railing, the giving of an erroneous instruction as to a requirement of law that there must be a railing, would be prejudicial. See McStay v. Citizens Nat. T. & S. Bank, 5 Cal.App.2d 595, 602, 43 P.2d 560, and Jewell v. New Hotel U. S. Grant, 99 Cal.App.2d 47, 221 P.2d 170.

Defendant offered three instructions based on Powell v. Stivers, supra, 108 Cal.App.2d 72, 238 P.2d 34 and Zavalney v. Donovan, supra, 70 Cal.App.2d 182, 160 P.2d 558, to the effect that there was no duty on defendant to warn plaintiff of obvious dangers. As pointed out herein, these cases were all ones in which the liability was that of a landlord to a tenant, and hence the rules there mentioned are not applicable in a case involving the liability of a landlord of a public building to the public. Moreover, there was no issue here of failure to warn.

(c) Other Rulings.

[7] Defendant contends that the court's attitude towards it was unfair, arbitrary, cavalier and hostile, claiming that of approximately 21 objections by defendant to the introduction of evidence defendant was overruled approximately 20 times. We have examined the record, and without going into the mathematics of the situation, find that in at least half of the rulings the court was correct. As to the others, they were mainly nonresponsive or conclusion answers by witnesses, and the motions of defendant to strike them should have been granted. However, they constituted error without prejudice. Although the court was in some instances a bit arbitrary, we cannot say that it was cavalier, hostile, or on the whole unfair. Moreover, we cannot find that the court's attitude was prejudicial.

4. View of the Premises.

[8, 9] Over defendant's objection the court granted plaintiff's motion to have the jury view the premises. The evidence showed that since the accident the stairs had been painted and bannisters and treads installed. The mere fact that changes have occurred at the scene of an accident does not necessarily prevent a view of the scene by the jury. Here there was no error in permitting the jury to visit the scene, because after the order to view was made, defendant removed the bannister and treads, and the premises were the same as at the time of the accident, except that the stairs were painted. The fact that there was this change in condition was made clear to the jury. There was no error in permitting the jury to view the place of the accident.

[10, 11] A much more serious question arises because of the failure of the judge to be present with the jury. The knowledge acquired by a jury by its visit to the premises is "independent evidence in the case". Neel v. Mannings, Inc., supra, 19 Cal.2d 647, 654, 122 P.2d 576, 580. Therefore, the view of the premises is a part of the trial and it is the duty of the judge to be present at all times during the trial. It has been held in a criminal case that the failure of the judge to accompany the jury to view the premises is reversible error. People v. Yut Ling, 74 Cal. 569, 16 P. 489. However, counsel have cited no case, and we have found none, in which a similar rule has been applied to a civil case. In Haley v. Bay Cities Transit Co., 82 Cal. App.2d 950, 187 P.2d 850, the trial judge was absent while the jury viewed the scene of the accident at which there was a demonstration of the manner in which a bus had been driven and stopped at the time of the accident. On motion for new trial it was urged that the judge abused his discretion in denying a new trial, because he did so without knowing and without considering the matters which the jury had observed. It was held that the trial judge should have been with the jury, but that his failure to be there did not consitute an abuse of discretion in denying the new trial. In that case no objection was made during the trial to the failure of the trial judge to accompany the jury. In our case, defendant requested the judge to go with the jury and seasonably objected to his failure to do so. In City of Newport v. Commonwealth, 108 Ky. 151, 55 S.W. 914, where the statute required the jury to be "accompanied by the judge" it was held that it was error but not prejudicial for the judge not to do so. In our case, there is no contention that anything untoward occurred while the jury was visiting the premises, nor is it pointed out how defendant was injured by the failure of the judge to be present, except, as in the Haley case, supra, defendant urges that the court could not properly pass on its motion for new trial without having seen what the jury saw. However, there was evidence as to the condition of the stairs at the time the jury saw them, which evidence the judge heard. He was therefore in a position to pass upon the motion for new trial fully. The failure of

a judge to perform his duty and accompany the jury when it views the premises, should not be encouraged. We expressly hold it to be improper, but we cannot say under the circumstances of this case that defendant was prejudiced by such failure.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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111 Cal.App.2d 589

In re COOK'S GUARDIANSHIP.

Civ. 18929.

District Court of Appeal, Second District, Division 1, California.

June 11, 1952.

Guardianship proceeding. From an order of the Superior Court, Ventura County, Walter J. Fourt, J., granting letters of guardianship to the petitioners, the opponent appealed. The District Court of Appeal, Doran, J., held that under the circumstances the failure to give alleged incompetent notice of continuance in proceeding on petition for appointment of guardians to serve in place of deceased guardian was not a denial of due process of law.

Affirmed.

1. Guardian and Ward 🔑13(1)

Interested parties who have received notice of first step in guardianship proceeding must keep themselves informed by diligent inquiry of subsequent continuances of the hearing. Probate Code, §§ 1205, 1606.

2. Constitutional Law 🔑306

The failure to give person, who had theretofore been adjudged incompetent, notice of continuance in proceeding on petition for appointment of guardians to serve in place of deceased guardian was not a denial of due process of law, where incompetent was given initial notice that proceeding had been instituted, and such failure was complained of only by incompetent's niece opposing the petition and not by incompetent, and incompetent's rights were not prejudiced or imperiled by such failure. Probate Code, §§ 1205, 1606.

◆

Mize, Kroese, Larch & Mize, R. C. Mize, Santa Ana, for appellant, Dorothy Tubbs.

Arthur H. Blanchard, Santa Paula, Edward Henderson, Margaret Keller, Ventura, of counsel, for respondents.

DORAN, Justice.

Maud L. Cook was adjudged incompetent in 1948 and one James T. White, a nephew, was appointed guardian of the person and estate. Upon the death of this guardian in 1951 a petition was filed by Ethel P. White and Clarence E. White, the former guardian's widow and son, seeking appointment as guardians. A citation to show cause why these persons should not be appointed, was duly served on the incompetent.

The hearing on this petition was scheduled for July 16, 1951, and on July 13th the appellant Dorothy Tubbs, a niece of Maud L. Cook, filed an appearance in opposition to the petition, alleging that Ethel P. and Clarence E. White were not proper persons to be appointed. The appointment of the Bank of America as guardian of the estate, and some proper person as guardian of the incompetent's person, was asked. No citation was issued respecting this document. When the matter was called for hearing on July 16th, a physician's affidavit was filed, showing that the incompetent was physically incapable of appearing on that day, whereupon the trial court, continued the matter until July 20, 1951. Maud L. Cook, the incompetent, was not represented by counsel and was not in court on the continuation date, nor was the incompetent given notice of the continuance. A further physician's affidavit was filed as to the inability of Maud L. Cook to appear on July 20th or any day of that month. A hearing was then had on the petition and objections thereto, and letters of guardianship were granted to Ethel P. and Clarence E. White. The present appeal is from the order of appointment.

It is appellant's contention that "There has been a denial of due process of law", in that "despite the fact that the alleged incompetent had not appeared and was not represented by counsel, no notice of the continuance was given to the alleged incompetent, Maud L. Cook". Guardianship of Walters, 37 Cal.2d 239, 231 P.2d 473, dealing with notice of resumption of a hearing after a guardianship case had gone off calendar, is cited by appellant in support of the contention.

Answering the above argument, respondents point out that in the present case, Maud L. Cook had long before been adjudged incompetent, and the hearing in question merely related to the appointment of guardians to serve in the place of the deceased guardian. Moreover, no objection to proceeding with the case was made by appellant in the trial court. In fact, the record discloses that Mr. Mize, one of appellant's attorneys said: "Judge, I have no objection to jurisdiction. I think you have jurisdiction, but if you please, you might read this Walters Guardianship. * * * Personally, I think you have jurisdiction, or I wouldn't have proceeded". The order appointing the guardians states that the continuance was "upon the request of Dorothy Tubbs (appellant) by her said attorneys, Arthur H. Blanchard, attorney for Petitioners, consenting thereto".

Respondents' brief also calls attention to Sec. 1606 of the Probate Code, providing that "When not otherwise specially prescribed in this division (Guardian and Ward), practice and procedure and the making and entry of orders under this division shall be governed by the provisions of Division III of this code, so far as they are applicable". In Division III, dealing with Administration of Estates, Section 1205 provides that "The court may continue or postpone any hearing, from time to time, in the interests of justice, and *no further notice of the continued or postponed hearing is required unless ordered by the court.*" (Italics added.)

[1] As said in Estate of Bell, 58 Cal. App.2d 333, 136 P.2d 804, 806, citing Sec. 1205 of the Probate Code, "After notice has been * * * given in the first instance, it becomes the duty of all interested parties to keep themselves informed by diligent inquiry of subsequent continuances of the hearing". In an early case, Halett v. Patrick, 49 Cal. 590, 595, relating to appointment of guardian, it is said: "Having had one notice of the first step in the proceeding, Wright (the incompetent) was bound to take notice of every subsequent step until a guardian was appointed and qualified, or the application otherwise definitely disposed of". The case of Guardianship of Walters, 37 Cal.2d 239, 231 P.2d 473, cited by appellant, related to the resumption of a hearing after same had gone off-calendar, a situation which did not exist in the present controversy.

[2] It is also to be noted that the incompetent here is not complaining; nor is any one complaining in behalf of the incompetent. Appellant is making this argument the basis of a complaint in respect to the trial court's action in granting the original petition and denying appellant's objections thereto. The record fails to indicate that the incompetent's rights were in any respect prejudiced or imperiled, or that the trial court's order was in any manner improper.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

111 Cal.App.2d 620

NICKOLA v. SUPERIOR COURT IN AND FOR SUTTER COUNTY.

Civ. 8237.

District Court of Appeal, Third District, California.
June 13, 1952.

Hazel Nickola filed a petition for a writ of prohibition restraining the Superior Court of the State of California, in and for the County of Sutter, from taking further proceeding in an action entitled "Hazel Nickola v. Earl Nickola". The District Court of Appeal, Schottky, J. pro tem., held that a dismissal without prejudice filed by the petitioner prior to the filing of any counterclaim, cross-complaint or prayer for affirmative relief in the suit in question had been effective to deprive the Superior Court of jurisdiction.

Order in accordance with opinion.

Courts ⚷488(1)
Dismissal and Nonsuit ⚷27

Where, pursuant to stipulation of parties, Superior Court of San Mateo County entered order on January 28, 1952, transferring action to Superior Court of Sutter County, and thereafter, on February 4, 1952, plaintiff filed with County Clerk of San Mateo County a "dismissal without prejudice", and on February 7, 1952, County Clerk of San Mateo County sent to County Clerk of Sutter County files in said action, including dismissal without prejudice, no counterclaim, cross-complaint or prayer for affirmative relief having been filed prior to February 7, 1952, dismissal was effective to deprive Superior Court of Sutter County of Jurisdiction to proceed further in such action. Code Civ. Proc. § 581.

◆

Thomas L. Bocci, Jr., and John A. Putkey, Daly City, for appellant.

Hewitt & McBride, Yuba City, for real party in interest, Earl Nickola.

SCHOTTKY, Justice pro tem.

Petitioner filed in this court a petition for a writ of prohibition restraining the Superior Court of Sutter County from taking further proceedings in an action entitled "Hazel Nickola v. Earl Nickola."

There is little, if any, dispute as to the facts. On November 23, 1951, Hazel Nickola filed an action against Earl Nickola in the Superior Court of San Mateo County. On December 7, 1951, defendant Earl Nickola filed a motion for change of place of trial to Sutter County. On January 28, 1952, pursuant to a stipulation of the parties, previously made, an order was made by the Superior Court of San Mateo County transferring the action to the Superior Court of Sutter County. On February 4, 1952, and before the papers and files were transmitted to Sutter County, plaintiff Hazel Nickola filed with the County Clerk of San Mateo County a "Dismissal Without Prejudice." On February 7, 1952, the County Clerk of San Mateo County sent to the County Clerk of Sutter County the files in the said action, including the dismissal without prejudice. On February 11, 1952, defendant, Earl Nickola, filed an answer and cross-complaint with the Clerk of the Superior Court of Sutter County. On February 29, 1952, Hazel Nickola, plaintiff in said action and petitioner herein, filed a motion to strike defendant's answer and cross-complaint from the files, which motion was denied by the Superior Court of Sutter County on March 27, 1952.

The question to be determined is whether or not the dismissal without prejudice was effective to dismiss the action.

There can be no question as to the right of a plaintiff to dismiss an action at any time prior to the filing of a counterclaim, cross-complaint or demand for affirmative relief. Code Civ.Proc. sec. 581.

In Rogers v. Transamerica Corp., 6 Cal. App.2d 340, at page 341, 44 P.2d 635, at page 636, the court said:

> "The dismissal was made by the plaintiff under section 581 of the Code of Civil Procedure, and it was accomplished without any intervention or action by the court, and by simply filing with the clerk of the court a dismissal of the action as to those three defendants as is expressly authorized by that

> section. The effect was, ipso facto, to dismiss the case as to said defendants. Huntington Park Imp. Co. v. Superior Court, 17 Cal.App. 692, 121 P. 701. Under the situation which existed, the plaintiff had an absolute right under said section to dismiss his action as to these defendants, and the act of the clerk in filing the request with the papers of the case was merely a ministerial act. A defendant cannot, by making a demand for a change of venue, deprive the plaintiff of such right to dismiss, and the rule that no judicial action can be taken pending such a demand has no application."

See, also, Coburg Oil Co. v. Russell, 100 Cal.App.2d 200, 223 P.2d 305, and Lori, Ltd. v. Wolfe, 85 Cal.App.2d 54, 61, 192 P.2d 112.

Respondent's counsel does not dispute the foregoing authorities but argues that after the order transferring the case was made on January 28, 1952, the Superior Court of San Mateo County no longer had any jurisdiction over the case, and that the dismissal without prejudice filed with the Clerk of San Mateo County was therefore of no effect.

We are unable to agree with respondent's contention that the dismissal filed was of no effect. Plaintiff had an absolute right to dismiss the action prior to the filing of a counterclaim, cross-complaint or demand for affirmative relief. The dismissal without prejudice filed with the Clerk of San Mateo County was entitled in the action involved, and whether it became effective on February 4, 1952, when filed in San Mateo County, or on February 7, 1952, when it was sent with the papers and files in the case to Sutter County, it is unnecessary to decide. If it did not become effective on February 4th, it certainly became effective when received and filed by the County Clerk of Sutter County. The fact that the dismissal was addressed to the Clerk of San Mateo County is unimportant; it was entitled in the action and was a direction to dismiss said action. No counterclaim, cross-complaint or prayer for affirmative relief having been filed at the time the dismissal without prejudice was filed by the Clerk of Sutter County the action ceased to exist prior to the time defendant filed his answer and cross-complaint.

It follows from the foregoing that the Superior Court of the State of California in and for the County of Sutter has no jurisdiction to proceed further in said action.

Let a writ of prohibition issue restraining said Superior Court from taking any further proceedings in said action.

PEEK, J., and ADAMS, P. J., concur.

111 Cal.App.2d 817

KEJR v. CONSTRUCTION ENGINEERS, Inc.

Civ. 8075.

District Court of Appeal,
Third District. California.

June 19, 1952.

Action by Joseph Kejr against the Construction Engineers, Inc., to have contract for sale of timber declared void and to have plaintiff's title to premises quieted. The Superior Court, Mendocino County, Lilburn Gibson, J., entered an order denying defendant's motion for change of venue, and defendant appealed. The District Court of Appeal, Peek, J., held that the action was local, rather than transitory.

Affirmed.

1. Action 🔑38(2)

Complaint seeking to quiet title and for cancellation of instrument under which defendant claims an interest in and to realty states but one cause of action though there may be multiple counts in the complaint.

2. Action 🔑38(1)

Quieting Title 🔑27

Although first count of complaint specifically alleged facts entitling plaintiff to have contract for sale of timber declared void and to have his title to the premises quieted, and second count alleged quiet title action in general terms, only one cause of action was stated, and that cause was to quiet title. Civ.Code, §§ 658, 660.

3. Venue ⚷4

Action to cancel, on ground of fraud, instrument which caused defect in title of certain property and to have plaintiff's title thereto quieted was a local, rather than transitory, action within venue statutes. Civ.Code, §§ 658, 660.

◆

Guthrie, Darling & Shattuck, Los Angeles, for appellant.

Preston, Falk & Johnson, Ukiah, for respondent.

PEEK, Justice.

This is an appeal from an order of the Superior Court denying appellant's motion for change of venue to Los Angeles county.

The first of the two counts set forth in plaintiff's original complaint alleged that on February 6, 1950 he owned certain lands in Mendocino county; that he entered into an agreement with defendant Construction Engineers, Inc. for the sale of the timber thereon, which agreement was subsequently recorded; that defendant, for the sole purpose of inducing plaintiff to enter into the agreement, falsely and with intent to deceive and without intention of performing same represented to plaintiff that it would immediately commence to remove the timber; that plaintiff, believing and relying on said representations, executed the agreement; that defendant has failed to perform any provisions of the agreement. The second count is a typical quiet title count alleging the defendant claims an interest adverse to plaintiff. The prayer requests that the recorded agreement be canceled and that it be adjudged the defendant has no right, title or interest in the property. Contemporaneously with the filing of its demurrer to said complaint defendant filed a notice for change of venue. Following the sustaining of the demurrer with leave to amend and the denial of defendant's motion for change of venue plaintiff filed his amended complaint.

In support of its contention that the trial court erred in denying its motion appellant first argues that as the timber was treated as personalty under the contract of sale, as is permissible, C.C. §§ 658, 660, the action did not concern realty and therefore the rules relating to venue actions concerning realty are not applicable here. Appellant next argues that even if it be determined that the property is realty rather than personalty the situation then becomes one in which a local action has been joined with a transitory action, and a like conclusion must follow. In this connection defendant argues that the gist of the action pleaded in the first count is fraud, that therefore if defendant were a natural person it would be entitled to have the cause transferred to its place of residence, and since the fraud action has not been brought in any of the alternate venues allowed for suits against corporations, appellant is, in such case, likewise entitled to have it removed to the county of its principal place of business.

[1,2] It is the rule that a complaint seeking to quiet title and for cancellation of the instrument under which defendant claims an interest in and to realty, states but one cause of action even though there may be multiple counts in the complaint. Earl v. Lofquist, 135 Cal.App. 373, 379, 380, 27 P.2d 416; Thompson v. Moore, 8 Cal. 2d 367, 370, 65 P.2d 800, 109 A.L.R. 1027. In the present case the only relief requested is that the title of plaintiff be quieted and that the instrument under which defendant claims be declared void. The first count of the complaint specifically alleges the facts entitling plaintiff to have the contract for the sale of the timber declared void and to have his title to the premises quieted. The second count alleges a quiet title action in general terms. The facts alleged in the first count would be admissible under the general issue of a quiet title action. Although the complaint is in two counts only one cause of action is stated, to wit, a cause of action to quiet title. Earl v. Lofquist, supra; Thompson v. Moore, supra.

In Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931, the plaintiff in a one count complaint sought cancellation of a deed of conveyance to real property on the ground of fraud and to have her title quieted against the claims of defendant therein. The defendant moved to have the action transferred from the county of the situs to her place of residence on the ground that the cause of action stated was transitory.

The Supreme Court in affirming the trial court's denial of said motion said, 217 Cal. at page 382, 18 P.2d at page 932:

> "From an examination of the complaint we are satisfied that the substantial nature of the action (citation) is to cancel a deed on the ground of fraud and to compel a reconveyance to or a reverting of the title in the plaintiff, and that such would be the only relief which could have been granted if the defendant had defaulted. * * * the action is local * * *."

[3] Here, as in the Eckstrand case, the essential nature of the action is to cancel an instrument which has clouded the title of certain property on the ground of fraud and to have plaintiff's title thereto quieted, hence "the action is local".

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

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111 Cal.App.2d 610

ELBERT, Limited, v. GAWN.

Civ. 18858.

District Court of Appeal, Second District,
Division 3, California.
June 13, 1952.

Action by Elbert, Ltd., a corporation, against J. D. Gawn, to determine adverse interests in realty. The Superior Court of Los Angeles County, Paul Nourse, J., found that the parties owned equal interests in the property as tenants in common, and entered judgment accordingly, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that tax deed from state and deed from city arising out of foreclosure of street bond, were on same footing, and neither was superior to the other.

Judgment affirmed.

Taxation 🔑509

A tax deed from the state, issued because of unpaid general taxes, and a deed from a city, issued after foreclosure of street bond, are on equal footing.

Ames Peterson, Los Angeles, J. D. Gawn, in pro. per., for appellant.

John F. Bender and Gizella M. Allen, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff is the holder of a Treasurer's Deed to real property in the City of Los Angeles described in the judgment, which deed was issued December 10, 1948, after foreclosure of a Street bond dated December 27, 1928, issued pursuant to the Improvement Act of 1911, Gen.Laws, Act 5205. Defendant is the holder of a deed from the State of California dated October 20, 1945, issued following a deed to the State for nonpayment of taxes levied for the fiscal year 1930–31.

The court found that the parties own equal interests in the property, as tenants in common, that plaintiff is the holder of an equitable lien in the sum of $1,951.02, defendant is the holder of an equitable lien in the sum of $75, and that defendant has paid taxes in the sum of $4.44, a lien upon the property. The judgment ordered the property sold by a referee, and that the proceeds, after costs of sale, should be distributed as follows: To plaintiff, his costs in the sum of $17.85; to defendant, the sum of $4.44; to plaintiff, the further sum of $1,951.02; and to defendant, $75; reasonable attorney's fees to plaintiff to be hereafter fixed, for prosecution of the action; and the balance, if any, to be divided equally between the parties. It was provided that if sufficient sums are not obtained on the sale there shall be a proportionate distribution. Defendant appeals.

The sole contention on the appeal is that defendant's tax title is superior to that of plaintiff. The law was settled to the contrary of defendant's contention in Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995. See also, Carpenter v. Laing, 108 Cal.App.2d 892, 239 P.2d 3.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

111 Cal.App.2d 690

PEOPLE v. McKINNEY.

Cr. 766.

District Court of Appeal, Fourth District, California.

June 16, 1952.

Defendant was convicted of robbery in first degree. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment on verdict of guilty and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that question whether defendant was armed with a dangerous or deadly weapon was one for jury.

Judgment and order affirmed.

1. Robbery 🔑26

In prosecution for robbery in first degree, question whether defendant was armed with a dangerous or deadly weapon was one of fact for jury. Pen.Code, § 211a.

2. Criminal Law 🔑1171(1, 3)

In prosecution for robbery in first degree, where district attorney, on cross-examination of defendant's witness, brought out fact that witness was confined in jail, and, in argument to jury, stated that defendant's only witness was one who was in jail, but no objection was made thereto, and record did not disclose that court heard these statements, and witness' testimony, if true, related to time about a half hour before robbery, reversible error did not exist.

Murry Luftig, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with robbery in two counts. The first count related to the robbery of the clerk in a cleaning establishment, and the second was for the robbery of the night clerk in a hotel. The first robbery occurred at 8:30 P.M. on July 27, 1951, and the second about 4:20 A.M. the following morning. The defendant pleaded not guilty, but admitted four prior convictions. A jury found him not guilty on Count I but guilty on Count II, finding the crime to have been robbery in the first degree. He appeals from the judgment and from an order denying his motion for a new trial. He was represented by counsel at the trial, but the appeal is presented by different counsel appointed by this court.

At about 4:20 A.M. on July 28, 1951, the appellant entered the Hotel Churchill at San Diego and asked the clerk for a room. He took two dollar bills from his wallet to pay for the room and as the clerk turned to get the key the appellant informed him that "This is a stick-up." The clerk observed that he had his right hand in his coat pocket and that there was some object in that pocket. Thinking that this object was a gun the clerk gave the appellant about $55 or $60 from the cash drawer. The appellant was not satisfied with the amount and conducted a further search behind the counter. When he found no more money he left, telling the clerk to remain seated for five minutes before calling the police. The clerk called the police immediately. The clerk testified that when the appellant said this was a "stick-up", "he went this way (indicating) and told me that he didn't want any trouble. There was an object there which I could see through the coat lining which I assumed was a gun," and that he could see the object poking out the lining of his coat.

About that time a police officer saw the appellant running down the street less than two blocks from the Churchill hotel. The officer ran across a lawn and intercepted the appellant about a block from where he had first seen him. Almost immediately a police car drove up and a broadcast was received concerning the hotel robbery. The description given fitted the appellant, and the officers took him to the hotel where he was positively identified by the clerk as the man who had robbed him. $54 in bills and some coins were found in his pockets, in addition to a few dollar bills in his wallet. A small hammer was also found in his hip pocket. The hotel clerk identified the wallet as similar to the one the appellant had previously displayed. The clerk testified the officers brought the appellant in about three or four minutes after he had left following the robbery.

The appellant denied that he had been in the hotel, but told conflicting stories to the officers as to what he had been doing shortly before his arrest. His defense was that he had been engaged in a dice game at a point a short distance from the hotel; that one of the players short-changed him as that player was leaving the game; that he grabbed this hammer and started in pursuit of the man; and that as he was running for this purpose the officer appeared. In support of this claim the appellant called one Tebbe, who testified that at some time in the early morning of July 28 he engaged in a dice game with the appellant and several others; that after a sailor left the appellant said he was "short"; and that the appellant then "shoved off". He then testified that it was around four o'clock when the appellant thus left the game, but that "I am not sure though". He went on to say that he himself then went out and got a taxi, and it was close to four when he got out to the Marine Base which was several miles away.

[1] It is not contended that the evidence is insufficient to support the finding that the appellant committed the robbery charged in Count II, but it is contended that the finding that the crime was first degree robbery is unsupported since there was no evidence that he was armed with a dangerous or deadly weapon at the time of the robbery, and that the court committed prejudicial error in instructing the jury with respect to what constitutes first degree robbery. It is argued that the evidence merely shows that the defendant had a hammer in his hip pocket when apprehended, and there is no evidence that he made any threatened or actual use of it. Under the circumstances of this case the question of whether the appellant was armed with a dangerous or deadly weapon, within the meaning of section 211a of the Penal Code, was one of fact for the jury. People v. Raleigh, 128 Cal.App. 105, 16 P.2d 752. When the robbery was committed the appellant used some object in his pocket to simulate a gun, making a threatening gesture and telling the victim that he did not want any trouble. The clerk thought it was a gun and made no resistance. When apprehended a few minutes later, the appellant had this hammer in his pocket and it may reasonably be inferred that it was the object used to simulate a gun. It may also be reasonably inferred from the evidence as a whole that the appellant intended to use the hammer as a weapon if it became necessary. The situation is similar in principle to that in People v. Ward, 84 Cal.App.2d 357, 190 P.2d 972, in which a conviction for first degree robbery was sustained. See, also, People v. Freeman, 86 Cal.App. 374, 260 P. 826; People v. Yankee, 79 Cal.App.2d 431, 179 P.2d 582; People v. Coleman, 53 Cal.App.2d 18, 127 P.2d 309. Since a factual question was presented the court properly instructed the jury in that connection, and no contention is made that these instructions do not correctly set forth the law.

[2] The only other point raised is that the district attorney was guilty of prejudicial misconduct in bringing out the fact that appellant's witness Tebbe was confined in jail, and in referring to this in his argument to the jury. When Tebbe was called as a witness appellant's counsel asked him where he lived and what his business was. He replied, "My home is in Kansas City," and that "I am a member of the Marine Corps stationed at the Recruit Depot." On cross-examination, the district attorney asked "Whereabouts are you staying now?" He replied "I am serving a sentence in the county jail." He was then asked "You are in custody?" And he replied "Yes, sir." During his argument to the jury the

district attorney said: "The only witness he has presented is Mr. Tebbe, a man who is in custody in the jail."

In similar situations it has been held that such error will not justify a reversal unless it clearly appears that prejudice has resulted. People v. Roeder, 41 Cal.App.2d 495, 107 P.2d 92; People v. Macias, 77 Cal. App.2d 71, 174 P.2d 895. In the latter case, it was pointed out that a judgment of conviction will not be reversed where the appellate court is unable to perceive that the alleged misconduct had a material effect on the determination of the issues of fact, and especially where the guilt of the accused has been established by clear and convincing evidence. There is nothing in the case of People v. Hamilton, 33 Cal.2d 45, 198 P.2d 873, which would require a reversal here.

The appellant contends that prejudice clearly appears since the jury acquitted him on the first count, although the person there robbed identified him as the robber, and that it follows that the different verdict on the second count must have been based upon the prejudicial effect of the testimony that his witness was a criminal.

Good reasons otherwise appear for the difference in the verdicts. While the person involved in the first count later identified the appellant as the robber, his then counsel raised a doubt as to whether that identification had not been suggested by the officers. The money then taken was not found on the appellant, and his counsel succeeded in creating a doubt as to how much money had been taken, and whether or not it had been taken by others. Appellant's counsel also made much of the fact that that witness testified that the person who robbed her had on a different colored shirt than that worn by the appellant when he was arrested. Moreover, Tebbe's testimony, if accepted as true, related to a time at least half an hour before the second robbery occurred.

No objections were made when the complained-of questions were asked, or when the matter was referred to in the argument. The evidence of appellant's guilt is clear and convincing and it would be unreasonable to believe that the alleged misconduct could have had any material effect on the verdict. Some contention is made that the court should had admonished the jury to disregard these questions and this argument. They were not called to the attention of the court and the record does not disclose that the court heard them. Under the circumstances shown by the record we are unable to hold that reversible error appears.

The judgment and order are affirmed

GRIFFIN and MUSSELL, JJ., concur.

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111 Cal.App.2d 570

DELANY v. TOOMEY et al.

Civ. 14863.

**District Court of Appeal, First District,
Division 1, California.**

June 11, 1952.

Elmer P. Delany brought proceedings for writ of mandate against Thomas A. Toomey, registrar of voters, respondent, wherein William M. Malone was the real party in interest and respondent. The Superior Court of the State of California, in and for the City and County of San Francisco, Franklin A. Griffin, J., entered a minute order on trial of issues of fact without making findings of fact and without a waiver of findings, and the petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that appeal was required to be dismissed since the order was not appealable because it lacked one of the requisites of a final judgment.

Appeal dismissed.

1. Appeal and Error 🔑77(1)

Appeal from order entered in minutes on trial of issues of fact in proceeding for writ of mandate requiring respondent as Registrar of Voters, to certify petitioner as newly elected Chairman of Democratic County Central Committee, denying petition, was required to be dismissed, in absence of findings of fact or waiver of findings, since order was not appealable because not a final judgment. Code Civ.Proc. §§ 632–634, 1067–1110b, 1107, 1109; Rules on Appeal, rule 2(b)(2).

2. Mandamus ⚿174

Findings of fact are required, unless waived, on the trial of a question of fact in a civil action, including a mandamus proceeding. Code Civ.Proc. §§ 632–634, 1067–1110b, 1107, 1109.

3. Appeal and Error ⚿76(1)

Where a minute order lacks one of the prerequisites of a final judgment, it is not appealable, and provisions of rule making minute order final, unless it shows by its own terms that it is to be followed by a formal order do not apply. Rules on Appeal, rule 2(b)(2).

◆

Delany, Fishgold, Werchick & Minudri, Jack H. Werchick, San Francisco, for appellant-petitioner.

Wm. J. Dowling, Jr., Wm. B. Wetherall, San Francisco, James W. Harvey, San Francisco, Irving S. Rosenblatt, Jr., San Francisco, for real party in interest.

FRED B. WOOD, Justice.

In this proceeding for a writ of mandate requiring respondent Thomas A. Toomey, as Registrar of Voters, to certify petitioner as the newly elected Chairman of the Democratic County Central Committee of San Francisco, judgment was entered in the form of a minute order reading, "Petition for writ of mandate denied. Demurrer and motion to strike denied. Ord: restraining order dissolved."

Petitioner has appealed from those portions of the judgment which denied the petition and dissolved the restraining order. The restraining order was incidental to and a part of an alternative writ which had been issued, containing a recital that such a writ should issue "together with a temporary restraining order pending the hearing on said writ."

[1] The appeal must be dismissed because taken from an order entered in the minutes upon the trial of issues of fact (not an order of nonsuit) made without findings of fact or waiver of findings.

[2] Findings of fact are required, unless waived, upon the trial of a question of fact in a civil action. Code Civ.Proc. sections 632–634. This requirement is made applicable to a mandamus proceeding by section 1109 of the Code of Civil Procedure, which declares that "Except as otherwise provided in this title [which includes sections 1084-1097, relating to the writ of mandate], the provisions of part two of this code [in which part sections 632-634 occur] are applicable to and constitute the rules of practice in the proceedings mentioned in this title." We find nothing in the title mentioned (sections 1067–1110b of the code) which dispenses with the requirement for findings of fact in a mandamus proceeding. Without discussion of section 1109, the court in Davis v. State Board of Optometry, 35 Cal.App.2d 428, 95 P.2d 959, held that findings of fact are required upon the trial of questions of fact in a mandamus proceeding. Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816, does not hold differently. Findings of fact were not necessary in that case because there had been no trial of questions of fact. No writ had been issued and no answer or return had been filed. The hearing was held pursuant to section 1107 of the Code of Civil Procedure, "under which a copy of the petition for the writ is served on the respondent before an alternative writ is issued and the respondent may file points and authorities in opposition to it." 26 Cal.2d at page 727, 160 P.2d at page 822. Accordingly, a denial of the petition by minute order without findings was sufficient.

There was a trial of questions of fact in the court below. Upon the filing of the petition, an alternative writ of mandate was issued requiring respondent Toomey as registrar of voters to issue the certificate demanded by the petitioner and to strike from his files a certificate showing that William M. Malone was the chairman of the committee, or to show cause at a time and place specified why he had not done so. On the return date, respondent Toomey filed his answer and return to the petition and respondent Malone as the real party in interest filed an answer. Each of these pleadings presented questions of fact to be decided by the court. In addition, Malone filed a demurrer to the petition and a motion to strike certain portions of the petition.

Shortly after the filing of the answer, the demurrer, and the motion to strike, the court, upon petitioner's request, continued the hearing to a later hour of the same day, to enable counsel for petitioner to examine the papers served that morning. At the postponed session, lengthy arguments were presented with reference to the demurrer and the motion to strike. Thereupon, the court asked "Is that all you are going to present to this Court this afternoon?" to which counsel for petitioner replied: "We are ready to proceed, your Honor, on the writ of mandate, but we presume we have to have a ruling on this demurrer to the motion." The court responded "I don't intend to rule on it until I have an opportunity to investigate the matter myself." Counsel for petitioner then made an opening statement, during the course of which a number of stipulations of fact were made by the parties. He then put six witnesses upon the stand, all upon direct examination except respondent Toomey whom he called under section 2055 of the Code of Civil Procedure. Of the other five, four were cross-examined and two gave testimony upon redirect examination. In addition, three exhibits were introduced in evidence by the petitioner, and one by respondent Malone, all bearing upon questions of fact in the case. This hearing extended into the following day. Neither of the respondents offered any testimonial evidence. The conclusion seems inescapable that this hearing had all of the aspects of a "trial" as that term is used in section 632 of the code.

Petitioner, in his briefs upon this appeal, contends that there was no trial, for the reason, asserted by him, that the court denied him a full and fair hearing. The fact that a hearing may lack in fullness or fairness does not prevent it from being a trial. Moreover, in this case there was no such lack. The record, which we have examined, does not support petitioner's contention. The court exhibited liberality in the reception of evidence and encouraged its presentation; did not curtail petitioner in its production. When the last witness was on the stand, the court and counsel engaged in a discussion whether or not the court had jurisdiction to try the title to an office in such a proceeding. During that discussion petitioner said "I think we should be permitted to make a complete record. There is further evidence—" The court replied "Go ahead, go ahead. I am just telling you what my feeling is." Petitioner did go ahead. His counsel asked further questions and then dismissed the witness. He called no more witnesses and did not indicate that he had any additional evidence to offer. He did ask and was granted permission to file authorities that afternoon on the issues presented by the demurrer. Thereupon the proceeding adjourned. That proceeding was a trial of questions of fact.

Petitioner further suggests that the minute order denying the petition may have been an order for nonsuit which would not require findings of fact. This point does not find support in the record, for neither of the adverse parties made a motion for nonsuit. The statute predicates an order for nonsuit upon the adverse party making a motion for nonsuit after the plaintiff has completed his opening statement or the presentation on his evidence. Code of Civ.Proc. section 581c. See Saul v. Moscone, 16 Cal.App. 506, 118 P. 452.

[3] Where, as here, a minute order lacks one of the requisites of a final judgment (in this case, the required findings of fact) it is not appealable and the provisions of Rule 2(b)(2) of the Rules on Appeal do not apply. See Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 346–347, 182 P.2d 182; People v. Gordon, 105 Cal.App.2d 711, 716–717, 234 P.2d 287; Reimer v. Firpo, 94 Cal.App.2d 798, 800-801, 212 P.2d 23; Estate of Dow, 91 Cal.App.2d 420, 423, 205 P.2d 698; Hirschberg v. Oser, 82 Cal.App.2d 282, 285–287, 186 P.2d 53.

The appeal is dismissed.

PETERS, P. J. and BRAY, J., concur.

111 Cal.App.2d 579

BERTONE v. CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 14817.

District Court of Appeal, First District, Division 2, California.

June 11, 1952.

Rehearing Denied July 11, 1952.

Stephen Bertone sued the City and County of San Francisco, and others for conversion of $5,000 of plaintiff's money. The Superior Court, City and County of San Francisco, Edward P. Murphy, J., rendered judgment awarding plaintiff only $1,019.33, and plaintiff appealed. The District Court of Appeal, Goodell, J., held that the entire $5,000 had been misappropriated.

Reversed.

1. Evidence 🔑265(8)

In customer's action against water department for conversion of sum received from customer by department for deposit in trust fund as guarantee, under agreement requiring determination, "by agreement, negotiation, or court action", of payment, if any, due for water deliveries in excess of amounts registered by meters, defendant's answer, alleging that $3,950.57 had been deducted by defendant out of the $5,000 deposit but failing to allege that such deduction was made after a final determination "by agreement, negotiation or court action", constituted admission of record that integrity of trust fund had been destroyed by department and money therein appropriated by it.

2. Trial 🔑388(1)

Purpose of findings is to answer questions put by the pleadings.

3. Trial 🔑395(5)

Findings on probative, as distinguished from ultimate facts, are unnecessary.

4. Trial 🔑388(1)

Unless waived, full findings are required on all material issues raised by pleadings and evidence, and this requirement applies not only to issues raised by denials of allegations of complaint but to issues raised upon affirmative defenses in answer. Code Civ.Proc. § 462.

5. Municipal Corporations 🔑738

Where water department received $5,000 from customer to be deposited in trust fund as guarantee, under agreement requiring determination, "by agreement, negotiation or court action", as to payment, if any, due department for water deliveries in excess of those registered by meters, action of department in taking matter into its own hands and transferring money to its general fund, after ex parte determination as to sum due, constituted appropriation of fund, leaving customer no alternative but action for misappropriation. Code Civ. Proc. § 339, subd. 1.

6. Accord and Satisfaction 🔑2(2)

Agreement, requiring water department to deposit in trust fund sum received from customer as guarantee for payment of unmetered water charges, if any, determined, "by agreement negotiation or court action," to be due, did not effect accord and satisfaction.

7. Municipal Corporations 🔑741(1)

Customer's claim for misappropriation of fund, received by water department from customer for deposit in trust fund as guarantee for payment of unmetered charges, if any, determined "by agreement, negotiation or court action", was not a "claim for damages" required to be presented to controller within sixty days after occurrence for which it was claimed damages had arisen. Code Civ.Proc. § 339, subd. 1.

8. Money Received 🔑15

Customer's action against water department, for misappropriation of fund received by water department from customer to be placed in trust fund as guarantee for payment of unmetered charges, if any, determined, "by agreement, negotiation or court action", to be due, was an action for money had and received.

9. Money Received 🔑1

An action for money had and received lies where defendants are in possession of money which in equity and conscience they are bound to pay over.

Allen Spivock, San Francisco, for appellant.

Dion R. Holm, City Atty., City & County of San Francisco, A. Dal Thomson, Public Utilities Counsel, Jack G. McBride, Deputy City Atty., San Francisco, for respondents.

GOODELL, Justice.

Appellant sued on a writing dated April 4, 1946, claiming a conversion by respondents of $5000 of his money. He was awarded a judgment for $1,019.33, and after the denial of a new trial took this appeal.

Appellant owned three apartment houses in San Francisco, one at 2459 Larkin Street of 12 apartments, one at 626 Pine Street of 30 apartments and a store, and one at 665 Pine Street of 40 apartments.

On March 5, 1946 the San Francisco Water Department wrote him as follows:

> "We are herewith rendering bills covering under-charges for water supplied through the services to the premises located at 2459 Larkin Street for a period of six years and to the premises located at 626 Pine Street and 665 Pine Street for periods of seven years each.
>
> "We have conclusive evidence that the meters on these services were not properly functioning during the specified periods of time.
>
> "Your remittance in accordance with our Rules and Regulations will be appreciated."

The three bills totalled $5,258.40.

On March 21 three final notices were served, reciting appellant's 15-day delinquency and stating that unless the bills were paid within three days water service would be discontinued. Appellant on April 4 deposited with the department $5000 in currency and the department drew up in its own language the following writing on which this litigation is based:

> "Received from S. Bertone, * * * the sum of $5,000.00 to be deposited by the Water Department in a Trust Fund as a deposit to guarantee payment of unpaid charges for water delivered at the undernoted premises for the accounts of said S. Bertone, during the periods indicated.
>
> 2459 Larkin Street
> For years 1940 to 1945 inclusive
> 626 Pine Street
> For years 1939 to 1945 inclusive
> 665 Pine Street
> For years 1939 to 1945 inclusive
>
> "Said unpaid charges are for water claimed by the Water Department to have been delivered by it to the several premises, during the periods indicated, in excess of the amounts registered by the several meters installed at the respective premises.
>
> "The Department having rendered bills for the excess deliveries claimed to have been made by it in the amount of $5258.40 and the said consumer S. Bertone having protested the accuracy of the estimates on which said claims of the Department were based;
>
> "It is mutually understood and agreed that said claims will be further reviewed, and that when the amount of such excess deliveries, if any, have been finally determined in the light of all factors involved, by agreement, negotiation or court action, the charges for such excess delivery as so determined shall be deducted from the deposit, any balance remaining after such deduction to be refunded to the depositor. Should the deposit not be sufficient to meet the full amount of the bill for the unpaid excess deliveries the depositor agrees to pay to the department the balance of such unpaid claims.
>
> "San Francisco Water Department
> Joseph Conway
> Manager, Water Sales Division
>
> "I hereby accept the conditions
> outlined in this receipt
> S. Bertone."

Shortly thereafter a re-check was made by the department, resulting in revised bills for the same periods. The bill for the Larkin Street property was reduced from $902.00 to $406.20, that for 626 Pine from $3837.60 to $3056.73, and that for 665 Pine from $518.80 to $517.74, a total of $3,980.67 instead of $5,258.40, and on May 23, the department wrote appellant to this effect and offered to return $1,019.33, the difference between $5000 and $3,980.67, if he accepted the adjustment. No reply having been received, the department wrote appellant on July 29 saying "we are holding balance of deposit amounting to $1,019.33" pending acceptance, and asking for a reply. On September 10 the department again wrote, referring to the unanswered letters of May 23 and July 29, and saying:

> "*It is our intention to conclude this matter* and therefore, unless you present a valid objection within fifteen days, *we propose to apply your deposit,* in so far as necessary, *to liquidate our claim* of $3,980.67 presented to you on May 23, 1946. A check for the balance of $1,019.33 will be forwarded to you promptly thereafter." (Emphasis added.)

This letter showed an intent already formed by the department to take the matter into its own hands.

On September 20 Attorney Louis Ferrari wrote the department as follows:

> "This is in reply to your letter of September 10, 1946, addressed to Mr. S. Bertone, 3030 Larkin Street.
>
> "Mr. Bertone has employed me to look after this claim against him, and I am writing in his behalf to protest against any action on your part in and by which you apply or attempt to apply any portion of the sum of $5000.00 deposited by Mr. Bertone with you, toward any alleged claim based upon your contention that the respective meters in the above named premises had not been properly functioning. It is the contention of Mr. Bertone that the meters in the above premises have been functioning properly at all times; that the fluctuations in the amounts of water used have been due to leakage.
>
> "Mr. Bertone would like to have a hearing on this matter, and would like an opportunity to present evidence to sustain his claim that he does not owe the San Francisco Water Department any amount whatsoever, and that he is entitled to have redelivered to him the entire sum of $5000.00.
>
> "We would be glad to have this hearing fixed at a time and place to be designated by you. However, the writer personally asks that the hearing be set for some time in October, as he contemplates being out of town during the coming week."

The record is silent as to the requested hearing. Needless to say a hearing was within the contemplation of the writing which provided for negotiation and agreement.

The last letter, dated October 22, 1946, reads as follows:

> "In accordance with our letter of September 10, 1946, and with the approval of our counsel, we have credited your account for water supply with the following amounts which, as outlined in our letter of May 23, 1946, represent minimum back charges for water delivered but not properly recorded on the several meters:

2459 Larkin Street	—	$ 406.20
626 Pine Street	—	3,056.73
665 Pine Street	—	517.74
Total	—	$3,980.67

> "These credits were made by deducting the necessary amounts from the sum of $5,000.00 which you deposited with us on April 4, 1946.
>
> "The remaining balance of $1,019.33 is refunded to you herewith by our Check Number 8715 dated October 18, 1946."

It was accompanied by a check for $1,019.33 (bearing on its face "Not valid after sixty days from date") which was never cashed. This letter showed that the department had carried out its expressed intent to take the matter into its own hands.

The writing of April 4 acknowledges receipt of $5000 "to be deposited by the Water Department in a Trust Fund as a deposit to guarantee payment of unpaid charges for water delivered." The department's manager of water sales when asked on cross-examination: "Now, this $5000 * * * was put in a trust fund?" answered "Yes". And when asked: "Has the City taken any of that money and put it into the regular Water Department funds?" frankly answered "Yes, we have."

Appellant contends that when this transfer was made without a determination by "agreement, negotiation or court action", of what, if anything, was owing, the respondents appropriated his $5000 to their own use.

The following allegations of the complaint are admitted by the answer: that plaintiff was the owner of the three buildings and shortly before March 5, 1946 the department informed him of its recent discovery that the meters therein had not been functioning properly during the past 6 or 7 years, so that water was supplied in excess of what was registered; that on March 5 the three bills were submitted to plaintiff aggregating $5,258.40; that plaintiff objected to these claims and denied that the meters were not properly functioning; that he owed nothing and had never interfered or tampered with the meters; that on March 21 the department served a written notice that unless plaintiff paid the $5258.40 within 3 days the water service to all 3 buildings would be discontinued; that to prevent such discontinuance plaintiff under protest deposited $5000 in cash with the department and received the writing which was made part of the complaint; that on May 23 defendants submitted the three revised bills totalling $3980.67 and offered to return the difference of $1,019.33 in full settlement; that no court action had been taken.

One of plaintiff's allegations was that he had continually refused to pay anything on the bills; this was denied by the answer. And in alleging the deposit of $5000 under compulsion plaintiff stated that it had been placed in a trust fund; the answer denied that it "now is, or ever was a trust fund". Plaintiff also alleged that he had rejected the $1,019.33; this was denied. One of the principal allegations was "That, up to the present time, the above dispute over said sum of $5,000.00 has not 'been finally determined' 'by agreement, negotiation or court action' "; this was denied.

In the second count plaintiff alleged that within four years last past defendants became indebted to him in the sum of $5000 upon the written agreement for money had and received by said defendants in a "Trust Fund" for the use and benefit of plaintiff. This was denied.

It will thus be seen that the only substantial issues raised by denials on the first count were (a) whether or not the $5000 was a trust fund and (b) whether or not the dispute had been determined in the manner prescribed in the writing.

The answer to the second count in addition to denying that the $5000 was owing to plaintiff, pleaded: "In this connection defendant alleges that the total sum of $3,980.67 was due, owing and unpaid from plaintiff to defendant wtih respect to the supplying of water by defendant to plaintiff and that said sum has been deducted by defendant out of said deposit of $5,000.00 * * * In this connection defendant further alleges that the sum of $1,019.33 was, on or about the 11th day of September, 1946, tendered by defendant to plaintiff, being the difference of said sum of $5,000.00 and said sum of $3,980.67."

[1] A careful reading of this allegation shows that it states no defense for this reason: while it alleges that the $3,980.67 "has been deducted by defendant out of said deposit of $5,000.00" it does not allege that such deduction was made after a final determination "by agreement, negotiation or court action". Without such allegation it amounts to nothing but a re-assertion of the department's claim that it had the right—agreement or no agreement, trust fund or no trust fund—to determine for itself that this $3,980.67 was owing and that, having such right, and having so determined ex parte, it had deducted $3980.67 from plaintiff's $5,000, which had been deposited only as security. Indeed the language itself "that said sum has been deducted by defendant out of said deposit of $5,000.00" is an admission of record that the integrity of the trust fund had been destroyed by the department and the money therein appropriated by it.

[2] This brings us to the findings. Although the answer expressly denied that the $5000 was a trust fund, there is no finding on that issue. The findings are silent also on the important issue whether or not there had been a final determination by agree-

ment or negotiation. "The purpose of findings 'is to answer the questions put by the pleadings.'" Moore v. Craig, 5 Cal.App.2d 283, 285, 42 P.2d 647, 648; Frascona v. Los Angeles Ry. Corp., 48 Cal.App. 135, 138, 191 P. 968. See 24 Cal.Jur. p. 940 § 186. Had the court touched at all on these issues, it must have necessarily found that the money was *received in trust*, and to be *held in trust* until a settlement had been reached by "agreement, negotiation or court action" and that no such settlement had been reached. It could not have found otherwise.

The court found that "the plaintiff was to repair all leaks on the three premises and defendant Water Department would reestimate the amount of water consumed under such conditions". If this was intended as a finding that the writing so provided, it is incorrect. There was no such provision.

[3] The findings quote at length the department's rules, but such findings are on probative and not ultimate facts, hence wholly unnecessary. (24 Cal.Jur. p. 968, § 203).

[4] The findings conclude: "That on May 23, 1946, defendant Water Department submitted revised bills claiming $406.20 for the premises at 2459 Larkin Street, $3,056.73 for the premises at 626 Pine Street, and $517.74 for the premises at 665 Pine Street, making a total of $3,980.87, and sent plaintiff a check for refund in the amount of $1,019.33, which check plaintiff did not cash." Such finding was wholly unnecessary since there was no issue thereon, the plaintiff's allegations to that effect having been admitted by the answer. (24 Cal. Jur. p. 982, § 211). *Neither that nor any other finding determines that appellant ever owed the department $3,980.67, or any part of it.* The allegation in the answer "that the total sum of $3,980.67 was due, owing and unpaid from plaintiff to defendant" was "deemed controverted" (§ 462 Code Civ. Proc.). "Under the system of express findings now provided for, full findings, unless waived, are required on all material issues raised by the pleadings and evidence" (24 Cal.Jur. pp. 935–6, § 183). "The requirement applies not only to issues raised by denials of the allegations of a complaint, but to issues raised upon affirmative defenses in the answer * * *" (24 Cal.Jur. p. 938, § 183).

The court failed to find on several minor issues namely, whether the department "did and does now supply water for profit, to the people" of San Francisco, and whether appellant had "continually refused to pay anything" on the back-bills.

On the second count there was no finding or conclusion on plaintiff's allegation, denied by defendants: "That within four years last past * * * defendants became indebted to plaintiff in the sum of $5,000.00 upon a written instrument * * * for money had and received by said defendants in a 'Trust Fund' for the use and benefit of plaintiff."

As separate defenses the defendants pleaded that plaintiff's action was barred (a) by § 339, subd. 1 Code Civ.Proc; (b) by laches, and (c) by § 87 of the San Francisco charter. There were no findings or conclusions on any of those issues.

The writing of April 4 contained the conditions, clearly expressed, upon which appellant's $5000 could be used, namely, only after a *final determination* of what, if anything, was owing on the back bills, *by "agreement, negotiation or court action"*.

[5] When, on September 20, 1946, appellant through his attorney asked for a hearing it should have been accorded since a hearing affords an opportunity for negotiation. No hearing was held. There was then clearly an *impasse*, and apparently nothing was left but court action. Instead of resorting to that, as the writing expressly provided, respondents took the matter into their own hands and transferred the money to their general funds. This was a clear departure from the terms of the agreement and an appropriation of appellant's $5000. Granting that a deadlock had been reached as far as negotiation and agreement were concerned, the writing still called for court action. Had respondents sued, the burden would have been theirs to prove a stale claim dating back 6 or 7 years, with no rule of the department providing for or justifying any such unusual

and belated action, and with the statute of limitations confronting them as well. Although this outlook might not have appeared attractive to the department, appellant still had the right to invoke court action. But respondents by their unilateral action had destroyed the trust fund and absorbed it as their own. Appellant was left with no alternative but an action for the misappropriation.

Respondents argue, without supplying any authority, that the designation of a trust fund was "purely an accounting procedure to designate and separate the money from the general funds of the Water Department". The department's situation is that of one who obtains (in this instance by compulsion) a sum of money belonging to another under an express declaration of trust and then takes it, after sitting in judgment on his own case and deciding that it is his own money. The court's language in Kreutz v. Livingston, 15 Cal. 344, 347, exactly fits this case: "The defendants occupied toward the plaintiff the position of trustees, and the money sued for was received in that character * * * the defendants cannot now repudiate it, and retain money *which they would not otherwise have received* * * *" (Emphasis added). Respondents' situation was essentially the same as that of a chattel mortgagee who sells or disposes of the mortgaged chattel *otherwise than in accordance with the conditions of the mortgage*. In such case there is an unlawful assumption of dominion over the property in defiance of the owner's rights, amounting to a wrongful conversion and effecting an extinguishment of the lien. Blodgett v. Rheinschild, 56 Cal.App. 728, 738, 206 P. 674; Metheny v. Davis, 107 Cal.App. 137, 139, 290 P. 91; Kee v. Becker, 54 Cal.App.2d 466, 470–471, 129 P.2d 159. The two situations are analogous. See, also, Lowe v. Ozmun, 3 Cal.App. 387, 394, 86 P. 729, where a pledgee asserted his ownership of the pledged property.

Respondents argue, further, that "where a claim is made upon a consumer for the furnishing of water and the consumer disputes the claim and the supplier indicates its intent to discontinue the supply, the right of the consumer is to pay the disputed amount under protest and thereafter have his action for the recovery of the excess." That, of course, is true, but these parties adopted a different expedient by drawing an agreement which prescribed explicitly how the undercharges, if any, were to be determined. It by no means provided for *payment* under protest of the disputed amount. The $5000 was deposited merely as a "guarantee" as the respondents themselves characterized it.

[6] Respondents assert, finally, that the writing effected an accord and satisfaction without even advancing an argument as to why this is so. The writing has none of the characteristics of an accord and satisfaction.

The figure of $1,019.33 for which judgment was awarded, was arrived at by deducting the $3,980.67 as *determined* by respondents, from the $5000. By reaching that result sanction was erroneously given to respondents' misappropriation of appellant's money. Moreover these figures, as shown above are afforded no support whatever by the findings.

[7–9] Defendants pleaded that plaintiff's causes of action were barred by § 87 of the charter, (and the court made no finding thereon.) Respondents now argue that § 87 "requires that all claims for damages against the City and County must be presented to the Controller within sixty days afer the occurrence for which it is claimed the damages have arisen" citing Cathey v. City and County of San Francisco, 37 Cal. App. 2d 575, 99 P.2d 1109. Appellant answers that this claim is not one for damages but is based on the writing of April 4. We are satisfied that this is a sufficient answer, but, in addition to that, the action is one for money had and received (See Ehrman v. Rosenthal, 117 Cal. 491, 496–497, 49 P. 460, citing inter alia Kreutz v. Livingston, 15 Cal. 344, supra. Such action lies, as said in the Kreutz case, where "the defendants are in possession of money which in equity and conscience they are bound to pay over."

The judgment is reversed.

NOURSE, P. J., and JONES, J. pro tem., concur.

111 Cal.App.2d 593

HARRIS v. LOS ANGELES TRANSIT LINES.

Civ. 19033.

District Court of Appeal, Second District,
Division 2, California.
June 13, 1952.

Action by Isabel L. Harris against Los Angeles Transit Lines for personal injuries to her back when streetcar on which she was riding was struck from rear by another streetcar. The Superior Court of Los Angeles County entered judgment for $10,503.77 damages and order denying motion for new trial, and plaintiff appealed, contending that award was inadequate. The District Court of Appeal, Fox, J., held that in personal injury actions, plaintiff may recover only for the necessary and reasonable expenditures attributable to the injury, and it was question of fact for court to determine how much of the medical expenses were necessitated by the accident.

Judgment affirmed.

1. Appeal and Error 🔑1013

The issue as to what amount of damages will adequately compensate plaintiff for loss of earnings, pain and suffering and cost of medical and hospital care and other expenses incurred by reason of injury negligently inflicted is primarily a question of fact, and award of damages may not be set aside unless it is so obviously unreasonable as to raise a presumption of passion, prejudice or corruption by the trier of facts, or the uncontradicted evidence demonstrates that the award is insufficient as a matter of law.

2. Appeal and Error 🔑932(1)

In determining whether damages awarded are inadequate as a matter of law, the evidence on that issue must be considered in light most favorable to the determination reached by trier of facts.

3. Damages 🔑116

In personal injury actions, the plaintiff may recover only for the necessary and reasonable expenditures attributable to the injuries, and while the amount charged for medical treatment is some evidence of its reasonable value, court is not required to allow full amount charged even though the doctor testifies that in his opinion such amount is reasonable and necessary.

4. Damages 🔑191

In action for injuries to plaintiff's back wherein doctors testified as to reasonableness of amount claimed by plaintiff as expenditures for doctor bills, but evidence was conflicting as to how much of the medical treatment was attributable to defendant's fault, court did not abuse its discretion in refusing to allow full amount claimed.

5. Appeal and Error 🔑1011(1)

Where evidence was conflicting as to whether plaintiff's disablement was caused by injuries complained of or by onset of menopause and its associated emotional stresses, question as to what extent impairment of plaintiff's earning ability was traceable to defendant's negligence was one of fact for trial court.

6. Appeal and Error 🔑1013

Responsibility of determining actual extent of plaintiff's pain and suffering in connection with personal injury rests upon the good faith, experience and sound discretion of the trier of the fact, and determination made by it upon such question must be sustained if it is compatible with human experience and the exercise of sound discretion.

7. Damages 🔑130(4)

In action for injuries to plaintiff's back when streetcar on which she was riding was struck from rear by another streetcar of defendant, evidence was not such as to compel holding as matter of law that award of $4,000 for pain, suffering, inconvenience and mental distress was wholly inadequate.

8. Appeal and Error 🔑996, 1012(1)

Appellate court will not reweigh the evidence and draw inferences contrary to those drawn by trial court.

9. Appeal and Error 🔑110

An order denying a motion for new trial is not appealable.

◆

Paul C. Hill, Los Angeles, for appellant.

Melvin L. R. Harris, Trippet, Newcomer, Yoakum & Thomas, and Henry F. Walker, Los Angeles, for respondent.

FOX, Justice.

Plaintiff was awarded $10,503.77 in an action to recover damages for personal injuries. She claims the award is inadequate.

The evidence shows that plaintiff was a passenger on a streetcar operated by defendant on September 13, 1948, at a time when the car, while stopped at a street intersection, was struck from the rear by another streetcar operated by defendant. The force of the impact threw plaintiff forward against the seat in front of her, while passengers in the seat behind her were thrust forward against the back of plaintiff's seat causing it to press against plaintiff's back and neck. Plaintiff testified that immediately following the interval during which she was wedged between the seats, she experienced sharp pain in her back. Thereafter she filled out an "accident" card given her by the motorman. She reached home without assistance, but on the day following her back pains intensified and she suffered from a painful soreness of the neck muscles. She thereupon telephoned defendant corporation and asked that a doctor be sent, but since one was not immediately available, she consulted her personal physician, Dr. Wallach, who prescribed sedatives and rest. On September 27, 1948, X-rays were taken which revealed that plaintiff had a congenital defect of the fifth lumbar vertebra known as spondylolisthesis, manifested by a slipping forward of the fifth lumbar vertebra upon the sacrum. This condition antedated the time of the accident. The X-ray also revealed a degree of pre-existing narrowing and degeneration of the intervertebral discs and a moderate sclerosis of the cervical spine. The X-rays of that region showed a reversal of the usual anterior curvature in the middle cervical spine, which Dr. Wallach testified might have been attributed to an injury. It was his opinion that the pains and soreness of which plaintiff complained were the result of the accident and that the trauma caused by the accident aggravated the pre-existing condition of plaintiff's spine.

During the two months following the collision Dr. Wallach administered to plaintiff several times but her condition failed to respond to treatments. Thereupon he consulted with Dr. Scott, an orthopedist, and it was decided that a surgical stretching operation, involving manipulation of the back under general anesthesia, should be undertaken. This operation was performed on November 18, 1948, but plaintiff's pain continued in the upper and lower lumbar areas, with generalized pain in the neck, shoulders, arms and knees and severe headaches.

To remedy this condition, on June 9, 1949, Dr. Scott performed a spinal operation, which necessitated the grafting of a bone into the area of the congenital spinal defect to accomplish the fusion of the fifth lumbar vertebra to the sacrum. The operation was pronounced a success. Dr. Scott indicated that it should have relieved the symptoms originating with plaintiff's spondylolisthesis which the injury on the streetcar had exacerbated. Plaintiff was discharged from the hospital on June 20, 1949, and remained at home confined to her bed for about eight weeks. Thereafter her convalescence was of an ambulant nature. She required the care of a practical nurse and housekeeper from June 20, 1949, to May, 1950, to whom the sum of $981 was paid for her services. Plaintiff remained out of work from the time of her injury until the date of the trial asserting she was physically incapable of pursuing her former occupation. On September 3, 1949, Dr. Scott visited the patient but she made no complaint with reference to her back at that time.

The testimony disclosed that at the time of the accident plaintiff was about 48 years old and the mother of two children. During the seven or eight months prior to the accident she had been regularly employed as a seamstress at a wage of $1.70 per hour and had earnings of $68 per week. Prior to her injury she was an active person and frequently attended dances. Her medical history indicates that in 1932 or 1933 plaintiff had an operation in which her Fallopian tubes were removed. In December of 1946 she suffered from backaches, headache and irritation upon passage of urine and in an examination by Dr. Wallach a large pendunculated fibroid tumor was discovered and subsequently removed. Dr.

Wallach also performed a subtotal hysterectomy, removing the entire uterus and the right ovary and freeing the pelvic area of adhesions.

Dr. Wallach testified that following plaintiff's discharge from the hospital on June 20, 1949, he examined her at various times until January 15, 1951. She continued to complain of the pains previously described, and on April 6, 1950, she complained of hot flushes which Dr. Wallach associated with the onset of a surgical menopause which had commenced from the time of the hysterectomy and ovarian operation of December, 1946. During these latter visits Dr. Wallach treated her primarily for her emotional and nervous symptoms and other symptoms of menopause, and he attributed a part of her mental state to the accident. The testimony of several doctors called by defendant suggested a lack of objective basis for plaintiff's complaints from the latter part of 1949 to the time of the trial other than that which would be characteristic of the menopause. A cronaxy test on plaintiff showed no nerve injury. One of the doctors testified to a "large element of exaggeration of her symptoms."

On this state of the evidence the court found that due to injuries caused by defendant's negligence, plaintiff had been unable to pursue her occupation for the period from September 13, 1948, to October 3, 1949, and had thus been deprived of earnings amounting to $3,740. The court also made an award of $4,000 for pain and suffering, and $2,763.72 for professional, hospital and housekeeping services, and entered judgment for $10,503.72 together with costs. Plaintiff contends that this award, as a matter of law, was inadequate.

[1, 2] The issue as to what amount of damages will adequately compensate plaintiff for loss of earnings, pain and suffering and the cost of medical and hospital care and other expenses incurred by reason of the injury is primarily a question of fact, and an award of damages may not be set aside unless it is so obviously unreasonable as to raise a presumption of passion, prejudice or corruption by the trier of facts, or the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. Gersick v. Shilling, 97 Cal.App.2d 641, 645, 218 P.2d 583; Quirk v. City and County of San Francisco, 105 Cal.App.2d 85, 87, 232 P.2d 893. In determining whether an amount awarded is inadequate as a matter of law, the evidence on the issue of damages must be considered in the light most favorable to sustaining the determination reached by the trier of the facts. Gersick v. Shilling, ibid.

[3, 4] With these principles in mind, we turn to a more specific consideration of plaintiffs contentions. Plaintiff urges that the court erred in the amount of the award for medical services by arbitrarily disregarding the testimony of witnesses as to the need for such services and the reasonableness of the charges. The court reduced the amount of the claim for Dr. Wallach's services from $560 to $335, decreased Dr. Scott's bill from $1,850 to $1,065, and eliminated the $1,415 charged for services by Dr. Billig in 1951. In personal injury actions, plaintiff may recover only for the necessary and reasonable expenditures attributable to the injury. It was a question of fact for the court to determine how much of the medical expenses were necessitated by the accident. While the amount charged for medical treatment is some evidence of its reasonable value, Dewhirst v. Leopold, 194 Cal. 424, 433, 229 P. 30, the court is not required to allow the full amount charged even though the doctor testifies that in his opinion such amount is reasonable and necessary. Gersick v. Shilling, supra, 97 Cal.App. at page 648, 218 P.2d 583. We find no abuse of discretion in the award made, since the court was free, in the face of conflicting evidence, to make its own reasonable inference as to how much of the medical treatment was referable to defendant's fault. The same prnciple applies to the allowance made by the court for hospital expenses and the services of a housekeeper.

[5] Plaintiff asserts that the court erred in limiting plaintiff's damages for loss of earnings to a period from the date of the accident to about three months after the spinal fusion operation. She claims that

she has been disabled right up to the time of the trial and argues that her incapacity to work was proximately caused by her injuries. The extent of plaintiff's disablement, its originating causes, and the degree to which defendant's negligence was responsible for producing it were the subject of dispute between the parties. There is much diversity of opinion on the matter in the medical testimony. While it is conceded that plaintiff was not free from physical discomfort at the time of the trial, the evidence supports the inference that some of her difficulty derives from the onset of menopause and its associated emotional stresses. It was a question of fact for the trial court to determine to what extent the impairment of plaintiff's earning ability is traced to defendant's negligence. Tornell v. Munson, 80 Cal.App.2d 123, 125, 181 P.2d 112.

[6, 7] Plaintiff strongly urges that the court erroneously refused to consider her continuing pain and disability and that the award of $4,000 for "pain, suffering, inconvenience and mental distress" was wholly inadequate. She claims that the court restricted its award by limiting its consideration to injuries of which there was objective evidence and by refusing to consider plaintiff's subjective feelings of pain and mental suffering. The record does not sustain this contention. The measurement of human pain and suffering and its translation into a monetary award sufficient to compensate an injured person for the trauma inflicted upon him is difficult of achievement. Although it would be improper to determine such an award by a mere consideration of the external indicia of injury, since traumatic injuries may produce deep-seated effects not susceptible of being gauged by the most sensitive of medical apparatus, Coleman v. Galvin, 66 Cal.App.2d 303, 152 P.2d 39, yet there is often much subjective coloration and distortion in a litigant's version of his injuries. Upon the good faith, experience and sound discretion of the trier of the facts must rest the delicate task of separating fact from fancy and divesting the kernel of truthful description from the shell of exaggeration in determining the actual extent of plaintiff's injury and suffering. In all such cases where no fixed standard of compensation is possible, the determination made must be sustained if it is compatible with human experience and the exercise of sound discretion. Sassano v. Roullard, 27 Cal.App.2d 372, 375, 81 P.2d 213. Where there is conflict in the evidence as to the cause or extent of plaintiff's maladies, it is for the trial court to decide how much of the pain and suffering stemmed from the accident. See Lee v. Nanny, 38 Cal.App.2d 90, 100 P.2d 832. In the instant case, the trial court observed plaintiff's demeanor, listened to extensive medical testimony, saw X-rays taken after the accident, and made its appraisal of defendant's liability. While there is room for disagreement in matters of this nature, it cannot be said as a matter of law that the award was inadequate. Johnson v. McRee, 66 Cal.App.2d 524, 152 P.2d 526; Gersick v. Shilling, 97 Cal.App.2d 641, 218 P.2d 583. When viewing the evidence in the light most favorable to supporting the judgment, it is patent the court was not convinced plaintiff had sustained her burden of proving that the ills she described were all caused by defendant's negligence. Signorelli v. Miller, 55 Cal.App.2d 538, 130 P.2d 730.

[8] The basic difficulty with plaintiff's argument is that she would have this court reweigh the evidence, and draw inferences contrary to those drawn by the trial court. Under firmly established principles we are not at liberty to do this. Johnson v. McRee, supra, 66 Cal.App.2d at Page 529, 152 P.2d 526.

[9] The purported appeal from the order denying the motion for a new trial is dismissed. Carlin v. Prickett, 81 Cal. App.2d 688, 690, 184 P.2d 945. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

111 Cal.App.2d 734

PETRIKIS et al. v. HANGES.

Civ. 15101.

District Court of Appeal, First District, Division 1, California.

June 18, 1952.

Rehearing Denied July 18, 1952.

Hearing Denied Aug. 14, 1952.

Action by Theodore Petrikis, and others, against Louis P. Hanges for losses allegedly sustained as result of defendant's withdrawal of his offer to purchase plaintiffs' partnership business. The Superior Court, City and County of San Francisco, William T. Sweigert, J., rendered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Bray, J., held that defendant had right to withdraw offer before its acceptance by all the partners, but that he was liable for bills incurred and stock on hand which was sold while he was in possession.

Affirmed in part and reversed in part.

1. Partnership ⚷141

A document which was signed by all the partners and which stated that partners would sell their business, but which provided no price and did not authorize any partner to make sale or enter into agreement of sale, did not authorize any one of the partners to bind remaining partners in sale of business. Corporations Code, § 15009.

2. Partnership ⚷141

The rule that one partner, without any writing, may bind another partner in the partnership business does not apply to sale of assets of partnership. Corporations Code, § 15009.

3. Sales ⚷23(2)

The receipt for purchase price signed by prospective buyer and by the partner who negotiated sale of partnership business without authority to bind remaining five partners, and the formal agreement to purchase signed by prospective buyer and the negotiating partner and three of remaining partners, constituted merely an offer to purchase on part of prospective buyer, and prospective buyer could withdraw such offer prior to time fifth partner signed receipt and agreement to purchase. Corporations Code, § 15009.

4. Sales ⚷23(2)

Fact that prospective buyer of partnership business entered into possession of premises did not affect buyer's right to withdraw from transaction without liability before all partners had signed binding sales agreement, where delivery of possession was conditional upon execution of binding agreement. Civ.Code, §§ 1589, 3521.

5. Sales ⚷23(2)

Prospective buyer withdrawing his offer to purchase partnership business prior to acceptance of offer by all the partners was liable for $326.89 stock on hand sold by prospective buyer while he was in possession and for $267.25 bills incurred by buyer during such period and paid by partners.

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Harry H. Baier, San Francisco, for appellant.

James C. Purcell, William E. Ferriter, William Petros, San Francisco, for respondents.

BRAY, Justice.

Defendant appeals from a judgment in favor of plaintiffs and from an order denying his motion to vacate that judgment.

Questions Presented

1. Sufficiency of the evidence to support the findings.
2. Could Petrikis bind his partner Ellis?
3. What was the effect of defendant's taking possession?
4. Damages incurred during possession.

Facts

Plaintiffs, as partners, owned and operated the "Chariot Bar and Cocktail Lounge." On April 30, 1948, all signed this document: "We the undersigned hereby agree to sell our interests in the Chariot Bar and Cocktail Lounge located at 1132 Market Street San Francisco, California. If and when the sale takes place and after all bills are accounted for the remainder of the money is to de [sic] divided according to the share each partner now attains in the the [sic] said business."

Thereafter Petrikis negotiated with defendant for the sale of the business to defendant. On January 5, 1949, at the office of Attorney Rubenstein, who was the attorney for defendant and became the escrow holder in the transaction, the following instrument was drawn. It apparently was dictated to Rubenstein's secretary by defendant with Petrikis putting "some words in it." It reads: "I have today received from Louis Paul Hanges $17,500.00 in the form of Cashier's Check on Bank of America N. T. & S. A., Powell-Post Branch, to be held in escrow by me, in the matter of the purchase of the restaurant and a bar known as the Chariot, located at 1132 Market Street, San Francisco, with the understanding that Mr. Hanges is to take possession within 24 hours of this date and take an inventory as of the 5th day of January, 1949. All open stock behind the bar is included in the purchase price of $17,500.00, and all stock not opened shall be paid for by Mr. Hanges at the present market price thereof. All pro rations of insurance and rent are to be assumed by Mr. Hanges from the date of possession. Any deposits on gas and water utilities and on Sales Tax Permit shall be refunded to the Sellers." It was then signed "David Rubenstein by Ingrid Josephson Secretary" and "Agreed And Accepted: Theo Patrikis Louis Paul Hanges." Defendant then delivered to the secretary a cashier's check for $17,500. Rubenstein drew a formal "Agreement to Purchase" the business, goodwill, etc. It also provided that the sellers were to deposit not later than January 13 with the escrow holder a bill of sale and a five year lease to defendant of the premises. The transfer of the money and documents was to take place upon completion of the statutory notice of intended sale. There was a provision for refund of the purchase price in case the lease or a transfer of the liquor license could not be obtained. The agreement also provided that the bill of sale should contain a covenant that plaintiffs would not directly or indirectly "enter into the restaurant or bar business within a radius of five (5) blocks" of the premises for a period of five years. On January 6, in Rubenstein's office, all plaintiffs, except Ellis, signed the agreement, as did defendant. The agreement provided that defendant was to have possession as of commencement of business that very day. The evening before (January 5) an inventory of the stock was taken by Petrikis, Ellis and defendant. Defendant then took possession and had the locks changed. On the 6th, after the agreement to purchase had been signed by defendant and all plaintiffs except Ellis, Petrikis took one of the originals to Ellis to sign. Ellis did not like the restriction against engaging in a similar business. The next day (the 7th) Ellis went to see Rubenstein. Ellis testified that he told Rubenstein he wanted to think the restriction over and that Rubenstein advised him to see another attorney about it, as he represented defendant and might have to prosecute Ellis if he violated the restriction. Ellis denied that he told Rubenstein he would not sign the agreement. Rubenstein testified similarly to Ellis as to advising Ellis to see another attorney, but testified that Ellis flatly stated that he would not sign the agreement with that provision in it, "even if it killed the deal." He asked Rubenstein to find out if defendant would consent to change the radius mentioned to two blocks. Ellis left the office and Rubenstein notified defendant of his conversation with Ellis and of the fact that Ellis had not signed the agreement. Defendant then called the deal off. Rubenstein immediately (all of this occurred on January 7) phoned Petrikis that he had been notified by defendant that the deal was off. The same day Ellis phoned Rubenstein and asked what defendant had said about changing the block limitation and Rubenstein told Ellis that the deal was off. Ellis claims he then told Rubenstein that he had signed the contract and that he was coming to his office to sign the other copies. Defendant stayed in the premises, Ellis working one shift, until January 9 when an inventory was taken and the keys given plaintiffs. Ellis claimed he was hired by defendant for this period. Defendant denied it.

Findings

The court found that by the receipt of January 5, 1949, plaintiffs and defendant entered into a formal agreement evidenced by a written memorandum wherein plaintiffs agreed to sell and defendant to buy the said business; that said memorandum was complete and binding on defendant and all plaintiffs, although informal, and was signed by plaintiffs through their authorized agent, Petrikis (whose authorization was in writing), and that it was contemplated that the agreement of January 5 would be reduced to "a more formal writing expressing the same terms and conditions and containing provisions for the transfer of the lease and license * * *" which provisions were contemplated by the memorandum, and that it was not the intention of the parties that the effect of the agreement of January 5 should be deferred until, or dependent upon, the execution of the more formal writing; that it was not contemplated by the parties that there were to be any further negotiations nor any terms or conditions other than those contained in and contemplated by that memorandum; that the restrictive clause was not contemplated by the memorandum and was inserted by Rubenstein for the further protection of his client, defendant; that plaintiffs tried to sell the business to other buyers and on February 21, 1949, sold it for $12,000, the reasonable market value thereof, and that because of defendant's repudiation of his obligations under the agreement of January 5 and the more formal document of January 6 defendant is liable to plaintiffs in the sum of $5,500 (the difference between the $17,500 contract price and the reasonable market value of the business), plus bills incurred by defendant while in possession of the business and unpaid in the sum of $267.25, which plaintiffs were required to pay, and plus the value of plaintiffs' stock sold by him in the sum of $326.89. The court gave judgment for those amounts. Thereafter defendant moved to set aside the judgment on the ground that the conclusions of law were not supported by the findings. The motion was denied.

1. Sufficiency of the Evidence.

Rubenstein testified that he prepared the agreement of purchase at the request of defendant and Petrikis. Defendant testified that it was Petrikis' suggestion that the restrictive clause be inserted in the agreement and that he, defendant, agreed with it. Petrikis did not deny it. Hence, the finding that the clause was inserted by the attorney for the further protection of defendant is not strictly supported by the evidence. However, the question of how it got into the agreement is unimportant. The court also found, in effect, that Ellis did not refuse to sign the agreement but merely wanted a short delay until he obtained independent legal advice. In other words, the trial court believed Ellis' version of the conversation rather than Rubenstein's. That, too, is unimportant, for the evidence clearly shows that defendant had called the deal off before Ellis signed or offered to sign. Either defendant was bound by the receipt memorandum or he was not. If he was not, he could withdraw his offer any time before all partners signed the agreement, whether Ellis said he would not sign or merely wanted more time. This brings us to the question—

2. Could Petrikis Bind Ellis?

[1–3] The court found that he could, holding in effect that the document of April 30, 1948, authorized Petrikis to bind his partners in the sale of the business. However, an examination of this document does not support this conclusion. It is merely a statement that the partners will sell their business. It provides no price, and, more important, does not authorize any partner to make the sale, bind his partners, or enter into any agreement of sale on behalf of his partners. But, argue plaintiffs, even without this writing, one partner may bind another partner in the partnership business. While that is true with reference to the transaction of the business it does not apply to a sale of the assets of the partnership. Corporations Code, section 15009 (formerly Civ.Code, § 2403) provides: "(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to: * * * (b) Dispose of the good will of the business. (c) Do any other act which would make it impossible to carry on the ordinary business of a partnership." See Cowan v. Tremble, 111 Cal.App. 458, 296 P. 91; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601. Therefore, neither the signing by Petrikis of the memorandum of January 5 nor by all the other partners of the agreement to purchase could, or did, bind Ellis. As all of the partners were not bound, neither was defendant. The effect of his signature on the two documents was, at best, an offer to purchase, accepted only when all partners had signed and bound themselves. Before that event occurred, defendant withdrew his offer. While the evidence is susceptible of the conclusion drawn by the court that Ellis had not refused to sign but merely delayed signing pending efforts to eliminate the restrictive clause which the court found was not contemplated by the original understanding as embodied in the receipt memorandum, and assuming, as found by the court, that under such memorandum it was not the intention of the parties signing it that the effect of the agreement should be deferred until, or dependent upon the execution of the more formal writing, nevertheless the evidence conclusively shows that with or without the reason that defendant believed Ellis to have refused to sign, defendant withdrew from the transaction before Ellis signed and before Ellis was bound as a party to the transaction.

It might be pointed out that it is very doubtful if the court's finding that the memorandum set forth the complete understanding of the parties signing it, and that there was to be no further negotiations, is supported by the evidence. Certainly some of the terms set forth in the agreement of purchase were not included in the memorandum, and there is no evidence that all of them were considered prior to the execution of the memorandum. These are: (1) the requirement that a notice of intended sale be given; (2) a new lease be obtained, rather than an assignment of the existing lease; (3) its terms; (4) the agreement contains a breakdown of the valuations placed on specific items (for example, the good will is valued at $50); (5) the restrictive covenant. However, it is immaterial whether the agreement merely formally included the terms of the memorandum or not, as neither document is binding because not signed by all the parties.

3. Possession

[4] Defendant testified that he did not take possession of the premises. The court found that he did, pursuant to the provisions of the memorandum, and there is ample evidence to support that finding. But his being in possession at the time and for two days after he withdrew from the transaction does not affect his right to withdraw before all the sellers were bound to sell to him. The delivery of possession both as to defendant and Ellis was conditional upon the execution of a binding agreement. It is not, as contended, a situation of an acceptance of the benefits of a transaction binding the acceptor to assume the obligations. Civ.Code, §§ 1589, 3521. The entry into possession alone could not bind defendant to a contract to which Ellis was not bound, and before Ellis signed defendant notified all parties of the withdrawal of his offer.

4. Damages

[5] The court found that during the approximately four days defendant was in possession he incurred bills in the sum of $267.25 which plaintiffs were compelled to pay, and that defendant used and sold stock on hand to the value of $326.89. While evidence as to these items of damage is conflicting, we are bound by the court's finding thereon and hence the judgment as to the total of those amounts, $594.14, is proper.

The judgment and the order are reversed as to all amounts in excess of $594.14, and are affirmed as to that amount. Plaintiffs will pay costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

MANDRACIO v. BARTENDERS UNION LOCAL 41, et al.*

Civ. 14980.

District Court of Appeal, First District, Division 2, California.

June 11, 1952.

As Modified on Denial of Rehearing July 11, 1952.

Hearing Granted Aug. 7, 1952.

Action by Joe Mandracio against Bartenders Union Local 41 and others for declaratory relief and damages. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that under constitution of international union, acceptance of travelling card on presentation by member of another local in good standing and admission of holder of card to membership in local were compulsory.

Judgment reversed.

1. Labor Relations ⚷90

A rule of local union, the language of which is clear, may not be nullified by an official of union under guise of interpretation.

2. Labor Relations ⚷99

Provision in constitution of international bartenders' union requiring each local to recognize and admit members of other locals who present a travelling card was mandatory, plain and unambiguous and called for no interpretation or construction.

3. Labor Relations ⚷99

Under provision in constitution of international bartenders' union requiring each local to recognize and admit members of other locals in good standing who present a travelling card, acceptance of travelling card on presentation by member of another local in good standing and admission of holder of such card to membership in local union were compulsory.

4. Labor Relations ⚷91

Provision in constitution of international bartenders' union authorizing local unions to enact rules for employment applicable to the manner in which a new member admitted on travelling card from another local may participate in work coming under jurisdiction of local and adoption thereunder of a local rule suspending acceptance of travelling card when local conditions of employment were such that all active members of union were unable to procure work created a condition of a closed shop and a closed union membership contrary to law.

5. Estoppel ⚷115

Pleading ⚷373

Defenses of laches and estoppel must be pleaded and proved.

6. Appeal and Error ⚷931(4)

Where no findings were made on issues of laches or estoppel, reviewing court must assume that neither defense was proved to the satisfaction of trial court.

Allan L. Sapiro, San Francisco, Aaron Sapiro, Los Angeles, G. C. Ringole, San Francisco, for appellant.

Charles P. Scully, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for declaratory relief and damages. Defendants had a judgment adverse to plaintiff on all issues.

The pertinent and undisputed facts are fairly and briefly stated in appellant's closing brief from which we quote:

> "On October 4, 1942, plaintiff became a member of the Hotel and Restaurant Employees' International Alliance and Bartenders' International League of America, being admitted into Local 877 of Fairbanks, Alaska (Exhibit 1, membership book).
>
> "Plaintiff secured a traveling card from the Alaska local, and on December 15, 1942, deposited the same with Local 500 in San Diego, California, was admitted without any delay, and was informed he could start working the next day.
>
> "On December 22, 1945 he secured a traveling card from Local 500, came to San Francisco, and pursuant to the procedure set forth in the International Constitution, presented the card to Local 41. This was done in accord with the requirements of the International Constitution Secs. 57, 58(a), 60. The officials at the Local 41

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* Subsequent opinion 256 P.2d 927.

office directed plaintiff to return on Friday, January 4, 1946, which he did. On that date plaintiff was given an application number, and thereafter his name was placed on a registration list. However he was denied admission into Local 41.

"Prior to January 4, 1946, it was the practice of Local 41 to admit members of the International Union with traveling cards. Defendant Dougherty admitted (1) that Local 41 did not seek authority for a different procedure until February, 1946; (2) that such procedure became effective in February, 1946; (3) that the book in which the traveling cards were registered was opened on February 1, 1946.

"Subsequent to January 4, 1946, plaintiff continued to report to Local 41 almost every day inquiring as to the acceptance of his traveling card. He could not ask for a job through the union because he had not yet been admitted, although jobs were available to him if he were admitted. Plaintiff was compelled to seek other employment; and between May, 1948, and August, 1948, he was employed as a bartender in Guerneville, California, having deposited his traveling card with Local 77 in Santa Rosa. On August 10, 1948, plaintiff was finally admitted to membership in Local 41, and immediately was employed as a bartender in San Francisco by the S.J.R. Corporation, which, in 1946, had agreed to employ plaintiff as soon as he was admitted into Local 41."

[1] The main issue involves an interpretation of Section 60 of the Bartenders' International Union which reads:

"Sec. 60. Local Unions shall be compelled to recognize and admit members who travel from one city to another, provided such members bring a traveling card and membership book from a Local Union in good standing and the card and book is properly signed and seal attached, and members so admitted shall be allowed to participate in all of the work coming under the jurisdiction of the Local Union subject to the rules for employment prevailing in the Local accepting the traveling card. All such rules for employment must be approved by the General President." Plaintiff's case calls for an interpretation of the section making it a must requirement of the local unions to accept a traveling card under the conditions stated. Defendants contend that they are excused from the mandatory provisions of the section because of a local rule excusing compliance when the local union adopts a rule suspending acceptance of a traveling card when local conditions of employment are such that all active members of the union are unable to procure work; they also rely on an "interpretation" of the rule by the international president. Their argument calls for an amendment of the international rule—not for an interpretation. When the language of a rule is clear no official may nullify it under the guise of "interpretation". Riviello v. Journeymen Barbers etc. Union, 109 Cal.App.2d 123, 240 P.2d 361.

[2-4] The section of the International Constitution is plain and unambiguous. It is mandatory and calls for no interpretation or construction. It make compulsory the acceptance of the traveling card on presentation. The fact that the section authorizes the local to enact "rules for employment" applicable to the manner in which such new member may participate in all work coming under the local's jurisdiction (if exercised in the manner as done here) merely creates a condition of a closed shop and a closed membership contrary to law. James v. Marinship Corp., 25 Cal.2d 721, 728, 729, 155 P.2d 329, 160 A.L.R. 900; Dotson v. International Alliance etc. Employes, 34 Cal.2d 362, 374, 210 P.2d 5. On the merits of the case—the right of appellant to admission into the local union—the judgment must be reversed.

[5, 6] Respondents argue the defense of laches and estoppel. Both are of the same type. They must be pleaded and proved. But no findings were made on either issue and we must assume that neither was proved to the satisfaction of the trial court.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

111 Cal.App.2d 592

PEOPLE v. HUTCHINSON.

Cr. 4756.

District Court of Appeal, Second District,
Division 1, California.
June 11, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Ellsworth Meyer, J., of driving while under the influence of liquor, issuing a check without sufficient funds, and theft of an automobile, and he appealed. The District Court of Appeal, Doran, J., held that the evidence sustained the conviction.

Affirmed.

Automobiles 🔑355(6)

False Pretenses 🔑49(1)

Larceny 🔑55

Conviction for driving while under influence of liquor, issuing check without sufficient funds, and theft of an automobile was sustained by evidence. Vehicle Code, § 501.

◆

Sam Houston Allen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment in two actions.

Appellant was charged by information with the violation of section 501 of the Vehicle Code and in another information with the offense of issuing a check without sufficient funds in Count I and in Count II with the theft of an automobile.

The two causes were consolidated for trial by stipulation. Defendant was adjudged guilty by a jury of all three offenses.

It is contended on appeal that the court erred in refusing to give certain instructions relating to circumstantial evidence; that the evidence is insufficient to support the conviction; that there is a fatal variance between the allegations and the proof; and that the verdicts on all counts are contrary to the evidence and the law.

Briefly, the facts are that defendant gave a check as a down payment on the purchase of an automobile. The check was returned marked insufficient funds. It was given on March 16, 1951, but was dated 4–16–51. Defendant did not inform the salesman nor did the salesman notice the date on the check. But defendant had no account even on the date the check bore. The home address given by defendant at the time was a vacant lot.

At 2 a. m. on March 16th, defendant was arrested for "drunk driving", following a collision. The prosecution followed.

There is no merit to appellant's contentions. That the evidence is sufficient there can be no question. As to the other contentions, they are highly technical. The instructions fully covered the issues and there was no variance in the proof.

The judgments are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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111 Cal.App.2d 611

PEOPLE v. FREEDMAN.

Cr. 4752.

District Court of Appeal, Second District,
Division 3, California.
June 13, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Philip H. Richards, J., of six felonies, and he appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that the evidence would sustain a finding that defendant had not been legally insane when he committed the offenses or at the time of the trial.

Affirmed.

1. Criminal Law 🔑570(1)

Evidence would sustain conclusion that defendant was not legally insane when he committed the offenses or at time of trial. Pen.Code, § 1027.

2. False Pretenses ⚷14

The offense of issuing a check without sufficient funds is complete when the check is issued with intent to defraud, even though no one is defrauded thereby. Pen.Code, § 476a.

3. Criminal Law ⚷1209

It is singleness of act which determines applicability of statute prohibiting punishment of act or omission under more than one section when such act or omission is made punishable in different ways by different sections. Pen.Code, § 654.

4. Criminal Law ⚷29

Defendant who issued two checks with insufficient funds and thereby acquired two airline tickets was properly convicted of two offenses of issuing bad checks and two offenses of grand theft of tickets, grand thefts not having been committed by same acts as were offenses of issuing checks. Pen.Code, §§ 476a, 484, 654.

◆

Jerome Freedman, in pro per.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was charged by information with six felonies: (1) Issuing a check without sufficient funds with intent to defraud W. McGann and others; (2) grand theft of an airline ticket from American Airlines, Inc.; (3) issuing a check without sufficient funds with intent to defraud Jack Williams and others; (4) grand theft of another airline ticket from Western Airlines, Inc.; (5) issuing a check without sufficient funds with intent to defraud Harriet Zweiler and others; (6) issuing a check without sufficient funds with intent to defraud Ione Mitchell and others. Defendant pleaded not guilty, and not guilty by reason of insanity, but withdrew his plea of not guilty. The issue of insanity was tried to a jury. Defendant was represented by counsel. Three psychiatrists were appointed by the court under section 1027 of the Penal Code to examine appellant as to his sanity and to report as to his mental condition. It was stipulated that written reports of two psychiatrists, Doctors Mitchell and Hacker, and letters which they had written to the trial judge, could be read to the jury as though the doctors were present in court and testifying personally. Defendant was found to be sane, his motion for new trial was denied and he was sentenced on each count for the term prescribed by law, the sentences to run concurrently. He appeals from the judgment and from the order denying his motion for new trial.

The reports and letters of Doctors Mitchell and Hacker were read to the jury. Defendant is 44 years of age. He has had a varied career and considerable trouble. In 1950 he served a 90-day jail sentence as a condition of three years probation after conviction of grand theft. In November, 1950, he suffered a serious head injury and was hospitalized for several weeks, following which he developed a partial paralysis of the left side and limb muscles. Later, in an accident, he suffered a cerebral concussion. He had an unfortunate marriage in 1938 and later got into trouble writing checks upon the account of a business in which he had been engaged. He made good these checks, which amounted to five or six thousand dollars. In January, 1951, he cashed checks at the May Company on Wilshire Boulevard and two checks at airlines companies for tickets. He testified that he could not recall these incidents and that he recovered his memory in Havana, when he found himself without luggage but with a ticket to Miami and two dollars. He was arrested while visiting his family in Richmond, Virginia.

Dr. Mitchell concluded that the facts indicated that defendant had had a period of mental disturbance, but that he was aware of the nature of right and wrong, that he was legally sane at the time of the alleged offenses and at the time of trial. Dr. Hacker's report was substantially the same as that of Dr. Mitchell. His conclusion as to sanity was the same.

Defendant testified in his own behalf. His testimony confirmed the opinions of the doctors that he is above the average in intelligence and is possessed of a good memory, although the subject of many unfortunate experiences and occasional spells of mental instability.

[1] Defendant has written his own briefs. His contention that the medical testimony established his insanity at the time the offenses were committed is not sustainable. It did prove that he had had periods of mental and emotional instability, as did his own testimony, but it was a reasonable conclusion from the evidence that he was not legally insane when he committed the offenses or at the time of trial. Defendant specifies alleged errors committed in the course of the proceedings, most of them connected with the receipt of the expert testimony, all of which was received under stipulation and without objection. There was no error in the course of the trial.

[2–4] Defendant makes the further point that he was improperly convicted of two offenses in two instances. He issued two checks with insufficient funds and thereby acquired two airline tickets. He was convicted of two offenses of issuing bad checks and two offenses of grand theft of the tickets. He claims he has been convicted of two offenses in each of these check transactions, and that each transaction constituted a single offense.

Section 654 of the Penal Code reads as follows:

> "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one * * *."

The offense of issuing a check without sufficient funds is complete when the check is issued with intent to defraud, even though no one is defrauded thereby. Penal Code, sec. 476a; People v. Cortze, 108 Cal. App. 111, 290 P. 1083. Grand theft is a separate offense (Penal Code, sec. 484), which involves the element of loss or detriment. The former offense may be committed without committing the latter. The grand thefts were not committed by the same acts as were the offenses of issuing the checks. It is the singleness of the act which determines whether section 654 applies. People v. Knowles, 35 Cal.2d 175, 187, 217 P.2d 1; In re Horowitz, 33 Cal.2d 534, 545, 203 P.2d 513. Obtaining the airline tickets were acts separate from the issuance of the checks with intent to defraud. Section 654 has no application.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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111 Cal.App.2d 564

GORDON R. BRANCH, Inc. v. ORANGE COUNTY DISTRICT COUNCIL OF CARPENTERS et al.

Civ. 4471.

District Court of Appeal,
Fourth District, California.
June 9, 1952.

Action by Gordon R. Branch, Inc., to restrain Orange County District Council of Carpenters, and others, from interfering with a building project being carried on by plaintiff in Orange County. A temporary restraining order was issued and later an order was entered vacating that order and sustaining defendants' demurrer and granting defendants' motion to strike portions of the complaint, and plaintiff appealed from the latter order. Defendants moved to dismiss appeal and the District Court of Appeal, Barnard, P. J., held that, in view of facts that there was question whether issue presented by appeal had become moot, and that another appeal in the action was pending in same court, and that defendants would not be seriously injured by letting appeal take its course and had ample security for any damage but plaintiff might be prejudiced by dismissal in view of conditions in order under which security was deposited in court, motion would be denied.

Motion denied.

Appeal and Error ⚷781(4)

Where there was question whether issue presented by appeal had become moot, another appeal was pending in the same court, and appellees would not be seriously injured by letting appeal take its course and had ample security for any possible damage, but appellant might be prejudiced by dismissal, motion to dismiss appeal would be denied.

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Reynolds, Painter & Cherniss, Los Angeles, Robert B. Powell, Santa Ana, for appellant.

Todd & Todd, San Francisco, for respondents.

BARNARD, Presiding Justice.

This is an action to restrain the defendants from interfering with a building project being carried on in Orange County. The complaint alleged that the plaintiff had entered into a contract with one McVay to furnish labor and materials for the building of 221 houses; that the plaintiff was compelled to cancel that contract because McVay had obtained partial payments on a false representation that certain labor and material had been fully paid for; that certain carpenters and concrete workers employed by McVay were not paid by him; and that the plaintiff has been prevented from completing the work by the acts of the defendants in striking and maintaining picket lines, and threatening to continue to do so until the wages of the men employed by McVay are paid. The prayer is for an injunction restraining the defendants from coercing the plaintiff into paying any wages thus due from McVay by striking, threat of striking or picketing the real property mentioned in the complaint.

A temporary restraining order was issued. Later, the court entered an order vacating that order; sustaining the defendants' demurrer to the complaint; and granting a motion to strike portions of the complaint. The plaintiff has appealed from that order. On its application the court entered an order restraining the defendants from maintaining such picket lines, pending the appeal. This order required the plaintiff to deposit $12,000 in court to cover any damage suffered by the defendants in the event the order appealed from is affirmed, and that amount was so deposited.

The defendants have moved to dismiss this appeal on the ground that the appeal is moot because the building project has been entirely completed since this appeal was taken; and that no material issue remains to be decided. The motion is supported by the affidavit of one Byrd, who is secretary of the Orange County Building and Construction Trades Council, one of the five union organizations named as defendants. This affidavit states that this building operation has been fully completed; that no member of any of the unions affiliated with the Building and Construction Trades Council is now at work on said project or on any building for which permits had been granted prior to October 11, 1951; that completion notices have been filed referring to a considerable portion of said work, and the houses in that project have been offered for sale; and that there is no longer any dispute between the Building and Construction Trades Council and its affiliated unions and the plaintiff over the right to picket said project.

In opposition to the motion the president of the plaintiff corporation has filed an affidavit alleging that this building project has not been fully completed; that while a portion of the houses have been sold the appellant is still obligated to make repairs and adjustments on them, necessitating the employment of carpenters, painters, electricians and plumbers; that with respect to the houses not sold it is necessary for the appellant to employ carpenters, painters and electricians to perform work which has not yet been completed; that it is necessary for the appellant to employ laborers for other work in and about the property; that the appellant is not in a position to know whether or not the carpenters, painters, electricians and laborers who must be employed on the project are members of the defendant unions; and that the appellant would be subject to further picketing by the defendants if this appeal should be dismissed.

On the showing here made there is a conflict with respect to whether this project has been fully completed, and whether or not the issue presented by this appeal has become moot. If, as the repondents contend, they have no intention or desire to continue any strike or picketing, they will not be seriously injured by letting the appeal take its course, and they have ample security for any possible damage they may suffer. On the other hand, the appellant might be prejudiced by a dismissal, in view of the peculiar and perhaps invalid wording of the conditions in the order under which the $12,000 was deposited in court. Also, there is another appeal in this action now pending in this court, and this incidental matter should properly be decided in connection with the main appeal.

The motion to dismiss this appeal is denied.

GRIFFIN and MUSSELL, JJ., concur.

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111 Cal.App.2d 604

PEOPLE v. SCHMIDT.

Cr. 4795.

District Court of Appeal, Second District,
Division 2, California.
June 13, 1952.

The defendant pleaded guilty in the Superior Court of Los Angeles County, Clement D. Nye, J., to two charges of rape and he waived time for sentence and requested leave to file application for probation, and permission was granted. Thereafter defendant was sentenced, and he appealed. The District Court of Appeal, McComb, J., held that defendant, after expressly waiving time for sentence, could not thereafter on appeal complain that sentence was not made as provided in statute.

Judgment affirmed.

Criminal Law 🔑1137(1)

Where defendant pleaded guilty to two charges of rape, waived time for sentence, and requested leave to file application for probation, and application was granted, defendant would not thereafter be permitted on appeal after sentence was imposed to complain that sentence was not pronounced within time provided by statute. Pen.Code, § 1191.

◆

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment entered after defendant pleaded guilty to two counts of rape, he appeals.

Facts: After entering a plea of not guilty to an information charging him in two counts with rape, defendant, on June 11, 1951, by leave of court withdrew his plea of not guilty to such charges and entered a plea of guilty.

At the time defendant entered his plea of guilty to the two charges of rape he *waived time for sentence* and requested leave to file an application for probation. Defendant was granted permission to file an application for probation and proceedings to determine whether he was a sexual psychopath were held pursuant to section 5504 of the Welfare and Institutions Code and 288.1 of the Penal Code.

On November 21, 1951, defendant was sentenced to the state prison for the term prescribed by law.

Defendant's sole contention on appeal is that *he was not sentenced within 21 days after the entry of his plea of guilty pursuant to section 1191 of the California Penal Code.*[*]

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[*] Section 1191 of the Penal Code reads as follows:

"Time for pronouncing judgment. In the superior court, after a plea, finding or verdict of guilty, or after a finding or verdict against the defendant on a plea of a former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment, which must be within 21 days after the verdict, finding or plea of guilty, during which time the court shall refer the case to the probation officer for a report if eligible to probation and pursuant to Sec-

Defendant's contention is without merit. Where defendant, as in the instant case, expressly waives time for sentence he will not thereafter be permitted on appeal to complain that sentence was not pronounced as provided in the Penal Code by section 1191. (People v. Morton, 32 Cal.App.2d 662, 664 [3], 90 P.2d 845; People v. Rubens, 11 Cal.App.2d 576, 587[10], 54 P.2d 98, 1107.)

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

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111 Cal.App.2d 686

STREIT v. FRANKS.

Civ. 18793.

District Court of Appeal, Second District,
Division 2, California.
June 16, 1952.

Hearing Denied Aug. 14, 1952.

Action by Clayton M. Streit against Maude Adele Franks, also known as Maude Adele McCormick, for personal injuries which resulted when plaintiff was struck by automobile operated by defendant while plaintiff was engaged in crossing street. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fox, J., held that even though cross lines at which plaintiff was crossing were not designated by ordinance or resolution as legally constituted pedestrian cross-walk, existence of such cross lines might be considered by jury on issue of defendant's negligence and plaintiff's contributory negligence.

Judgment affirmed.

1. Automobiles 🔑243(3, 17)

In action for injury to pedestrian as result of being struck by defendant's automobile, wherein it appeared that pedestrian had just completed traversing street on area marked by cross lines but not designated by ordinance or resolution as crosswalk, evidence concerning the establishment of the cross lines of the highway was properly admitted, regardless of any technical defect in mode of authorization, since the de facto existence of lines was of significance to jury in determining whether defendant had been negligent and plaintiff contributorily negligent.

2. Automobiles 🔑246(50)

In action for injuries to pedestrian when struck by defendant's automobile, wherein it appeared that pedestrian had crossed street in area delineated by cross lines, but not designated by ordinance or resolution as legally constituted pedestrian crosswalk, giving of instruction which permitted jury to consider lines marked on road in determining question of defendant's negligence, and refusal of instruction that crosswalk had not been created pursuant to duly authorized ordinance was not error.

3. Negligence 🔑136(14)

While an ordinance which has been irregularly enacted may insulate a wrongdoer from criminal prosecution, it may also have effect of establishing a standard of reasonable conduct which trier of fact may take into consideration in determining civil liability.

4. Automobiles 🔑246(31)

In action for personal injuries to pedestrian when struck by defendant's automobile, wherein jury had been instructed that they might consider fact that pedestrian had been engaged in crossing street between white cross lines which were not designated by ordinance or resolution as legally constituted crosswalk, instruction that pedestrian was under a duty to yield

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tion 1203 of this code; provided, however, that the court may extend the time not more than 10 days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment, and may further extend the time until the probation officer's report is received and until any proceedings for granting or denying probation have been disposed of. If in the opinion of the court there is a reasonable ground of believing a defendant insane, the court may extend the time for pronouncing sentence until the question of insanity has been heard and determined, as provided in this code."

the right of way to defendant because of crossing outside a legally established crosswalk was properly refused in that such instruction would have been confusing and misleading in view of previous instruction. Vehicle Code, §§ 459.2, 562.

◆

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for appellant.

Elbert E. Hensley, Allan M. Carson, Los Angeles, for respondent.

FOX, Justice.

Plaintiff brought this action to recover damages for personal injuries sustained as a result of being struck on a highway in the city of Seal Beach by a vehicle driven by defendant. From a judgment of $25,000 entered on a verdict in favor of plaintiff after a jury trial, defendant appeals.

The accident occurred on March 10, 1950, at about 6:30 P.M. when darkness was coming on. Plaintiff was crossing the Pacific Coast Highway from north to south between white lines running across the highway, and was either just off the highway on an unpaved shoulder of the road or at the edge of the roadway in the act of jumping onto the shoulder when he was struck by the right side of defendant's automobile. Defendant, who was traveling east, had crossed over a bridge immediately before the accident, and, though the highway narrowed at the end of the bridge, continued straight ahead with the right wheels on the shoulder of the road at the place where the impact occurred. Defendant testified that as she crossed the bridge just west of where plaintiff was hit, she struck a rough spot in the road which jolted the car, and was obliged to reach to her right to prevent a bag of tomatoes on the seat next to her from lurching off. Defendant failed to see plaintiff, and became aware that her car had struck something after she felt a bump and heard a thumping sound. Plaintiff testified that before crossing the highway from the north going in a southerly direction, he looked both to the east and the west and saw two cars approaching from the east. He kept this traffic under observation as he crossed between the white lines, and estimated the cars to be between 300 and 350 feet away as he began his crossing. When he reached the center line, which is 17 feet from the south edge of the pavement, he glanced again to the west in the direction of the bridge over which defendant was driving her car and noticed defendant's oncoming auto on the bridge, at a distance of about 400 feet. Plaintiff continued to cross and was about two or three feet from the edge of the pavement when he looked again and saw that defendant's car was almost upon him. Plaintiff leaped towards the shoulder of the road and testified that he was upon the shoulder when the impact with defendant's car occurred.

Stipulations were made that in 1947 Fire Chief Knighton, of the city of Seal Beach, by direction of the City Council of Seal Beach, painted the two white stripes hereinbefore mentioned across the roadway and that he repainted these lines again in 1948. It was also stipulated that John W. Mulcahy, city clerk of the city of Seal Beach, had made a thorough search of the city records and found no ordinance or resolution relating to the cross lines in issue prior to the date of the accident.

Defendant contends that the court committed prejudicial error in admitting evidence, over her objection, concerning the establishment of the white cross lines for the reason that such cross lines did not constitute a legally-established crosswalk, the city of Seal Beach having failed to authorize the crosswalk by a valid ordinance as required by law. Vehicle Code, sec. 459.2; Government Code, secs. 36930 to 36937. Defendant further urges that the trial court committed prejudicial error both in its instructions to the jury as to what consideration it could give to the existence of the cross lines, and in its refusal to instruct the jury as she requested on the subject of the cross lines.

The instruction objected to reads as follows: "It is your duty to formulate or determine what is the standard of conduct that would be observed by a reasonably prudent pedestrian under the facts of this case. If you find the cross lines were painted across the roadway at the place of this accident, then you may take that fact into consideration in determining the proper standard of conduct regardless of whether such a crosswalk was properly authorized or not." The court refused to give instructions (1) in the language of Vehicle Code section 562 regarding the duty of a pedestrian crossing a roadway outside a marked crosswalk to yield the right of way to vehicles upon the roadway, and (2) to the effect that the cross lines were put on the road without legal authority and so were not marked crosswalks within the meaning of the Vehicle Code.

[1–3] It was appropriate for the court to admit evidence concerning the establishment of the cross lines on the highway, regardless of any technical defect in the mode of the authorization, since the de facto existence of the lines was of significance to the jury in an action predicated on defendant's negligence, to which defendant raised the affirmative defense of contributory negligence. In order for the jury to formulate the standard of care that a reasonably prudent person would have exercised in the situation in which plaintiff and defendant found themselves, the whole interplay of facts and circumstances relating to their reciprocal duties of care, including the appearance and condition of the road, was important to that end. The fact that the cross lines were there, that plaintiff used them, and that defendant was familiar with their existence, had a direct bearing on the issues. While an ordinance irregularly enacted may insulate a wrongdoer from criminal prosecution it may still have the effect of establishing a standard of reasonable conduct which the trier of fact may take into consideration in determining civil liability. Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777. Since the evidence objected to by defendant was properly admitted the court was correct in instructing the jury that they were entitled to consider the lines marked on the road in determining the question of defendant's negligence. The court did not commit error in refusing to instruct that the crosswalk had not been created pursuant to a duly-authorized ordinance in view of the fact that the jury were entitled to consider the physical presence of these cross lines, the fact that plaintiff availed himself of their apparent protection, and that defendant had knowledge of their existence, in determining the standard of care that should have been employed by a reasonably prudent person. See Jacoby v. Johnson, 84 Cal.App.2d 271, 275, 190 P.2d 243.

[4] Defendant's attack on the refusal of the trial court to instruct that under Vehicle Code section 562 plaintiff was under a duty to yield the right of way to defendant because of the former's crossing outside a legally established crosswalk, is without merit. The effect of such an instruction would have been to tell the jurors they could ignore the presence of the white cross lines. This they were not at liberty to do. Such an instruction would have been confusing and misleading in view of the previously quoted instruction which the court gave regarding the presence of these lines and the fact that they might be taken into consideration in determining the proper standard of conduct on the part of the plaintiff. In view of the circumstances under which this accident occurred, it was entirely proper for the questions of negligence of the defendant and the possible contributory negligence of the plaintiff to be submitted to the jury under the instructions as given.

The judgment is affirmed.

We concur:

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; SCHAUER, J., dissenting.

111 Cal.App.2d 745

GASKILL v. RICHMAID ICE CREAM CO. et al.

Civ. 15017.

District Court of Appeal, First District, Division 2, California.

June 18, 1952.

Action by Helen Gaskill against Richmaid Ice Cream Co. and others commenced after dismissal of action by plaintiff's assignor when motion for change of venue was granted. From an order of the Superior Court, City and County of San Francisco, Preston Devine, J., granting a motion for change of venue, plaintiff appealed. The District Court of Appeal, Dooling, J., held that prior order granting motion for change of venue was res judicata of proper place of trial in subsequent action based on the same facts.

Order affirmed.

1. Venue 🔑78

An order granting a motion for change of place of trial, if not appealed from, becomes res judicata of the proper place of trial in any subsequent action based on the same facts, unless there are changed facts or new conditions since the making of the order.

2. Courts 🔑92

Where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of decision than the other.

3. Venue 🔑78

Where record showed that place of making and performance of contract on which action was based, though not alleged in complaint, was considered by court in granting motion for change of venue and plaintiff thereupon dismissed action and assigned claim to another who filed action in the same court against the same defendants on the same cause of action, assignee was bound by prior order fixing proper place of trial, notwithstanding allegation in complaint in second action, not found in complaint in first action, that it was based on oral contract made and to be performed in city and county of suit.

4. Venue 🔑66

On motion for change of venue, the facts may be shown by affidavits and complaint need not allege the place of making and performance of contract on which action is based in order to raise such issues.

5. Venue 🔑78

Defendants, by also filing affidavits of the facts, did not thereby waive their right to rely on prior order granting motion for change of venue as res judicata of the proper place of trial.

6. Pleading 🔑20

Parties may rely on alternative grounds for relief without waiving either.

Joseph A. Brown, Harry Gottesfeld, and Hutchinson & Quattrin, all of San Francisco, for appellant.

Leon E. Warmke, Stockton, for respondent.

DOOLING, Justice.

Plaintiff appeals from an order granting a motion for change of venue from the City and County of San Francisco to San Joaquin County. One Molick as assignee commenced an action in the San Francisco superior court in which a motion for change of venue was granted to San Joaquin County. Molick thereupon dismissed the action and assigned the claim to appellant. Appellant then filed the instant action in the superior court of San Francisco against the same defendants on the same substantive cause of action. The complaint in the second action contained an allegation, not found in that in the first action, that it was based on "an oral contract made and entered into in the City and County of San Francisco and to be there performed."

The order appealed from was made by the court solely on the ground "that the matter of the place of trial had been conclusively decided in said prior action as to any action upon said contract."

[1] It is settled that an order granting a motion for change of place of trial if not appealed from becomes res judicata of the proper place of trial in any subse-

quent action based on the same facts, Karst v. Seller, 45 Cal.App. 623, 188 p. 298; Fitzhugh v. University Realty Co., 46 Cal. App. 198, 188 p. 1023; Plum v. Forgay Lumber Co., 118 Cal.App. 76, 4 P.2d 804, unless there are changed facts or new conditions since the making of the order, People v. Spring Valley Co., 109 Cal.App.2d 656, 241 P.2d 1069.

[2] Appellant claims that the holdings on this point in the cited cases are *dicta* because the court also considered the motions properly granted on the merits; but an alternative ground of decision in an appellate opinion is not *dictum*. " 'It is well settled that, when two independent reasons are given for a decision, neither one is to be considered mere *dictum*, since there is no more reason for calling one ground the real basis of the decision than the other.' " Gilgert v. Stockton Port Dist., 7 Cal.2d 384, 389, 60 P.2d 847, 849; Bank of Italy Nat. Trust & Savings Ass'n. v. Bentley, 217 Cal. 644, 650, 20 P.2d 940; Coombes v. Getz, 217 Cal. 320, 329, 18 P.2d 939; Armstrong v. Armstrong, 85 Cal.App. 2d 482, 485, 193 P.2d 495.

[3, 4] While it is not claimed that there are any changed facts or new conditions since the making of the first order appellant asserts that because the complaint in the first action did not contain the allegation of the place of making and performance of the contract that question was not litigated or determined by that order. The record shows the contrary. The parties have stipulated that on the hearing of the first motion affidavits "were submitted for the purpose of showing that the alleged contracts were made and entered into in the County of San Joaquin * * * and were to be performed in said County" and that such affidavits were considered by the judge in deciding that motion. On motion for change of venue the complaint need not allege the place of making and performance of the contract to raise those issues. The facts may be shown by affidavits. Turner v. Simpson, 91 Cal.App. 2d 590, 205 P.2d 423; Mills v. Dickson, 129 Cal.App. 728, 19 P.2d 278; Kiku Saito v. Policy Holders' Life Ins. Ass'n, 132 Cal. App. 412, 22 P.2d 724.

[5, 6] Respondents did not waive their right to rely on res judicata by also filing affidavits of the facts. Parties may rely on alternative grounds for relief without waiving either and this rule applies in the case of res judicata. 15 Cal.Jur., Judgments, sec. 233, p. 215 and cases cited in note 19.

Appellant herein as successor in interest to her assignor Molick is bound by the prior order to the same extent as Molick. 15 Cal.Jur., Judgments, sec. 221, p. 193; cf. Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal. 2d 807, 122 P.2d 892. As said in Plum v. Forgay Lumber Co., supra, 118 Cal.App. 76, 79, 4 P.2d 804, 805, to allow successive actions to be filed for the purpose of relitigating the proper place of trial over and over "seems like trifling with the court." The same observation applies with equal force to subsequent assignments for that purpose.

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.

111 Cal.App.2d 475

KEPPELMAN v. HEIKES et al.

No. 15091.

District Court of Appeal, First District, Division 1, California.

June 2, 1952.

John A. Keppelman, doing business as "Tribune", also known as "Pacific Grove Tribune", brought an action against John D. Heikes, Mrs. James H. Peden, individually, and doing business as James H. Peden associates, and Salinas Newspapers, Inc., a corporation, and others, on an open book account, and on an account stated, and for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet. The Superior Court of the State of California, in and for the County of Monterey, Anthony Brazil, J., rendered a judgment for plaintiff against defendant Peden and Salinas Newspapers, Inc., on count for reasonable value of work done and materials furnished and on count under which recovery on open book account was sought, and defendant Salinas Newspapers, Inc., appealed. The District Court of Appeal, Bray, J., held, inter alia, that evidence justified finding that such work was ordered by radio station which was owned by defendant Salinas Newspapers, Inc.

Judgment affirmed.

1. Appeal and Error 🔑931(1)

On a defendant's appeal from an adverse judgment in action for reasonable value of work done and materials furnished, and on open book account, District Court of Appeal was required to take facts and reasonable inferences therefrom most strongly in favor of plaintiff.

2. Principal and Agent 🔑99

Before a recovery can be had against a principal for alleged acts of an ostensible agent the person dealing with agent must prove that he did so with reasonable belief in agent's authority, and such belief must have been generated by some act or neglect of principal sought to be charged, and third person in relying on agent's apparent authority must not have been guilty of negligence. Civ.Code, § 2300.

3. Corporations 🔑432(12)
Joint Adventures 🔑8
Partnership 🔑217(3)
Principal and Agent 🔑23(1)

In action for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet, evidence justified conclusion that person who gave plaintiff the order was agent of corporate defendant and that general manager of corporate defendant approved the order, and justified conclusion that person who gave order was also agent for an individual defendant who had agreement with corporate defendant whereby individual defendant would publish and pay for booklets, and that corporate defendant and individual defendant were jointly and severally liable regardless of whether such defendants were joint venturers or partners. Civ.Code, § 1659.

4. Appeal and Error 🔑1057(1)

In action for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet allegedly ordered by agent for both corporate defendant and individual defendant, refusal of trial judge to permit introduction in evidence of agreement between defendants, under terms of which individual defendant was to publish and pay for directory, would be error without prejudice to corporate defendant where principal terms of contract were already in evidence.

5. Work and Labor 🔑4(2)

Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and latter expresses no dissent, or avails himself of service, a promise to pay reasonable value of services is implied.

6. Corporations 🔑432(6)

In action for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet which were allegedly ordered by agent for corporate defendant and which were to be known under name of radio station owned by corporate defendant, invoices which such alleged agent ordered plaintiff to print after order for printing directories was given, containing blanks for name and address of directory advertiser, were admissible in evidence to show that radio station held out person who gave orders to plaintiff as its agent.

7. Corporations 🔑432(6)

In action for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet for radio station owned by corporate defendant, an advertisement published in newspaper prior to time plaintiff did any work on booklets, which stated that such directory was being compiled and prepared by such radio station, was admissible in evidence as bearing on ostensible authority of person who gave plaintiff the order to act as agent for radio station.

8. Corporations 🔑432(11)

In action for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet for radio station owned by corporate defendant, a directory for year involved which gave impression that it was published by radio station was admissible in evidence as bearing upon ostensible authority of person who gave plaintiff the order to act as agent for radio station, where corporate defendant had notice of contents of directory when 10 per cent of the order was completed and corporate defendant did not repudiate holding out that it was publisher of directory.

9. Appeal and Error ⚷970(4)
Trial ⚷377(2)

Permitting or denying a party the right to reopen a case to introduce further proof, particularly after trial has concluded even though before judgment, is within discretion of trial court, the exercise of which will not be disturbed on appeal unless there has been a clear abuse of discretion.

10. Trial ⚷377(2)

It is not an abuse of discretion to refuse to set aside a submission for taking of further testimony unless a good excuse is offered for failure to produce the testimony before submission.

11. Trial ⚷377(2)

In action for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet, trial judge did not abuse discretion in denying defendant's motion to reopen cause and for commission to take deposition of absent witness whose testimony would have been material and important, which motion was made two weeks after submission of case, where prior to end of trial defendant and defendant's attorney had contacted absent witness, knew that he was willing to testify and where he was, but did not call that fact to attention of court or ask for continuance to obtain deposition until trial was concluded and plaintiff had left the country.

12. Corporations ⚷432(12)

In action on open book account and for reasonable value of work done and materials furnished by plaintiff in printing copies of a business directory booklet, evidence justified finding that such work was ordered by radio station which was owned by corporate defendant.

Lacey & Thornberry, Salinas, for appellant.

Foster & Redhead, Pacific Grove, for respondent.

BRAY, Justice.

In an action on three counts (1) for the reasonable value of work done and materials furnished, (2) an open book account, and (3) an account stated, plaintiff recovered judgment on the first two counts in the sum of $1,302.18, against defendants Peden and Salinas Newspapers, Inc.[1] The last named defendant appeals.

Questions Presented.

1. Sufficiency of evidence.
2. Alleged errors in admission and rejection of evidence.
3. Alleged abuse of discretion by court in refusing to reopen cause to take a deposition.
4. Book account.

1. Sufficiency of Evidence.

[1] Taking the facts and the reasonable inferences therefrom most strongly in favor of plaintiff, as we are required to do, it appears that there is substantial evidence to support the findings and judgment. Plaintiff is a newspaper publisher and printer in Monterey. He printed about 6,000 copies of a business directory booklet entitled "KDON 1950–1951 Directory and Guide Book," and several other matters including stationery and mailing envelopes for the directory. The order was given by John D. Heikes and the main controversy is whether defendant either joined in the order or held out Heikes to plaintiff as its agent. Heikes was the general manager of James H. Peden Associates, the business name of defendant Martha E. Peden. She does not deny liability and has not appealed. Defendant owns radio stations KDON and KSNI and the Salinas "Californian," a newspaper. Gilbert Baymiller is the general manager of station KDON and the Californian. Peden has been engaged for several years in the business of promotion

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[1] Defendant Salinas Newspapers, Inc., will be referred to herein as defendant.

and advertising, and has published numerous similar business directories in California and elsewhere. She had an agreement with defendant by which she was to publish the directory at her own expense. She was to pay defendant $3.75 for each advertiser listed in the directory which charge included $3.50 for two radio announcements of the advertiser and 25 cents for setting each listing in type. Defendant had this type made by a third party. Peden charged each advertiser $15 per listing. The contract provided that all payments by advertisers were to go into a bank account called the KDON Special Directory Account. Funds from this account could be paid out only by checks signed by Baymiller.

Heikes came to plaintiff stating that he was representing KDON and ordered the printing of the directory. About a month or six weeks later and before any work was started plaintiff called Baymiller on the phone. "I told him that it was a fairly large printing order for us to do; probably would involve, for us, quite a bit of money, and that I wanted to be sure that we didn't get stung on it, and he said that I would have nothing to * * *. He simply told me that all of the funds—that I would have nothing to worry about in payment of the book because all of the funds which involved the book were being handled by him and were coming through his account, and before anything was paid out in the way of profit or remuneration to the parties doing it, that all the costs would be paid. I had had some unfortunate experiences before and I didn't want to get caught again." At the trial after giving the above testimony plaintiff was asked if Baymiller gave him any authorization to print the directory for KDON. He replied, "Strictly speaking, I don't think he did quite that way." Later, when asked by the court to repeat the conversation in more detail, plaintiff testified: "I said, 'A fellow by the name of Heikes has been coming in here to find out about the printing of a KDON Directory. You were manager of KDON. I don't know the guy. I don't know anything about him, and we have been stung previously on some accounts and I wanted to find out whether this was authorized, whether it is a genuine order and something about him,' and Gil said, 'Yes.' He said, 'It is perfectly genuine.' He said, 'Have you got the order?' I said, 'Well, to the best of my knowledge we have, but I don't want to order any paper or do any printing until I have some idea whether it is to be paid.' Well, Gil said, 'Kep, you don't have a thing to worry about on this.' He said, 'All the funds come into my hands,' and he said, 'I make out all the checks on it,' and he said, 'Nothing will be paid out to them at all until all the costs are paid.' I said, 'That is swell, Gil. I think that is wonderful. I just wanted to make sure that it is on the up and up and that somebody more responsible than this guy was going to see that I got paid' * * *." Plaintiff went to the Californian building where defendant and KDON are located and received the type for the directory from defendant's composing room. An advertisement was run in defendant's newspaper concerning "KDON-KSNI Compiled Directory for the County." This was with Baymiller's sanction and approval. A similar advertisement was run in other county papers, including plaintiff's. Plaintiff could not recall who ordered it run in his newspaper. (It probably was Heikes.) A small part of plaintiff's charge, and included in the judgment, is the cost of running this advertisement. Baymiller testified he did not know of the advertisements in any of the newspapers other than his own. However, as he signed the checks for the cost, it is a reasonable inference that he did. Defendant did authorize the use by Peden of the name KDON directory. Baymiller's version of the phone conversation with plaintiff is drastically different than that of plaintiff. Baymiller denied that he told plaintiff that he would see that the costs were paid. He admitted, however, that he told plaintiff about the bank account and that he was going to issue checks and explained how the bank account was to be handled. He admitted telling plaintiff that he would have nothing to worry about on the account, but claimed it was in connection with explaining to plaintiff that

Peden had an excellent reputation and was "A-1."

Plaintiff claimed that at no time in the conversation did Baymiller mention Peden. When the first 600 directories were printed Baymiller took some of them. Other directories were shipped to KDON, Salinas. All checks for subscribers to the directory were made to KDON Directory. A KDON Special Directory Account was set up by Heikes and Baymiller. Most of these checks were given to Heikes by the debtors and by him turned over for deposit to Baymiller's secretary handling the account. Some, however, were mailed directly to KDON. Baymiller testified that all disbursements from this account were made only on authorization of Heikes and signed by Baymiller. Some of the checks were made out by Heikes and some by Baymiller's secretary. Apparently on occasions she made out checks and was to get Heikes' authorization later. Among the checks signed by Baymiller were four to Heikes totaling $480 and three to Peden totaling $2,400. Defendant controlled KDON advertising and did not make known the fact either to plaintiff or through the advertisements run in the various newspapers concerning the KDON directory that Peden had anything to do with it. Defendant desired the directory to be known as the KDON Directory, and although other directories put out by Peden contained her name, no mention of Peden appears in this directory. Heikes had his headquarters in defendant's office and used its phones. Defendant knew that the name KDON was to be used in soliciting advertising for the directory and that telephone solicitations were to be in the name of KDON. A Mrs. Dear in the name of KDON directory solicited plaintiff for an advertisement in the directory. Plaintiff received an invoice for this on a billhead containing defendant's name (one of those printed by plaintiff). From time to time as the work progressed plaintiff sent bills to KDON and received no objection to them. Baymiller denied he had ever seen them. The first bill of $550 was so sent and plaintiff received a check for that amount signed "KDON Special Directory Account [typewritten], Gilbert V. Baymiller [in ink]." Plaintiff had performed services in the past for defendant and kept a ledger sheet showing charges and credits, the last entry upon which (prior to the matters involved here, which were also charged to that account) shows a balance of the account. On June 24, 1950, Peden and plaintiff signed a memorandum agreement, referred to in defendant's brief as "an accepted offer of compromise" in which plaintiff agreed to accept $1,629.32 as the price of the directory, subject to various adjustments specified and less the sum of $550 already paid on account. It provides that it "is a compromise settlement between the parties hereto" and that all directories are available to Heikes as of that date.

[2] The conversation between plaintiff and Baymiller coupled with the other matters above set forth which occurred before and during the printing of the directory would cause any reasonable person to conclude that Heikes was the agent of defendant in the getting out of the KDON directory and that Baymiller had approved of the order given plaintiff by Heikes. It is true that in that conversation nothing was said in exact words that Heikes was KDON's agent, but such a conclusion is a reasonable one to be deduced from plaintiff's version, and it was plaintiff's version that the trial court believed. "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civ.Code, § 2300. The test is: "'before a recovery can be had against a principal for the alleged acts of an ostensible agent, three things must be proved, to-wit' (quoting from Hill v. Citizens Nat. Tr. & Sav. Bank, 9 Cal.2d 172, 176, 69 P.2d 853, 855): '[First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person in relying on the agent's apparent authority must not be guilty of negligence. [Citations.]'" Stan-

hope v. L. A. College of Chiropractic, 54 Cal.App.2d 141, 146, 128 P.2d 705, 708.

An examination of the evidence in our case shows that there is substantial evidence in plaintiff's favor to meet this test.

[3] The trial court held both defendant and Peden liable to plaintiff. Defendant contends that there can only be a joint liability where the promisors are joint venturers or partners. The cases cited for this proposition do not support it. Norris v. Campbell Electric Corp., 54 Cal.App. 72, 201 P. 132, held that there was no contractual relationship between plaintiff and two of the three defendants held liable by the trial court. In Tryon v. Clinch, 32 Cal. App. 150, 162 P. 428, the court held that there was no evidence to support a finding that the appellant had given anyone authority to bind him for the full cost of the improvement of a street. In McEwen v. Taylor, 106 Cal.App.2d 25, 234 P.2d 754, the reviewing court sent the case back to the trial court for further determination of the question of whether there was a joint liability. In our case the evidence supports the conclusion that Heikes was an agent for both Peden and defendant and therefore they were jointly and severally liable. Section 1659 of the Civil Code provides: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." We know of no authority to the effect that in order to hold two persons joining together in a promise they must be strictly speaking joint venturers or partners.

2. Rulings.

(1) Rejection of Contract.

[4] Defendant sought to introduce the agreement between Peden and defendant under the terms of which Peden was to produce and pay for the directory, on the theory of the improbability of Baymiller ordering the work of printing in view of the fact that Peden was to pay for it, and to show the circumstances surrounding the transaction. Assuming that the contract should have been admitted, its rejection would be error without prejudice for the reason that its principal terms were already in evidence. Baymiller testified at some length to the terms of the contract.

[5] The evidence, in addition to showing a holding out by defendant to plaintiff of Heikes as its agent, brings the case within the rule "Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied." Young v. Bruere, 78 Cal.App. 127, 132, 248 P. 301, 302; see also Medina v. Van Camp Sea Food Co., 75 Cal.App.2d 551, 171 P.2d 445; Resetar v. Leonardi, 61 Cal.App. 765, 216 P. 71.

(2) Admission of Evidence.

[6] (a) Plaintiff's exhibit 4 is a billhead or invoice with, among other matters, blanks for name and address of the directory advertiser "For insertion of your card in Directory as per your order—$15.00." These invoices were one of the items which Heikes ordered plaintiff to print after the original order for printing the directory was given. All checks by advertisers were made to KDON or KDON directory and some were mailed to KDON long before plaintiff completed the work on the directory. It is a reasonable inference that these invoices accompanied the checks and thereby defendant was put on notice of their use. No objections to their use was made by defendant. The invoices, therefore, were admissible to show the holding out by KDON of Heikes as its agent.

(b) Plaintiff's exhibit 5 is a statement headed "Radio Station KDON" and its address. This was a form of statement the upper part of which was detachable and to be returned with the check in payment of the charge contained in the lower portion. This particular statement was addressed to Pacific Grove Tribune, plaintiff's newspaper, and contained a charge against it for $15 for "One Listing in the 1950 Directory and Guide Book and Announcements over KDON and KSNI, $15.00." This statement is in the same category as

(a) above discussed. Moreover, this was a direct charge against plaintiff by KDON.

[7] (c) Plaintiff's exhibit 6 is a copy of the Pacific Grove Tribune containing an advertisement "KDON, KSNI Compile Directory for County." This stated that such a directory was being compiled and prepared by these stations. While the evidence fails to disclose who ordered it, Baymiller admitted that a similar advertisement was run in the Salinas Californian, defendant's own publication. Of this he had knowledge, although he denied knowing of the advertisements in the Tribune and other county papers. These advertisements were run long before any of the work was done by plaintiff. It is doubtful if Baymiller, a newspaper man, and the other executives of defendant, would not know that advertisements of this type were being printed in the county's newspapers. No repudiation of them was ever made. These are circumstances bearing on the question of ostensible authority. Hence the advertisement was admissible.

[8] (d) Plaintiff's exhibit 1 is the KDON 1950–1951 Directory and Guide Book. An examination of it gives the very definite impression that it is published by KDON. Peden is nowhere mentioned in it. Defendant had notice of its contents when the first 600 were complete (10 per cent of the order). It in nowise repudiated the very definite holding out that it was the publisher of the book. It was admissible as another chain in the circumstances justifying plaintiff in the belief that Heikes was KDON's agent.

The above-mentioned evidence which was admitted over defendant's objections was properly admitted as circumstances tending to bring the case within the rule set forth in Wainwright Trust Co. v. Kinder, 69 Ind.App. 88, 120 N.E. 419, and quoted with approval in Moore v. Spremo, 72 Cal.App.2d 324, 331, 332, 164 P.2d 540, 545: "'"The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, as well as from direct communications between the parties. * * * To warrant the finding of such contract, the elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist; but, such elements, like other ultimate facts, may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue."'"

3. Refusal to Reopen Case.

[9] The trial was started February 14, 1951. It ended and the case was submitted for decision February 21. March 7, defendant filed a "Notice of Motion to Reopen Cause and for Commission to Take Deposition." The trial court denied the motion and thereafter rendered judgment. Defendant contends that the trial court abused its discretion in denying this motion. It is well settled that permitting or denying a party the right to reopen a case for the purpose of introducing further proof, and particularly after the trial has concluded even though before judgment, is a matter within the discretion of the trial court and will not be disturbed on appeal unless there has been a clear abuse of discretion. See Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, 208 P.2d 1009, and Gelberg v. Consolo, 51 Cal.App.2d 516, 125 P.2d 74. Defendant wanted the submission set aside to enable it to take the deposition of Heikes in Pennsylvania and use it on a further hearing. The ground of the motion was that the whereabouts of Heikes was not known and could not with reasonable diligence have been known, prior to the trial. Accompanying the notice of motion was the affidavit to the effect that Heikes had now been found in Harrisburg, Pennsylvania; that he would testify that he had ordered the printing of the directory from plaintiff, telling him he represented Peden who was having the printing done and would pay for it; that in September, 1950, plaintiff told Heikes that plaintiff knew that KDON was not responsible for the bill but that plaintiff was going to try to collect it from somebody; that they were unable to discover Heikes' whereabouts prior to

trial; that on February 16[2] after the first day's trial, Baymiller inquired of the Salinas manager of the telephone company as to Heikes' last known telephone number and was informed that it was located in Santa Barbara and that certain phone calls from said number were unpaid for several months, among which calls was one to a number in Harrisburg; that Baymiller then placed calls to all of said numbers and upon calling the Harrisburg number found that it was that of Heikes' brother-in-law and that Heikes was there at the time and talked to Baymiller; that Heikes said he was unwilling to come to California but would give his deposition in Harrisburg. An affidavit was filed by one of plaintiff's attorneys to the effect that plaintiff was en route to the Caribbean; that plaintiff had advised affiant that at no time did he state that he would look solely to anyone but KDON for payment of his bill.

[10, 11] There is no question but that the testimony of Heikes would have been material and important. Nevertheless, we cannot say that the court abused its discretion in refusing to reopen the case to obtain his deposition. There was no showing of diligence by defendant in attempting to locate Heikes prior to the trial. The affidavits merely state that his whereabouts was unknown to Peden, defendant and its attorneys, from whom alone inquiry appears to have been made. There is no showing of any diligent attempt before trial to locate Heikes. "It is not an abuse of discretion to refuse to set aside a submission for the taking of further testimony unless a good excuse is offered for the failure to produce the testimony before submission." Kan v. Tsang, 90 Cal.App.2d 538, 542, 203 P.2d 86, 89. There is no showing why Baymiller could not have made the same inquiry of the telephone company prior to the trial that he made during the trial. But even more important is the fact that prior to the end of the trial defendant and its attorneys had contacted Heikes, knew what he was willing to testify, and where he was, but did not call that fact to the attention of the court or ask for a continuance to obtain his deposition, until after the trial was concluded and plaintiff had gone to the Caribbean. This was a lack of diligence which justified the court in denying the motion filed two weeks after the submission of the case. While the record does not disclose whether the judge had intimated what his decision would be, it is significant that defendant having all the information concerning Heikes that it later set up in its motion to reopen, permitted the case to be submitted without giving the judge that information. See Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, where the motion to reopen was not made until after the court had indicated its probable ruling on a motion for a directed verdict.

Winkler v. Winkler, 54 Cal.App.2d 398, 129 P.2d 43 cited by defendant, where the reviewing court held that the trial court erred in not granting a continuance of the case for the testimony of the child of the parties, or, at least, a new trial upon the showing made by the "*undenied* affidavits," 54 Cal.App.2d at page 404, 129 P.2d 46, is readily distinguishable from our case. There were "peculiar circumstances here existing," 54 Cal.App.2d at page 404, 129 P.2d 46, which do not appear in our case.

4. Book Account.

[12] Defendant's contention that there is no evidence to support the finding that defendant became indebted to plaintiff on an open book account is based primarily upon its claim that there is no evidence to support the court's finding that the work was ordered by KDON. We have heretofore pointed out that there is such evidence. Hence its contention falls. Defendant contends that the fact that the signature "KDON Special Directory Account" on the check for $550 in part payment of the account was in typewriting, in some way was notice that the check was not sent in payment of a KDON obligation. This is a nonsequitur. Any reasonable person on seeing the check so

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[2] Both parties state the trial commenced February 16. The transcript gives February 14 as the starting date.

signed would conclude that it was a payment of a KDON obligation. They would reasonably assume that the special directory account was simply a matter of intra-office bookkeeping. The court's finding in favor of defendant on the account stated count is not necessarily a finding that defendant did not receive the bills sent it by plaintiff.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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111 Cal.App.2d 741

TRICKEY v. HUNTER.

Civ. 14916.

District Court of Appeal, First District, Division 2, California.

June 18, 1952.

Rehearing Denied July 18, 1952.

Hearing Denied Aug. 14, 1952.

Action by Anne Trickey against Raymond Louis Hunter for injuries to plaintiff when automobile in which she was a guest rider was struck by defendant's automobile at an intersection. The Superior Court, Santa Clara County, John D. Foley, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the evidence showed that the collision was caused solely through the negligence of plaintiff's driver in failing to stop at intersection.

Affirmed.

1. Automobiles 🔑244(36)

In automobile guest's action for injuries sustained when automobile was struck by defendant's automobile at a through highway intersection, evidence showed that collision was caused solely through negligence of plaintiff's driver in failing to stop at intersection and in failing to stop, look and listen after passing a parked truck which obstructed view of both drivers.

2. Trial 🔑260(8)

In automobile guest's action for injuries sustained when automobile was struck by defendant's automobile at a through highway intersection, refusal to give instruction embracing statute pertaining to right of way at intersections generally was not error where jury was instructed in statutory language pertaining to right of way at through highway intersections. Vehicle Code, §§ 550, 552.

3. Trial 🔑251(8), 252(8)

In automobile guest's action for injuries sustained when automobile was struck by defendant's automobile, wherein defense of contributory negligence was pleaded, but no issue was made of such defense nor any evidence offered of defense and no mention of defense was made to jury, failure of trial court to instruct jury on such issue was not error.

Philander Brooks Beadle, Abraham Setzer, San Francisco, for appellant.

Campbell, Hayes & Custer, Faber L. Johnston, Jr., San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages arising out of a collision of two auto vehicles in one of which she was a guest rider. She appeals from the verdict for the defendant.

[1] The facts are not seriously disputed. Defendant was driving north on Middlefield Road, an arterial highway, on a Sunday of heavy traffic. The driver of the car in which plaintiff was riding approached the intersection on an east-west crossroad, failed to stop at the warning sign, and was hit broadside by defendant's car. Directly south of the intersection a large truck was parked at the easterly curb of Middlefield Road obstructing the view of both drivers. There was no evidence of excessive speed on the part of either. There was no evidence of contributory negligence on the part of the plaintiff. There was no evidence of negligence on the part of the defendant as a proximate cause of the collision. The evidence showed unmistakably that the collision was caused solely through the negligence of plaintiff's driver in failing to stop at the intersection and particularly in failing to

"stop, look and listen" after he had passed the parked truck where, for the first time, he had a view of the highway to his left.

The jury's verdict is in full accord with Pollind v. Polich, 78 Cal.App.2d 87, 90, 177 P.2d 63; Shivers v. Van Lobensels, 109 Cal.App.2d 286, 240 P.2d 635 and similar cases.

[2] Appellant complains that the trial court erred in refusing to give an instruction embracing section 550 of the Vehicle Code, since an instruction covering section 552 was given. The objection is answered by an opinion of the trial judge in denying appellant's motion for a new trial. We quote from that opinion as fully covering the criticism:

"The second ground of error in law is directed at the court's refusal to give an instruction embracing a portion of section 550 of the Motor Vehicle Code having to do with right of way at intersections generally. The court instructed the jury in the language of Section 552 of the Motor Vehicle Code which section pertains to right of way at through highway intersections. It is conceded that the highway upon which the collision occurred was a through highway.

"A number of cases have been cited by plaintiff in support of his (her) contention. These decisions, however, hold merely that it is not error to give instructions based both upon Section 550 and Section 552. None of the authorities cited hold that it is error to refuse to give an instruction based on Section 550 where the collision occurred at a through highway intersection.

"Plaintiff argues that if the driver of plaintiff's car did not stop before entering the intersection Section 552 would not be applicable but that Section 550 would be applicable. In analyzing this argument, we must bear in mind that Section 552 was amended in 1947. Prior to that amendment the section provided 'The driver of any vehicle *which has stopped*' etc.; the section as amended reads 'The driver of any vehicle *shall stop*' etc. It seems to me that the amendment to the section takes away the main support to plaintiff's contention. If plaintiff's argument is accepted, we will arrive at a very interesting result which can be demonstrated by the following examples.

"A is driving on a through highway. B, driving on a nonthrough highway, approches the through highway. B stops as provided in Section 552 at the entrance to the through highway. A, on the through highway, is so close to the intersection as to constitute an immediate hazard. Under these facts, it is conceded that A has the right of way and B must yield.

"If B violates the law and fails to stop at the entrance to the through highway, he then would have the right of way and A, proceeding on the through highway, would have to yield. This, it seems to me, would place a premium upon a violation of law and would give the driver of an automobile who violated the law an advantage over the driver who obeyed the law.

"The end result would be that a driver on a through highway approaching so closely to an intersection as to constitute an immediate hazard would have the right of way if the driver on the non-through highway obeyed the law and stopped at the entrance to the through highway but he would not have the right of way if the driver on the non-through highway violated the law and failed to stop. I hardly believe that such is or should be the law.

"It should be noted also that the cases cited by plaintiff were without exception, I believe, decided prior to the 1947 amendment to Section 552."

[3] Finally appellant complains of the failure of the trial court to instruct the jury on the issue of contributory negligence. The defense was pleaded, but no issue was made of it, no evidence of it was offered, and no mention of the defense was made to the jury. No authority is cited holding that an instruction should be given under these circumstances. We find no error.

Judgment affirmed.

I concur: GOODELL, J.

DOOLING, Justice.

I concur. I feel it advisable, however, to comment on an apparent illogicality in the law which has been created by the cases of Medeiros v. Soares, 17 Cal.App.2d 176, 61 P.2d 501, Pattisson v. Cavanagh, 18 Cal.App.2d 123, 63 P.2d 868, 64 P.2d 945, and Gulley v. Daggett, 80 Cal.App.2d 784, 182 P.2d 613, in all of which it was held that in collisions at intersections of sign-posted through highways it is proper to instruct on both sections 550 and 552 (formerly secs. 131(a) and 131(c)) of the Vehicle Code. This rule has the express sanction of the Supreme Court as noted in Gulley v. Daggett, supra, 80 Cal.App.2d at page 786, 182 P.2d 613, since in denying a hearing in Pattisson v. Cavanagh, supra, the Supreme Court expressly disapproved Elmore v. County of Lassen, 10 Cal.App.2d 229, 51 P.2d 481, which announced the contrary rule. 18 Cal.App.2d page 130, 63 P.2d 868, 64 P.2d 945.

Sec. 550 is general in its terms while sec. 552 has application to a particular situation, the rights and duties of the drivers of vehicles at the intersections of sign-posted through highways. Under the settled rule of statutory construction sec. 552, the particular, controls sec. 550, the general, in the situations to which it is made applicable. 23 Cal.Jur., Statutes, sec. 136, pp. 762–763. Since sec. 552 gives the driver on a sign-posted through highway somewhat greater rights than the driver on other highways is given by sec. 550 (and is expressly designed to do so to facilitate the flow of traffic on the through highway) I would hold, were I free to so act, that it is error to instruct on sec. 550 in any case to which sec. 552 is applicable, but such a holding if it is to be made can only come now from the Supreme Court.

However it is one thing to say, as do the cases cited above, that it is *not error to* instruct on sec. 550 in a case to which sec. 552 applies. It is quite another to say, as appellant asks us to do in this case, that it is *error not to* instruct on sec. 550 in such a case. I am more than content not to push what I believe to be a bad rule of law any further than the decided cases compel me to.

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111 Cal.App.2d 606

WIGHT v. HUBBARD et al.

Civ. 18843.

District Court of Appeal, Second District, Division 3, California.

June 13, 1952.

Action for damages for fraud. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered a judgment dismissing the action after sustaining demurrer to complaint without leave to amend, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that where plaintiff did not plead ignorance of false representations, and promises, and of facts, but only claim of discovery was that certain defendants had fraudulent motives, statute of limitations was not tolled and action brought eight years after alleged fraudulent obtaining of property was barred.

Judgment affirmed.

1. Fraud ⚿44

Complaint in action for fraudulently obtaining apartment building, alleging that one defendant in committing fraud was counselled and guided by codefendant, and that defendant obtained judgment on note through codefendant and through execution sale acquired title to other property, stated no cause of action against codefendant, where connection between suit on note and execution sale, and transactions in which apartment building was lost, was not alleged.

2. Limitation of Actions ⚿100(1)

Where plaintiff did not plead ignorance of false representations and promises, and of facts, but only claim of discovery was that certain defendants had fraudulent motives, statute of limitations was not tolled, and action for fraud brought eight years after alleged fraudulent obtaining of property was barred.

3. Limitation of Actions ⚿180(2)

Where affirmative allegations showed that plaintiff at all times knew facts constituting alleged fraud consummated eight years before action, plaintiff could not by amending complaint state cause of action, and sustaining demurrer without leave to amend was proper.

A. J. Blackman, Los Angeles, Jacob Chaitkin, Pasadena, for appellant.

Maurice Gordon, in pro. per.

SHINN, Presiding Justice.

This is an action for damages for fraud against defendants Mabel L. Hubbard, Kathleen B. Wirick and Paul C. Wirick, Jessie Northrup and Maurice Gordon. Defendant Gordon demurred to the amended complaint; the demurrer was sustained without leave to amend, the action was dismissed and plaintiff appeals.

The claim of damages arises out of complicated transactions dating back to March, 1942. The allegations of the complaint may be summarized as follows: In March of 1942 plaintiff was in possession of the Sherlandy Apartments in Los Angeles under a contract of purchase from defendants Hubbard and Wirick. The property was subject to an encumbrance of about $45,000 and another one of about $6,000, the two payable at the rate of $800 per month; plaintiff had paid approximately $37,000 on account of the purchase price, including a note and mortgage on land in Montana in the sum of $10,000 which he had given to defendants Hubbard and Wirick; in March, 1942, he entered into an agreement with defendant Northrup to trade his interest in the Sherlandy Apartments for Mrs. Northrup's apartment house, which also was encumbered. Mrs. Northrup was to obtain a new loan of at least $50,000 on the Sherlandy, payable at $725 per month; Mrs. Northrup advised plaintiff she was unable to get the new loan; defendants Hubbard and the Wiricks induced plaintiff to cancel his agreement of purchase and surrender possession in consideration of an option to repurchase the property at a reduced price within ninety days; plaintiff was also to pay for necessary improvements and other obligations relating to the property; they represented they would be able to procure the desired new loan; during the ninety-day period they put a new roof on the apartment house, installed refrigeration and made other expensive but unnecessary improvements and repairs; they did not apply for a loan; at the end of the ninety-day period they demanded payment for the repairs and improvements and upon plaintiff's failure to pay declared the option terminated; their representations were false and fraudulent, and their promises were made without intention to perform them. During the ninety-day period defendant Northrup represented that she would consummate the exchange provided plaintiff would pay certain taxes and other charges against the Sherlandy Apartments; she had previously advanced plaintiff $2,500 and upon her representation that she would make the exchange as evidence of the loan, plaintiff gave her his note for $2,500; her representations were false and fraudulent; she had no intention of consummating the exchange and knew that she could not for the reason that defendants Hubbard and the Wiricks had failed to obtain the loan; plaintiff relied upon the representations of Mrs. Northrup and paid out sums amounting to $3,265 including the $2,500 Mrs. Northrup had advanced him; Mrs. Northrup failed to consummate the exchange; defendants Hubbard and the Wiricks foreclosed the $10,000 mortgage on plaintiff's property and thereby acquired the same; they have refused to restore possession of the Sherlandy Apartments to plaintiff or to return any money to him. It was further alleged that Mrs. Northrup, through her attorney, Maurice Gordon, obtained a default judgment against plaintiff on the $2,500 note and through execution sale acquired title to another apartment house worth not less than $18,000, subject only to an encumbrance of $6,500. Plaintiff did not know until about one year prior to the institution of the action that "the two sets of defendants [one set evidently being defendants Hubbard and the Wiricks and the other Mrs. Northrup and Gordon] had acted in concert or pursuant to a common scheme or design to ruin plaintiff financially and take over his equities," etc. It was alleged that within the year last past he first discovered that all the defendants were in a conspiracy to defraud him when certain tenants of the Sherlandy Apartments told him they had overheard the defendants state "on concert they intended to 'take plaintiff to a cleaning' and they knew exactly how to do it." The complaint prayed for damages in the sum of $74,000 actual and $25,000 exemplary damages.

[1] It was not alleged that Mr. Gordon had anything to do with the various transactions except "that in committing the fraudulent acts hereinabove described, Defendant Northrup was counselled and guided by her attorney, Defendant Gordon." Mr. Gordon acted as Mrs. Northrup's attorney in her action on the $2,500 note and the execution sale that followed (the history of this litigation will be found in Beadle v. Northrup, 90 Cal.App.2d 510, 203 P.2d 552; Northrup v. Security Title Insurance & Guarantee Co., 90 Cal.App.2d 518, 203 P.2d 557; and Gerry v. Northrup, 102 Cal.App.2d 449, 227 P.2d 857. As far as we can determine from the complaint there was no connection whatever between the suit on the note and the execution sale, and the transactions in which plaintiff lost his interest in the Sherlandy Apartments to defendants Hubbard and Wirick. It was alleged that "the defendants" conspired to cheat and defraud plaintiff of his interest in the Sherlandy Apartments and other properties but other allegations of the complaint sufficiently show that the allegation refers to the defendants other than defendant Gordon. No facts were alleged which even remotely charged bad faith on his part. No cause of action was stated against this defendant.

[2] The complaint was filed November 28, 1950, some eight years after plaintiff lost his interest in the Sherlandy Apartments. No facts were alleged which would toll the Statute of Limitations. Plaintiff did not plead ignorance of the facts which he alleged. He knew defendants had not made good their representations and promises. His only claim of discovery is that certain of the defendants were actuated by fraudulent motives. He alleged that the representations of the defendants were false and that their promises were made without intention to perform them but did not allege ignorance of their falsity throughout the eight-year period.

[3] Under familiar rules his action was barred by the Statute of Limitations. The allegations with respect to plaintiff's claimed failure to discover facts constituting the alleged fraud and with respect to the claimed discovery of facts were patently insufficient. See Mortimer v. Loynes, 74 Cal.App.2d 160, 172, 168 P.2d 481. This would be a good defense for defendant Gordon even if the complaint stated a cause of action against him. It is clear from the affirmative allegations of facts which were at all times known to plaintiff, that plaintiff could not, by amending his complaint, state a good cause of action. Findley v. Garrett, 109 Cal.App.2d 166, 240 P.2d 421.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

39 Cal.2d 109

ALLEN v. FRANCHISE TAX BOARD.

L. A. 21776.

Supreme Court of California, in Bank.

June 17, 1952.

L. J. Allen sued the Franchise Tax Board of the State of California to recover income taxes paid under protest. The Superior Court, Los Angeles County, Edward R. Brand, J., gave judgment for plaintiff, and defendant appealed. The Supreme Court, Shenk, J., held that where retroactive effect of an income tax statute, which allowed lump sum payments received for services given over extended period to be apportioned over the years of service and which became applicable prior to time tax became due and payable, affected the tax base and not the tax rate, such retroactive effect was not constitutionally invalid as a gift of public moneys.

Judgment reversed in part; affirmed in part.

Prior opinion, 236 P.2d 378.

1. Statutes 🔑251

In income tax statute allowing lump sum payments for extended services to be apportioned over the years of service, section relating to the economic inequality which would result if statute were not enacted and stating that it should be given immediate effect, was not a statement of the public use of state moneys but was only the constitutionally required statement of facts deemed to constitute the urgency necessary for immediate effectiveness, and was sufficient to permit that immediate effectiveness. St.1941, p. 471, § 2; Const. art. 4, § 1.

2. Taxation 🔑301(3)

The right of the state to a tax does not vest until the tax is due and payable.

3. Taxation 🔑966

Income tax statute which provided that lump sum payment received for services given over extended period of time could be apportioned over the years of service and which was to have immediate effect as to tax year prior to enactment, was not, in effect, a retroactive change of the rate of tax after the close of the taxable year but was only a retroactive change in the personal income base to which unchanged rates would apply. Revenue and Taxation Code, § 17054.

4. States 🔑119

Where retroactive operation of income tax statute, which allowed lump sum payments received for services given over extended period to be apportioned over the years of service and which was enacted before tax became due and payable but after close of tax years during which part of services were rendered, affected the tax base and not the tax rate, such retroactive operation was not constitutionally invalid as a gift of public moneys. Revenue and Taxation Code, § 17054; Const. art. 4, § 31.

5. Taxation 🔑1044

Where an attorney's fee for establishing his client's royalty interest was to be a fraction of accumulated royalty and a fraction of any royalties subsequently paid, attorney would not be entitled to take depletion deduction in computing income taxes as to his fraction of accumulated royalty but only on payments received after the time he acquired right to future payments Revenue and Taxation Code, §§ 17314, 17816.

6. Courts 🔑97(1)

In action for return of personal income taxes paid under protest, where attorney claimed depletion deduction on accumulated oil well royalties paid to him as fees for establishing claim to those royalties for his client, United States Supreme Court cases involving other litigants and a Tax Court case involving this attorney all of which had decided the issue adversely to his contentions, were persuasive in regard to application of state income tax provisions allowing depletion deduction. Revenue and Taxation Code, §§ 17314, 17816.

7. Courts 🔑97(1)

Decision by United States Tax Court, that a federal taxpayer's interest in oil well royalties had value for purposes of personal income tax, was of no binding force on state court in proceeding by same taxpayer for return of personal income taxes paid to state under protest on basis of valuation given the royalty interest by the United States Tax Court, and Tax Court's decision was controlling on state court only as to questions of law under the doctrine of stare decisis.

8. Taxation ⚷1099

In proceeding by taxpayer for return of personal income taxes paid to state under protest on basis of value given to taxpayer's interest in oil well royalties, trial court's finding that the royalty interest had no value was supported by evidence and finding would not be disturbed on appeal.

◆

Edmund G. Brown, Atty. Gen., James E. Sabine and Edward Sumner, Deputy Attys. Gen., for appellant.

Harold E. Prudhon, Los Angeles, for respondent.

SHENK, Presiding Justice.

The plaintiff brought this action against the Franchise Tax Board, substituted for Charles J. McColgan, Franchise Tax Commissioner, to recover taxes paid under protest. The plaintiff had judgment for the sum prayed for and the defendant appealed.

The controversy presents the question of the validity of the operation retroactively of section 7.1 added to the Personal Income Tax Act in 1941, Stats.1941, p. 471, cf. § 17054 Revenue & Taxation Code. Prior to applicable amendments persons who received a lump sum as compensation for services rendered over a period of years and who reported income on a cash basis, paid the tax on the accumulated amount in the year in which it was received.

In 1939 the Congress added section 107 to the Internal Revenue Code, § 220(a), Rev. Act of 1939, 26 U.S.C.A. § 107. By that section compensation for personal services rendered over a period of five or more years received in any taxable year beginning after December 31, 1938, was taxed at no more "than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period."

In 1941 the legislature added section 7.1 to the State Personal Income Tax Act to achieve uniformity with the Federal income tax law. The section provided that the tax attributable to compensation for personal services earned over a period of five or more years which was received in any taxable year beginning after December 31, 1939, should likewise not be greater than the aggregate of the taxes attributable to that compensation had it been received in equal portions in each of the years included in that period. The effect of the enactments was to permit the accumulated compensation paid in a lump sum to be spread over the years in which it was earned.

The urgency declaration in the California legislation provided that the statute should take effect immediately, that is on February 4, 1941.

The issues in the case were tried on stipulated facts. In March, 1933, the plaintiff, an attorney, was engaged to take legal steps to determine the interest of his client in an oil lease. As compensation for his services he was to receive one-half of a claimed five per cent oil royalty and the accumulations thereof when his client's title should be established. Proceedings were accordingly commenced and pursued through judgments, appeals and affirmances. The litigation was finally determined in favor of his client in April, 1940. At that time the plaintiff received the agreed compensation which consisted of $32,178.64 representing one-half of the accumulated royalties and an assignment of one-half of the five per cent royalty interest. In reporting his income for the calendar year 1940 the plaintiff invoked the provisions of section 7.1 of the Personal Income Tax Act and paid the tax computed on the income when spread equally over the years in which it was earned. Subsequently he was notified of an additional assessment demanded on the ground that section 7.1 of the Personal Income Tax Law could not constitutionally be retroactively applied to the taxable year 1940. The plaintiff paid the amount of the additional assessment under protest and brought this action to recover the amount paid.

The defendant contends that the retroactive application as provided in the Act would violate section 31 of Article IV of the California Constitution which prohibits a gift of public money. The argument is that the plaintiff's liability for the 1940 income tax accrued as of December 31, 1940, and that the lessening of the plaintiff's liability for that year amounts to a relinquishment on the part of the State of a portion of taxes as to which its right had vested.

It is not questioned that the statute was intended to have application to the taxable years beginning with January 1, 1940. The defendant questions its constitutional application to any taxable year which ended prior to the effective date of the act, February 4, 1941. It is also not questioned that the statute may constitutionally apply to a taxable year commencing in a year ending after the effective date of the act; but it is urged that it may not be considered applicable to the calendar year 1940 or any fiscal year commencing between January 1 and February 4, 1940.

[1] It may not rightly be contended that the urgency clause is insufficient to permit the immediate effectiveness of the enactment. Section 2 contains the legislative statement of the facts concerning the urgency. It is stated that in 1940 many taxpayers received lump sum payments of compensation for services rendered over the preceding five years; that because of the graduated tax rates they would be paying higher taxes on their income than others who received compensation in the year in which the services were rendered; that the disparity in the treatment of taxpayers receiving such accumulated compensation gave rise to an economic inequality which was declared to affect directly the public peace, health and safety; also because the due date for payment of the 1940 income tax fell on April 15, 1941, immediate effect was deemed imperative.

There is no merit in the defendant's contention that the legislative declaration was a statement of the public use of state moneys. The declaration was nothing more than the statement of the facts deemed to constitute the urgency necessary for immediate effectiveness pursuant to section 1 of Article IV of the constitution. But the position of the plaintiff that the enactment does not constitute a gift of public moneys is tenable and supports the disposition of this appeal adversely to the contentions of the defendant on that phase of the case.

There is no provision in the constitution forbidding retroactive effect of tax measures in proper cases. The effectiveness of statutes imposing taxes on income already earned, in the absence of considerations of arbitrary or capricious action, has been deemed constitutionally valid. Fernandez v. Wiener, 326 U.S. 340, 355, 66 S.Ct. 178, 90 L.Ed. 116; Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87, 118 A.L.R. 1142 and note page 1153 with citation of cases; Cooper v. United States, 280 U.S. 409, 50 S.Ct. 164, 74 L.Ed. 516. In those cases the rights of the taxpayer in the light of the constitutional requirements of equal protection and due process were considered. Under the state constitution prohibiting gifts of public money, the question is whether the legislature had the power to enact a provision the effect of which would be to reduce the amount of the tax on income otherwise returnable by the plaintiff in 1940.

The defendant does not question the policy and practice to cause state legislation and regulation to conform with federal laws on income tax matters. See Holmes v. McColgan, 17 Cal.2d 426, 430, 110 P.2d 428. However, in contending that the application of the statute to the calendar year 1940 as in this case amounts to a gift of public moneys for the private benefit of the taxpayer, the defendant assumes that the state's right in the tax vested at the close of that taxable year. The defendant relies on cases involving retroactivity in tax legislation other than that relating to income tax matters.

In Re Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788, it was held that the right to the statutory inheritance tax vested in the state when the tax was declared to be due and payable, namely at the death of the decedent, and that an amendment which reduced the tax could not apply retroactively where the decedent died prior to the effective date of the act. The state's ownership was held not to depend on actual possession of the funds produced by the tax but on the right to collect the tax which right had accrued and was vested when it was due and payable. Any other conclusion was held to contravene the constitutional provision prohibiting a gift of public moneys. That decision has been uniformly followed or not questioned in subsequent cases. Trippet v. State, 149 Cal. 521, 86 P. 1084, 8 L.R.A.,N.S., 1210; In re Estate of Martin, 153 Cal. 225, 94 P. 1053; In re Estate of Kennedy, 157 Cal. 517, 527, 108 P. 280, 29 L.R.A.,N.S., 428; In re Estate of Lander, 6 Cal.App. 744, 93 P. 202. In relation to transfers inter vivos, the state's right became a lien on the property at the date of the taxable transfer and was held to vest as of that time, although payable later. In re Estate of Potter, 188 Cal. 55, 204 P. 826.

[2] The principle that on pain of offending the constitutional prohibition the legislature cannot surrender the vested right of the state to a tax does not control the outcome in this case favorably to the defendant's contentions. In making these contentions the defendant has mistakenly assumed that accrued liability of the plaintiff resolved the question of when the state's right to the income tax vested. Following the cases relied on, the right of the state does not vest until the tax is due and payable which as here was not until April 15th following the close of the preceding calendar year. True the plaintiff cannot escape liability for the tax on income earned in 1940. The amount of the income may be determinable at the close of the year. But that fact does not control the time when the state's right to the tax becomes vested. As stated that right does not mature until the tax becomes due and payable.

[3] We are not here concerned with the question whether the legislature may change the rate of the tax after the close of the taxable year. Cf. Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 176, 39 P.2d 796. It may be assumed that under the state organic law changes in the rates may be enacted only in the taxable year to which they apply. No such changes were made directly. And it must likewise be concluded that they were not made indirectly. Our concern here is with retroactive changes relating to the personal income base to which unchanged rates apply.

The changed method of returning accumulated income concerns only certain taxpayers who are thereby placed in the same position as other taxpayers. It cannot be denied that the result is to reach all of the income received by the affected taxpayers and, as in the case of other taxpayers, at the rates applicable in the years in which it was earned. No income is freed from tax liability. Taxpayers in the situation of the plaintiff are in effect merely given the same opportunity as all other taxpayers to return their income for taxation in the year in which it was earned. The legislature has said that the tax produced at the rate so applicable is all that the state is entitled to and that the taxpayers affected by the change should be treated as are taxpayers who return compensation in the year in which it was earned. It is not inconceivable that a similar result might be accomplished where a taxpayer returns his income on an accrual basis. The legislature has in that wise permitted the taxpayer to return his accumulated earned compensation on an accrual basis where it was not otherwise feasible to do so. The cases relied on by the defendant were similarly held inapplicable where the legislative objective was to regulate the procedures by making a change in the method of collecting the state's tax revenues. Gartner v. Roth, 26 Cal.2d 184, 157 P.2d 361. There the legislature was concerned with replacing delinquent taxpayers on an equality by restoring a right originally possessed but which had been lost to some of them for a time. This court recognized that the state was entitled only to its tax moneys, that it was not giving away state property, and that the retroactive application of the act involved did not impair the state's right to payment of delinquent taxes.

[4] There can be no constitutional objection to the result which affects only the tax base as distinguished from a tax rate change where, as in this case, the provision was enacted prior to the time the tax should become due and payable. The provision was enacted and became effective prior to the time when the state's right to receive or collect the tax accrued. There is therefore no relinquishment of a vested state right.

From the foregoing it is concluded that by the express application of the 1941 provision to taxable years commencing January 1, 1940, there is no remission of taxes.

The remaining questions relate to the valuation of the royalty interest received and to the deductibility of 27½ per cent of the accumulated compensation as a depletion allowance.

[5, 6] Section 8(j) of the Personal Income Tax Act, cf. sec. 17314, Rev. & Tax. Code, stated the allowable deductions including that for depletion in the case of oil and gas wells. Section 9.5(b) (3), cf. sec. 17816, Rev. & Tax. Code, provided that the allowance for such depletion should be 27½ per cent of the gross income from the property during the taxable year, with exceptions not material here. For present purposes the provisions are noted as substantially similar to the related federal income tax provisions. The trial court allowed as a deduction for depletion 27½ per cent of the cash compensation received by the plaintiff. It must be concluded that the deduction was not allowable on the facts of this case. To allow it would result in an unauthorized deduction from the amount received by the plaintiff as compensation for services rendered. The accumulated compensation received by the plaintiff in 1940 was not paid to him as royalties on an interest owned by him. His client received double the amount as royalties on a 5% leasehold interest as to which his title was established in the final outcome of the litigation prosecuted on his behalf by the plaintiff. An amount equal to one-half of those royalties together with one-half of the five per cent royalty interest was received by the plaintiff as compensation for services rendered. Only from and after the time of that payment did the plaintiff become the owner of an economic interest in the leasehold. And only on royalties received on his interest from and after that time can he be said to have an interest as to which the depletion allowance may be attributable. Since he had no capital investment in the interest at and during the time of the performance of the services or until 1940 he had no interest subject to depletion. Kirby Petroleum Co. v. Commissioner of Internal Revenue, 326 U.S. 599, 66 S.Ct. 409, 90 L.Ed. 343; Helvering v. O'Donnell, 303 U.S. 370, 58 S.Ct. 619, 82 L.Ed. 903; Allen v. Commissioner, 5 T.C. 1232. The plaintiff's attempted distinction based on the fact that the courts in the cited cases referred to an economic interest in the "oil in place", which is not the nature of the property interest under California law, is unavailing. The time when the plaintiff became the owner of an economic interest in the property involved, whatever its nature, is the material and determinative factor. That question was involved and was decided adversely to him in his case before the federal tax court, Allen v. Commissioner, supra, 5 T.C. 1232. The foregoing decisions are persuasive that the trial court erroneously allowed depletion.

[7, 8] The defendant contends that the record does not support the trial court's finding that the 2½ per cent royalty interest received by the plaintiff was of no value. The plaintiff included the 2½ per cent royalty interest as part of his 1940 income but as of no value. In assessing the additional tax for the year 1940 the defendant had given it a valuation of $3,483.90. On the trial the plaintiff introduced evidence of shutting down the wells, their relative nonproductiveness, and the consequent low valuation. The defendant relied on the valuation of $3,483.90 found by the federal tax court in Allen v. Commissioner, supra, based on the evidence before that court. The defendant contends that the holding in that case has a binding effect here; also that the testimony of the plaintiff and his expert witness was inherently unsound and is insufficient to support the trial court's finding as to the value of the interest. The trial court could proceed only on the evidence before it. The decision of the federal court in the Allen case on the factual issues has no binding force here. That decision is controlling only as to questions of law under the doctrine of stare decisis. Since there is support in the record for the trial court's finding of no value as to the royalty interest the finding will not be disturbed.

The judgment is reversed with directions to the trial court to disallow depletion and reduce the amount of the judgment accordingly; with costs to the plaintiff.

EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

39 Cal.2d 146

PEOPLE v. LE BEAU.

Cr. 5275.

Supreme Court of California, in Bank.

June 20, 1952.

The defendant was convicted in the Superior Court, County of Alameda, of possession of cocaine, and he appealed. The Supreme Court, Gibson, C. J., held that where defendant testified on direct examination that he had never seen narcotics and would not know what they looked like, prosecution was entitled to introduce testimony of witness in rebuttal that defendant had some knowledge of cocaine.

Affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion 235 P.2d 850.

1. Criminal Law 🔑683(1)

In prosecution for possession of narcotics, wherein defendant testified on direct examination that he had never seen any narcotics and would not know what they looked like, prosecution was entitled to introduce testimony of witness in rebuttal that defendant had some knowledge of cocaine.

2. Witnesses 🔑380(5)

A party may impeach his own witness by use of prior inconsistent statements where he has been surprised and damaged by witness' testimony. Code Civ.Proc. §§ 2049, 2052.

3. Witnesses 🔑380(5)

Where witness in prosecution for possession of narcotics was placed on stand by prosecution for purpose of impeaching defendant's credibility and rebutting his testimony that he did not use narcotics, but witness denied any recollection of ever having made statement in district attorney's office that defendant had told her he used drugs, prosecution was entitled to correct damaging impression such testimony may have had on jury by cross-examining witness and by impeaching her with proof of her prior statement.

◆

Thomas L. Berkley, Berkeley, Joseph G. Kennedy, San Francisco, Clinton Wayne White and Charles E. Wilson, Berkeley, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., J. Frank Coakley, Dist. Atty., and Vernon L. Goodin, Deputy Dist. Atty., Oakland, for respondent.

GIBSON, Chief Justice.

Vernon LeBeau was convicted of possessing narcotics in violation of Section 11500 of the Health and Safety Code, and he appeals from the judgment and an order denying his motion for a new trial. Defendant does not contend that the evidence is insufficient to support the verdict, but he claims that the court erred in admitting evidence and in permitting the prosecution to impeach its own witness.

[1] A police officer testified that he searched defendant's room and discovered two capsules of cocaine in the pocket of a jacket which defendant admitted was his. LeBeau took the stand in his own defense and testified on direct examination that he had not seen the capsules before the officer discovered them, that he never had narcotics in his possession, "wouldn't know narcotics," and had "never been in contact with any of them." On cross-examination defendant was asked without objection if he had not been using narcotics for many years prior to his arrest, and he answered that he had not. He was then questioned as follows:

"Q. You are acquainted with Nancy Teeples, known as Nancy McDowell? A. I know Nancy.

"Q. Do you know who I am referring to? A. Yes, I do.

"Q. Isn't it a fact that on several occasions you have told her that you used cocaine? A. No, I never told anybody I used cocaine."

The prosecution called Nancy McDowell in rebuttal and asked if defendant had not told her that he used cocaine. She replied, "No." She was asked if she did not recall making a statement in the district attorney's office that LeBeau had told her on several occasions that he used cocaine. Mrs. McDowell replied "I don't believe that I stated anything that definite. I may have stated that from conversations that I have witnessed that the defendant talked about cocaine. Whether he used it, I would not know, and I have already told you that." She testified later that she had heard defendant "talking about cocaine."

The prosecution claimed surprise and called a police inspector who testified that Mrs. McDowell, when questioned in the district attorney's office before the trial, had said that defendant had told her that he used the drug. Mrs. McDowell was recalled by the prosecution, and, over defendant's objection, she testified that she remembered making a statement in the district attorney's office, but that she had not used the words attributed to her by the inspector.

There is no merit in defendant's contention that the court erred in admitting the testimony of Mrs. McDowell because it was immaterial and tended to show commission of another offense. Defendant testified on direct examination that he "wouldn't know narcotics" and had had no contact with them. Mrs. McDowell's testimony indicated that he had some knowledge of cocaine. It did not, however, tend to show the commission of another offense.

[2] Defendant also contends that the court erred in permitting the prosecution to impeach Mrs. McDowell. It is well settled that a party may impeach his own witness by the use of prior inconsistent statements where he has been surprised and damaged by the witness' testimony. See Code Civ.Proc. §§ 2049, 2052; Rystinki v. Central California T. Co., 175 Cal. 336, 342, 165 P. 952; cf. People v. Newson, 37 Cal.2d 34, 41, 230 P.2d 618; People v. Sliscovich, 193 Cal. 544, 553–554, 226 P. 611. No question is raised on this appeal as to surprise, and the sole problem to be determined is whether Mrs. McDowell's testimony prejudiced the People's case and warranted her impeachment.

[3] In support of his claim that Mrs. McDowell's testimony was not damaging, defendant relies on People v. Newson, 37 Cal.2d 34, 230 P.2d 618. In that case defendant was charged with murder and a witness for the prosecution was asked on direct examination if at the time of the crime she had seen anyone in a building where the killing had occurred. She replied "No, I didn't." Over objection, the district attorney was permitted to impeach the witness by proving her prior extrajudicial statements that she had seen defendant in the building at that time. The admission of her prior inconsistent statements was held to be error on the ground that her testimony " 'was purely of a negative character * * * neither favorable to one side nor the other' ", and was in no way damaging to the prosecution's case. 37 Cal.2d at page 44, 230 P.2d at page 624.

The Newson case did not, of course, purport to lay down a rule that all negative answers are harmless, and it is necessary to determine on the facts of each case whether the testimony of the witness sought to be impeached has actually damaged the party calling him. Here we are satisfied that the witness' answer was more than a harmless refusal to testify as expected and that it prejudiced the People's case. Mrs. McDowell was placed on the stand by the prosecution for the purpose of impeaching defendant's credibility and rebutting his testimony that he did not use narcotics. Her denial that defendant had ever told her that he used cocaine was likely to make it appear to the jury that the district attorney was harassing defendant and attempting to discredit him without any basis in fact by asking him on cross-examination if he had not told Mrs. McDowell that he used the drug. This impression might well have been aggravated in the jurors' minds by the fact that the subject of defendant's use of narcotics was brought into the case by defendant himself. Under the circumstances the prosecution was entitled to correct this damaging impression by cross-examining its own witness and by impeaching her with proof of her prior inconsistent statements.

Other contentions made by defendant are so entirely without merit that they need not be discussed.

The judgment and order are affirmed.

SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It is here held by the majority that the state may impeach its own witness by another witness on the basis of a claimed prior contradictory statement, even though the answer of the impeaching witness was not damaging or adverse to the prosecution. That result is reached by a process of reasoning that otherwise the state could be accused of harassing defendant by asking questions about prior contradictory statements without any basis—without showing that such statements had been made. This is directly contrary to People v. Newson, 37 Cal.2d 34, 230 P.2d 618, 622, and other decisions of the court and the District Court of Appeal. The rule is thus stated in the Newson case: "* * * [T]he prior statements inconsistent with the witness' present testimony *can only be considered for the purpose of neutralizing and counteracting the effect of his statements upon the trial.* The purpose of the statute is to allow a party to wipe out, as nearly as possible, the evidence which has been given. *Where a witness states no fact against the party calling him, there is nothing to counteract.* The *testimony* which may be contradicted must be *prejudicial and detrimental,* otherwise the previous statement shown would stand out, not as offsetting contrary testimony already given, but as substantive evidence of a fact." (Emphasis added.) In this case the "no" answer to the inquiry of whether defendant had told the witness, Nancy Teeples, that he was a narcotic addict, was in no way damaging or adverse to the state or beneficial to the defendant. No "fact against" the state was stated by the witness. Hence there was nothing to "counteract." Indeed, the prior statement, claimed to be contradictory, would "stand out, not as contradictory testimony already given, but as *substantive* evidence of the fact," which, of course, is not proper.

The majority opinion seeks to escape the holding in the Newson case, supra, by stating that the state had the right to counteract the impression that it was harassing defendant when it asked him whether he had made such a statement to the witness. Thus the state is permitted to lift itself by its own bootstraps. It is permitted, by the device of first putting the question to the defendant, to make the evidence of the impeaching witness stand out as substantive evidence. The effect is that little is left of the Newson case rule because it may easily be avoided by the prosecution by the simple method here used. Moreover, the state will always be able to claim that it is prejudiced in the eyes of the jury because it has called a witness who does not testify as expected, thus indicating bad faith on its part. If it may "counteract" that effect by calling the impeaching witness, then there is nothing left of the Newson case rule. Under that rule, as appears from the foregoing quotation, the *only* thing the person calling the witness may counteract is the *testimony* of the witness which damages him. He *cannot* "counteract" an unfavorable impression that may be made when such impression does not come from the witness sought to be impeached.

In People v. Mitchell, 94 Cal. 550, 29 P. 1106, it was held error to impeach a witness by former testimony where on the stand he said he had not said a certain thing. The court said, 94 Cal. at page 556, 29 P. at page 1108: "A witness, whichever party calls him, cannot be impeached unless he has given testimony against the impeaching party. This witness had not testified against the prosecution. He simply failed to testify to a fact which the district attorney thought he could prove by him. * * * The impeaching statements were evidently desired as evidence. If such testimony were admissible, it would be *easy to manufacture evidence of that kind.* Id.

witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements. It is only when he has given damaging testimony that he can be impeached." (Emphasis added.) In People v. Creeks, 141 Cal. 529, 75 P. 101, the facts were closely analogous. A witness for the prosecution, defendant's mother, did not live up to the prosecution's expectations and said she did not know what shoes defendant was wearing on the day of the crime (a vital matter as footprints were involved). It was held error to permit her impeachment by her testimony at the preliminary hearing that the shoes in question were worn. She had been asked if she had made such contradictory statements exactly the same as in the instant case. The court said, 141 Cal. at page 531, 75 P. at page 102: "The evidence (given at the preliminary) *was incompetent for any purpose.* * * * The testimony was sought to be elicited solely for the purpose of getting before the jury statements made by the mother on a prior occasion, tending to make out the case of the people. Where a witness called by a party has simply failed to testify to all that party expected or desired, but has not given *testimony against* him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case. As was said by Mr. Justice McKinstry in People v. Jacobs, 49 Cal. 384: 'To admit the proof of such statement would enable the party to get the naked declaration of the witness before the jury as independent evidence.' That such testimony is not authorized by the provisions of sections 2049, 2052, Code Civ.Proc., was squarely held in People v. De Witt, 68 Cal. 584, 588, 10 P. 212. The decisions of this court uniformly hold such testimony objectionable. See People v. Jacobs, 49 Cal. 384; People v. De Witt, 68 Cal. 584, 588, 102 P. 212; People v. Wallace, 89 Cal. 158, 164, 26 P. 650; People v. Mitchell, 94 Cal. 550, 566, 29 P. 1106; In re Kennedy ['s Estate], 104 Cal. 429, 431, 38 P. 93; People v. Conkling, 111 Cal. [616], 624, 44 P. 314; People v. Crespi, 115 Cal. [50], 55, 46 P. 863. Upon this subject, this court has never gone further than to hold that where a witness called by a party has given damaging testimony against him —as, for instance, if the mother had here affirmatively testified that defendant did not wear the shoes when he left her home —the party calling him may show that the witness previously made statements inconsistent with his present testimony, and this ruling is apparently upon the theory that the party was surprised by the adverse testimony given by his own witness." (Emphasis added.) A similar situation was presented in People v. Sliscovich, 193 Cal. 544, 553, 226 P. 611, 615, and the court there said: "While it is true that under the provisions of section 2049 of the Code of Civil Procedure a party producing a witness may show that the witness had made statements at other times inconsistent with the testimony as given upon the witness stand, still the privilege permitted by this section may not be invoked on every occasion. The purpose of the provisions of this section is to permit a party who has in good faith, produced a witness upon the stand in the belief that the witness will give certain testimony in support of the party calling him to show that prior to being called to the witness stand the witness made statements which, if admitted in evidence, would have been favorable to the party calling the witness. But to entitle a party to contradict his own witness by showing statements elsewhere made, and contrary to those made upon the witness stand, *it must appear not only* that the party was surprised by the testimony of the witness, but that such *testimony* was *prejudicial* to the case of the party calling the witness. Therefore, the mere failure of a witness to testify favorably for the party calling him, unaccompanied by any *testimony* which would tend to the prejudice of the case of the party calling the witness, will not entitle such party to show that the witness has elsewhere made contrary statements concerning the facts sought to be elicited from him. The witness in the instant case not having testified to anything that was prejudicial to the defendant and the defendant's case, the defendant was not privileged to invoke the provisions of the code section last above referred to." (Emphasis added.) To the same effect are In re Kennedy, 104 Cal. 429, 38 P. 93; People v. Crespi, 115 Cal. 50, 46 P. 863; People v. Cook, 148 Cal. 334, 83 P. 43; In re Estate of Dolbeer, 153 Cal. 652, 96 P. 266.

The majority opinion in the instant case cannot be reconciled with any of those authorities. It does not cite or attempt to distinguish any of them except the Newson and Sliscovich cases which are clearly indistinguishable.

It is clear that the ruling was prejudicial because the evidence admitted painted defendant as a depraved person—a narcotic addict. On that basis alone the jury may well have found him guilty.

I would, therefore, reverse the judgment.

SCHAUER, Justice.

I concur in the reasoning and conclusion of Justice CARTER.

111 Cal.App.2d 912

OPDYKE & BUTLER v. SILVER.

Civ. 8120.

District Court of Appeal,
Third District, California.
June 23, 1952.

Action by Opdyke & Butler, a co-partnership consisting of Paul Opdyke and Herman Butler, against Benjamin Silver to recover the balance due under a contract for remodeling. Judgments for plaintiffs in the Superior Court, Sacramento County, C. C. McDonald, J., and the defendant appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained the finding that the parties had abandoned the contract price limitation and proceeded upon a straight cost basis permitting recovery by the plaintiffs for the extras performed.

Judgment affirmed.

1. Contracts 🔑350(1)

In an action to recover the balance due on an oral construction contract for remodeling, finding that the written contract therefor had been abandoned on the day it was made, and that on such day an oral contract in lieu thereof had been entered into was not supported by the evidence.

2. Contracts 🔑247

In action to recover balance due upon an oral contract for remodeling of a building, evidence justified finding that parties had abandoned the price limitation in the contract and had proceeded upon a straight cost plus basis, permitting recovery by contractors for the extra work performed.

Carl Kuchman, Sacramento, for appellant.

McAllister & Johnson, Sacramento, for respondents.

VAN DYKE, Justice.

Respondents, a co-partnership, as plaintiffs, brought this action against appellant to recover an alleged balance due upon an oral contract. They alleged that on March 15, 1950, they entered into a written contract with appellant to do certain construction work in the remodeling of a building. They next alleged that on the same day and by mutual oral agreement the written contract was abandoned, and that the parties thereupon orally agreed upon the terms of a new contract; that they then adopted new plans and specifications to designate the work to be performed under the oral agreement and that respondent's compensation as to be on the basis of cost plus 10 per cent. Further alleging that cost of the completed work, plus 10 per cent, amounted to $24,253.79 and that only $17,652.38 had been paid, they prayed judgment for the difference. Appellant answered, admitting that the written contract had been entered into and that the compensation thereunder had been cost of the completed work, plus 10 per cent, but appellant alleged that the written contract provided for a maximum limit as to cost of $15,900. He denied that this contract had been abandoned and alleged that all the work that had been done by respondents had been done pursuant to it and under plans and specifications made a part of it. The controversy between the parties centered around this matter of the alleged abandonment of the written agreement and the substitution of an oral contract in lieu thereof. The trial court found that on March 15, 1950, the parties had entered into a written contract and that under it respondents were to perform certain construction work for appellant at cost plus 10 per cent, with total cost not to exceed $15,900; that on the same day and by mutual oral agreement the written contract was abandoned, new plans and specifications were prepared, orders for new and different work were given to respondents and that the parties orally agreed upon a new contract whereby the work was to be done in conformity with the new plans and specifications and the new orders at cost plus 10 per cent, without a maximum limit; that the work had been done, and that the difference between the amount paid and the amount earned amounted to $6,600.52. Judgment accordingly followed.

[1] It is not disputed that on the date alleged a written contract was entered into; that plans and specifications as drawn by an architect were made a part of it and that the contract so executed was full and complete as a construction contract. It contained the usual provisions for supervision of the work by the architect as the work progressed, for the making of progress payments based upon statements for labor and materials incorporated in the work, furnished by the contractor from time to time and approved by the architect. Appellant was given the contractual right to order changes in the work, the contract price to be adjusted accordingly but it was stipulated that all such orders and adjustments should be in writing and that claims for extra cost must be made in writing before executing the work involved. It is appellant's contention that although numerous and material changes were made in the work to be done by respondents during the course of construction, beginning quite early in the history of the work, yet that these changes were made under the written contract; that though they may have justified claims for extra cost neither these changes nor anything else occurring worked an abandonment of the written contract and the mutual adoption of an oral contract. Appellant, therefore, argues that respondent's recovery would have to be in accordance with the written contract limited by the maximum price save for allowable extras, less allowable deductions, where changes worked a saving. Appellant argues further that, there being no support in the record for the court's finding of abandonment of the written agreement, it results that the proof made by respondents was wholly inadequate to support findings or judgment, since it consisted of a running account of work done and material installed by respondents and their sub-contractors without consideration of the maximum price. On the contrary, respondents contend, in line with the findings and judgment of the trial court, that the written contract was abandoned, that the oral contract substituted therefor contained no maximum nor other contract price save cost of labor and material plus 10 per cent and that, therefore, it was proper to prove the amount earned and unpaid by the introduction of their ledger account of such cost of labor and material.

[1] Though the trial court found that the written contract had been abandoned on the very day it was signed, we note that respondent Opdyke, while he testified in respondents' behalf as to the abandonment of the written, and the adoption of the oral, contract, with different plans and specifications governing work to be done, yet he did not claim, though he appears to have been the managing agent of the partnership in respect of the appellant's work, that there had been an abandonment until May or June, after work had been under way for a considerable time. And no testimony was given that the parties ever expressly agreed to abandon the written contract or to adopt the alleged oral agreement. Opdyke simply assumed, according to his testimony, that such abandonment and adoption had been worked by reason of the constant changes, and the constant interference with

the work, by appellant. He testified that he contended there came a time when the written contract no longer applied and they were no longer working under it and that this occurred upon a day when appellant, expressing dissatisfaction with the architect's services, told Opdyke that he (Opdyke) was as good an architect as the one the parties had agreed upon and for him to go ahead and run the job as he saw fit. He said "That contract [the written contract] was based upon the plans and specifications as they were originally drawn. There being numerous changes that developed that in my opinion made the contract, drawn as it was stated in the original agreement a cost-plus agreement." This culminating incident, in the opinion of respondent Opdyke, worked the abandonment of the written contract with its maximum price limitation and its provisions for extras, and amounted to the making of a new agreement, on a straight cost plus basis. He could fix no definite date for this happening, but said it was about the time when they had started the plastering and was either in May or June of 1950, some two months after the written contract was executed and some six weeks after the building permit was taken out and the first labor costs incurred. In addition to the foregoing and as pertinent to the question of when, if at any time, the abandonment of the old and the adoption of a new contract occurred, Opdyke testified that he submitted bills regularly to appellant which were approved by the architect and paid. He identified bills dated May 2d, June 2d, July 13th and August 1st of 1950. The bill of July 13th resulted in a "Certificate of Payment" issued by the architect for the amount called for in the sum of $8,767.63. The certificate referred to the "Original Amount of Contract" in the sum of $15,900.00 and to "Extras" in the sum of $305.51, which, according to the certificate, raised the contract price to $16,205.51. The architect stated on the certificate this total sum did not include "extra changes by the owner". The certificate certified that there had been theretofore approved by the architect the sum of $6,032.70, which, when added to the face of the certificate, made a certified total of $14,800.33, leaving a balance on the original contract, plus allowed extras, and without extra changes by the owner of $1,405.18. Opdyke acknowledged over his signature upon the face of the certificate that he had received the payment called for by the certificate. At this point we may here say that, in view of the foregoing evidence, we think it clear the trial court's finding that the written contract had been abandoned on the day it was made, and that on that day an oral contract in lieu thereof had been entered into is without support by, and is contrary to, the evidence.

But we think also that the precise or even the approximate day the written contract was abandoned and the oral one adopted, if such occurrences took place, is not material. If, taking the evidence most favorably to respondents, there be anything from which it may be inferred that at any time during the course of construction there was an abandonment of the written contract, either actual or implied, and a substitution therefor of an oral contract on a straight cost plus basis, then the judgment must be affirmed, for there is on the record no room for dispute that the actual cost was as found by the trial court. We will examine the record further to see whether the judgment may be sustained on such a theory.

Respondents do not rely upon any evidence of express abandonment; but they say that abandonment may be implied from the acts of the parties. They quote from O'Loughlin v. Poli, 82 Conn. 427, 74 A. 763, 765, where the court said:

> "* * * the parties to a written contract of the character of the one under review are as free to alter it after it has been made as they were to make it, and all attempts on their part by its terms to tie up their freedom of dealing with each other will be futile. * * * To this end parol agreements will be as effective as written ones. * * * And implied agreements satisfactorily established will have all the force of express ones."

They quote further from the opinion of Justice Holmes written in Bartlett v. Stanchfield, 148 Mass. 394, 19 N.E. 549, 550, 2 L.R.A. 625, where that noted jurist said:

> "* * * Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant, no doubt. But it cannot be assumed, as matter of law, that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way, and by any mode of expression, they saw fit. They could substitute a new oral contract by conduct and intimation, as well as by express words." (See, also, 66 A.L.R. 649, and Bavin & Burch Company v. Bard, 81 Cal.App. 722, 255 P. 200, and cases cited.)

Respondents say they made out their case in accordance with the foregoing statements of the law and they recite the following testimony in support of that contention. From the very start of the work appellant constantly changed his mind concerning the construction, and the completed alterations differ markedly from the blueprints and specifications attached to the original contract. Appellant himself admitted the following changes made with his knowledge and at his request:

1. The stairway to the second floor was removed after it had been constructed, and a new stairway built with different risers.

2. The stairway from the main floor to the basement was changed.

3. A new and different counter was built on the first floor.

4. A stair rail was added to the basement stair.

5. There were two change orders in the basement, and then the basement was reconstructed according to the first change order, with changes therein requested by appellant.

6. A curved watchmaker's bench was installed instead of a straight one, and at least 15 new drawers constructed.

7. A change in the optometrist's refraction room required the removal and rerouting of pipes rather than furring in the pipes.

8. Plywood was substituted for plasterboard in the construction of basement partitions.

9. Plastering was changed due to the change in lighting systems.

10. The entire lighting system was changed to provide recessed lighting rather than dropped fluorescent lighting.

11. This required the lowering of the ceiling to accommodate the lighting system.

12. There were additional lights added to the system.

13. There were additional electric plugs placed wherever appellant or members of his staff requested them.

14. A pipe was torn out of the wall and replaced because of a leak.

15. Office furniture was planed down and repainted.

16. The safe was to fit under a stairway. However, the space was filled with drawers, and the safe was covered with hardwood on three sides.

17. The safe was fitted with drawers and shelves for the storing of jewelry.

18. A new counter was placed in the dentist's office upstairs.

19. Wall cases were moved out from the wall, and this involved plastering behind the cases.

20. The partition for the optometrist's room had to be removed and changed at the request of appellant.

[2] We think there can be no doubt that these numerous changes, some minor it is true but many of which must have interrupted the orderly progress of the work, materially increased the contractor's cost and forced the doing of the work under disadvantageous circumstances. These changes began even before the work was started, and evinced a high degree of uncertainty on the part of appellant as to what he wanted done. They show the early adoption and consistent use of a policy of demanding changes and even reconstruction after portions of the work were completed. This goes far toward supporting the soundness of the trial

court's conclusion that the original contract was in fact abandoned. There was other evidence that should be mentioned, tending to the same conclusion. Although the written contract, as noted, provided that all change orders should be approved by the architect, should be in writing, and the contract price should be adjusted accordingly before the work was done, yet the parties consistently ignored this requirement in material part. Although at the very beginning two change orders were made in writing, no adjustment in price was made and no further written orders were used. Opdyke testified that there was a pretty consistent running fire of change and suggested change on the part of appellant, with nothing said as to price except appellant's saying "That won't cost very much will it?". Apparently no answer was expected; certainly none was required. The electrical installation was radically changed and the cost greatly increased. For the most part no serious attempt was made between the parties to follow the contract requirement of separately charging for extras. Some extras were charged it was true, as has been stated, and for a while an attempt was made to carry the work along on the basis of contract work and extra work, but long before the work was completed this system seems to have been departed from. And even in the architect's certificate of July 14th hereinbefore discussed there was an express reservation, which the architect said the respondents insisted upon, that the net amount of extras therein stated did "not include extra changes by the owner." It appears that appellant paid the certified amount without asking any explanation of that reservation. Furthermore appellant paid sums substantially over the maximum limit stated in the written contract without asking justification as extras. The original plans call for seven fluorescent light fixtures to be added without additional wiring, but when the electrician began work conditions showed up in the old walls necessitating radical changes in order to comply with applicable building laws and it appears that to a great extent appellant directed extensive electrical installations be made without so much as consulting respondents. Opdyke so testified, adding that even at the time of the testimony he did not know what wiring was done, but could see, after the electrician started, that he was not following plans and specifications as to wiring. He said further that he discussed the matter with appellant who said that the electrican had gotten along with him so well on a residence he had wired for appellant that he would handle the electrician, and Opdyke was to leave the wiring up to appellant. By projecting himself into the daily work of performance and by himself joining in ignoring the stipulation for written change orders and price agreement for extras before the work was done appellant participated in, if he did not compel, the destruction of the device intended to make and to keep clear the separation of extras from contract work, which device was badly needed to make the maximum price agreement workable. The provision that appellant could require changes was not intended to permit him to destroy the identity of the contract work. Without going further into the details of evidence, it does appear that from a time even before work had started and until the completion of the job, the parties had in many respects disregarded the terms of the written contract; that appellant had arrogated to himself the right to make sweeping changes without arriving at cost and, in short, that he completely took over the minute directing of work to be done, whether it complied with the plans and specifications attached to the written agreement or not. One result was that the cost to the contractor must have been greately increased so as to make it unfair that, having dictated what was to be done without bothering to agree upon the price, appellant should now be permitted to plead the maximum price provision which he himself had made inapplicable and unjust. While we do not think the specific holding of the trial court that the written contract was abandoned on the date of its making can be sustained, we think that the trial court was well justified in determining that, by the course of conduct which the parties adopted, they abandoned the price limitation and proceeded upon a straight cost plus basis. That is all that is necessary to warrant the upholding of the judgment.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

111 Cal.App.2d 824

PEOPLE v. CAMPBELL.

Cr. 768.

District Court of Appeal, Fourth District.
California.
June 19, 1952.

Defendant was confined under sentences for statutory rape and committing lewd and lascivious acts and he filed petition for writ of error coram nobis, on ground of newly discovered evidence. The Superior Court of San Diego County, John A. Hewicker, J., denied writ, and petitioner appealed. The District Court of Appeal, Griffin, J., held that purpose of such writ is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it, and which through no negligence or fault of defendant, was not then known to the court.

Affirmed.

1. Criminal Law 🔑997

Petition for writ of error coram nobis on ground of newly discovered evidence did not entitle petitioner to relief from conviction when the alleged newly discovered evidence was either known or should have been discovered by defendant at time of trial by use of reasonable diligence, and when there was no allegation that petitioner had been prevented by extrinsic causes from offering same.

2. Criminal Law 🔑997

The purpose of a writ of error coram nobis is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it, and which, through no negligence or fault of defendant, was not then known to the court.

3. Criminal Law 🔑997

Attacks by defendant on credibility of prosecuting witnesses are matters commonly adjudicated on motion for new trial, or on appeal from order denying a new trial, or from the judgment, and are not matters reviewable by writ of error coram nobis.

4. Criminal Law 🔑997

Petition for writ of error coram nobis is not proper procedure for raising contention that adult authority had erroneously fixed term of imprisonment.

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Franklin B. Orfield, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant, on October 4, 1945, was charged in count one of an information with committing, on or about March 30, 1943, lewd and lascivious acts on the body of one Barbara Campbell (aged 12 years); in count two with statutory rape with the same person on or about May 13, 1945; in a third count with sexual intercourse on or about March 15, 1945 with one Virgene Lyons, aged 16 years; and in a fourth count with an act of sexual intercourse with her on May 15, 1945.

Defendant was represented by his counsel, entered a plea of not guilty, and after a jury verdict of guilty on all counts, the defendant was sentenced to state's prison, sentences to run consecutively. No motion for a new trial was made and no notice of appeal from the judgment was taken. On August 27, 1951, about six years later, plaintiff in propria persona filed a document in the Superior Court denominated "Petition for Writ of Error Coram Nobis", which writ was denied. Immediately thereafter, he again filed such a petition and "Addenda Thereto", in which it is generally charged that it was filed "for the purpose of exoneration and vindication from an erroneous conviction and sentence had in the above entitled court, by trick and device and extrinsic fraud by false testimony given in 'Proxy'." Defendant now prosecutes this appeal from the order denying his petition. He claims on appeal that certain facts existed which, if known by the defendant and presented to the trial court, would have prevented the rendition of the judgment of guilty. In his statement of facts, which is an admixture of factual and argumentative material, the defendant quotes some of the claimed testimony produced at the trial by the prosecution. The record on appeal does not include the reporter's transcript of the trial proceedings.

[1] To epitomize defendant's argument, it is based upon the alleged weakness, falsity, improbability and impossibility of the statements made by the two witnesses for the state, against whom the crimes were committed. Defendant also attempts to prove by affidavits from various persons that the crimes alleged to have been committed on certain days could not have been so committed because the two girls were either in school or church or that he was at work on those days. Nowhere does defendant allege that he was prevented by extrinsic causes from offering the newly discovered evidence contained in the affidavits. The newly discovered evidence was either known or should have been discovered by the defendant by the use of reasonable diligence. Suffice it to say that defendant stood in loco parentis to Barbara, and because of such relationship he, more than anyone else, should have known at the time of trial of the alleged facts that he now claims he later discovered. He endeavors to account for the delay in instituting this proceeding on the claimed ground that he was unable to employ counsel, compelled to study law in the prison to "find a case in point similar to" his; that his spasmotic access to books and the securing of evidence to support his assignments of error and in obtaining the attention of the courts to act, were difficult tasks and caused the delay.

[2] The cases are legion which announce the narrow scope or limitations of this writ. The purpose of it is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it, and which through no negligence or fault of the defendant, was not then known to the court. People v. Schuman, 98 Cal.App. 2d 140, 219 P.2d 36; People v. Ingles, 97 Cal.App.2d 867, 871, 218 P.2d 987; In re Sprague, 37 Cal.2d 110, 230 P.2d 633; In re Lindley, 29 Cal.2d 709, 177 P.2d 918; People v. James, 99 Cal.App.2d 476, 222 P. 2d 117; People v. Tuthill, 32 Cal.2d 819, 198 P.2d 505.

[3] The attacks made by defendant in reference to the credibility of the prosecuting witnesses are answered by the same principle of law set forth in the cited cases. These grievances are matters commonly adjudicated on a motion for new trial, or on an appeal from an order denying a new trial, or from the judgment, and are not matters reviewable by writ of error coram nobis. People v. Knight, 73 Cal. App.2d 532, 166 P.2d 899. The trial court was justified in denying the issuance of the writ.

[4] In some supporting affidavits presented with this petition on appeal, defendant claims that a duplicate commitment of him to the state's prison was issued by the Superior Court and that the Adult Authority, in certifying its action taken on June 19, 1950, to the Department of Corrections, in fixing the term of imprisonment, erroneously fixed the term of sentence. These are not matters that can be raised on a coram nobis proceeding. If there is merit to the claim an appropriate remedy exists which may be used at the proper time. Sec. 1487, Penal Code; In re Morck, 180 Cal. 384, 181 P. 657; 13 Cal.Jur. 243, sec. 22.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

112 Cal.App.2d 8

ALTMAN et al. v. PEIRANO et al.

Civ. 14833.

District Court of Appeal, First District,
Division 2, California.

June 25, 1952.

Rehearing Denied July 25, 1952.

Actions by Clark Altman, and by Marie Smith, against Richard Peirano and others, for death of sons who were riding bicycle when struck by automobile. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgments on verdicts returned for defendants, and denied new trials and plaintiffs appealed. The District Court of Appeal, Goodell, J., held that if bicyclist turned onto through highway from asphalt shoulder running parallel thereto, at point other than intersection, he had no right of way superior to that of approaching motorist.

Judgments affirmed.

1. Highways 🔑47

Asphalt shoulder running parallel to through highway, from which bicyclist turned onto highway, was portion of highway, although not roadway portion thereof. Vehicle Code, §§ 82.5, 83, 84.

2. Automobiles 🔑171(4)

If bicyclist turned onto through highway from asphalt shoulder running parallel thereto, at point other than intersection, he had no right of way superior to that of approaching motorist. Vehicle Code, §§ 82.5, 83, 84, 550–555.

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Dana, Bledsoe & Smith, San Francisco, for appellants.

Hoge, Pelton & Gunther, Reginald M. Watt, San Francisco, for respondents.

GOODELL, Justice.

On November 3, 1945 George Altman and Billie Welcher, 13-year old boys, were killed when an automobile driven by respondent Richard Peirano struck the bicycle on which they were riding. Two actions were brought, one by appellant Clark Altman for the death of his son George, the other by appellant Marie Smith for the death of her son Billie. They were consolidated for trial and in each case the verdict was for the defendants for costs. New trials were denied and these appeals were taken.

The sole question presented for decision is whether there was prejudicial error in the rejection of an instruction tendered by the plaintiffs.

Highway 29 runs in a general northerly and southerly direction. About a half mile south of Napa a road known as Silverado Trail, the general direction of which is northeasterly and southwesterly, forms a junction at an angle of about 45 degrees with Highway 29 and ends there.

Highway 29 is a "through highway" as defined by § 82.5 Vehicle Code and at its junction with Silverado Trail there is an arterial stop sign directed to traffic entering from Silverado Trail.

The collision occurred either immediately south of, or possibly within, this junction between 5:30 and 5:45 on a Saturday evening. George was operating the bicycle and Billie was riding on the handle-bars. It was after sunset (which was at 5:09 or 5:10) about dusk, visibility was very poor, and some of the cars in the heavy stream of traffic had headlights lighted while others had not.

Highway 29 has a 4-lane roadway which, northerly of the junction, is 48 feet wide while southerly thereof it is 57 feet wide. Northerly of the junction there is a 6-foot asphalt shoulder running along the westerly edge of the 48-foot roadway and a 6-foot sidewalk running parallel to the shoulder on *its* west. This sidewalk comes to an end at a point about opposite the center of the junction. Another sidewalk starts within or just below the junction but across the highway, on its east side, and runs southerly. The gap between the southerly end of one sidewalk and the northerly end of the other is about 50 feet.

The speed limit at the point of collision was 55 miles per hour and several defense witnesses, including respondent Richard Peirano, testified that he was traveling at about 45; one of the plaintiffs' witnesses, however, testified that he was going 70. The bicycle, traveling southerly at 6 or 7 miles per hour, was ahead of Peirano's car, traveling in the same direction, both vehicles in the inside or fast lane. Peirano testified that when he first saw the bicycle it loomed up "directly in front of me" at a distance of about 40 feet; that he applied the brake and swerved to the left to avoid running it down but, because of oncoming traffic, had to swerve back to the right. In one of these swerves, the bicycle was hit. The boys were thrown a long distance and died instantly.

The rejected instruction (No. 25) reads:

> "I instruct you that if you find from the evidence that the bicycle was being operated from the shoulder of the road to and upon the main highway that the operator of said bicycle had the right-of-way over all vehicles upon the highway, if any, which were so far distant as not to constitute an immediate hazard at the time said bicycle entered upon the main traveled portion of the highway. In other words, if at the time a bicyclist enters upon the paved portion of the road an approaching vehicle is so close as to constitute a hazard, then said bicyclist must yield the right-of-way to said approaching motorist. On the other hand, if an approaching motorist is so far away that he does not constitute an immediate hazard to the operation of said bicycle upon and across the highway, then the bicyclist has the right-of-way and the motorist must yield the same to the bicyclist."

Appellants contend that the theory on which their actions were tried called for the instruction and that it was prejudicial error to refuse it. Respondents, without questioning the rule requiring instructions to be given on the theories of both sides, contend that there was no evidence whatever to support appellants' theory or require such instruction, and in their brief they challenged appellants to point out the testimony relied on.

Daniel Conley, who testified for the defense, was the only witness who saw the bicycle immediately before the crash. He testified that when he first saw the boys on the bicycle "They were coming off the Silverado Trail * * * headed out towards the middle of the highway" which means, of course, an entry from a *northeasterly* direction where there is a stop sign.

The claim of the plaintiffs was that the bicycle entered from the 6-foot shoulder (adjoining the paved roadway on the *west*) at or about the point where the westerly sidewalk ends, and that the purpose of the boys was to cross the highway from west to east and then proceed southerly on the easterly sidewalk.

The only testimony in the record (quoted by appellants in response to respondents' challenge) is that of appellant Clark Altman to the effect that he had always told his son that when bicycling southerly from Napa he should not use Silverado Trail but should first use the westerly sidewalk and then cross over where it ends at the junction and resume his southerly trip on the easterly sidewalk; also *that about 15 minutes before the crash* he had seen his son George with Billie at a service station on the *west* side of the highway about a half mile north of the junction. Respondents argue that such testimony does not tend to prove that the boys traveled on the westerly sidewalk instead of Silverado Trail on this particular occasion.

It is not necessary to decide whether or not this testimony supports appellants' theory, for if the tendered instruction was not a correct statement of the law it was properly refused, regardless of the theory on which it was tendered.

Appellants contend that "The law embodied in appellants' proposed instruction No. 25 properly outlined the rights and liabilities of persons who enter a through highway *at a point other than an intersection*" (Emphasis ours, not appellants'). The last few words state the real point of appellants' whole argument.

"'Intersection' is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles *or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict*." § 86, Veh.Code: emphasis added. An instruction to that effect was given. Instructions were also given respecting the entering of a "through highway" §§ 82.5 and 552, Veh.Code.

If, as appellants argue, the bicycle entered the roadway a short distance south of the end of the westerly sidewalk opposite the Adobe Hut, it would appear probable that it entered *at the intersection itself*, rather than "at a point other than an intersection". See Ades v. Brush, 66 Cal.App.2d 436, 446–448, 152 P.2d 519.

However that may be, appellants argue that the refusal of the instruction "left the jury with the impression that unless the boys entered the highway from Silverado Trail they had no rights whatsoever." The only *rights* with which their instruction dealt were *rights of way*, and such rights are defined by statute.

In support of their contention that the instruction "correctly states the rights and liabilities of persons who enter a highway *at a point other than an intersection*" (emphasis added), appellants point to the construction which has been given to § 553, Veh.Code by such cases as Shannon v. Thomas, 57 Cal.App.2d 187, 196, 134 P.2d 522, McDougall v. Morrison, 55 Cal.App.2d 92, 95–97, 130 P.2d 149, and Jansen v. Sugiyama, 29 Cal.App.2d 717, 85 P.2d 476, which they cite.

The chapter of the Vehicle Code covering the subject "Right of Way" is composed of six sections (550–555). Section 550 deals with "Vehicle Approaching or Entering Intersection"; § 551 with "Vehicle Turning Left at Intersection"; § 552 with "Vehicle Entering Through Highway"; § 554 with "Operation of Vehicles and Street Cars on Approach of Authorized Emergency Vehicles", and § 555 with "Equestrian Crossings".

Section 553 read at the time as follows: "The driver of a vehicle about to enter or cross a highway from an alley not exceeding a width of 16 feet, or any private road or driveway shall yield the right of way to all vehicles approaching on said highway."

None of the six sections goes so far as to prescribe the right of way of a person entering "'a through highway at a point other than an intersection.'" Section 553 is limited in its terms. All three decisions cited by appellants, Shannon v. Thomas, McDougall v. Morrison, and Jansen v. Sugiyama, supra, are cases where the vehicle entered the highway from a private road or driveway, clearly within the terms of § 553. Moreover, every reported case under § 553, as far as our own research has disclosed, has dealt with that situation or with an alley. In other words, the authorities up to date have never attempted to broaden the scope of § 553 beyond alleys and private roads or driveways.

Section 82, Veh.Code defines a "'Private road or driveway'" as "a way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other members of the public." An alley needs no definition.

[1] At the junction there was no alley or private road or driveway; there was no artery, roadway or opening of any kind into the highway on its westerly side. By statutory definition, § 84 Veh.Code, the sidewalk on which it is claimed the bicycle traveled was a portion of Highway 29. The shoulder from which the bicycle is claimed to have entered certainly was a portion of Highway 29, although not the roadway portion thereof, § 83, Id.

In McDougall v. Morrison, 55 Cal.App.2d 92, 96, 130 P.2d 149, 151, supra, relied on by appellants, plaintiff's car was entering El Camino Real from the driveway of his home when side-swiped by defendant's car traveling on the highway. Defendant contended on his appeal that he was entitled to the right of way as a matter of law under the language of § 553 ("shall yield the right of way to all vehicles approaching on said highway"), but the court said:

> "The true rule is that, under the section of the Vehicle Code above quoted, it is made the duty of the driver of an automobile entering the highway from a private drive to look for approaching cars, and not to proceed if one is coming, unless, as a reasonably prudent and cautious person he believes, and has a right to believe, that he can pass in front of the other in safety. Wakefield v. Horn, 109 Cal. App. 325, 293 P. 97; see, also, Conley v. Marvin, 210 Cal. 330, 291 P. 830; see cases collected 5 Am.Jur. p. 670, § 306; [24 A.L.R. 946]".

Shannon v. Thomas, 57 Cal.App.2d 187, 196, 134 P.2d 522, where plaintiffs were entering (or had already entered) the highway from the driveway of a drive-in restaurant, is to the same effect, and so is Jansen v. Sugiyama, 29 Cal.App.2d 717, 720–721, 85 P.2d 476. In the two last-cited cases the court points out that at the time of impact the car in question was not about to enter or cross a highway, § 553 but had already progressed into the channel of traffic. Such apparently was the case here since at the time of impact both bicycle and automobile were in the same lane, the former ahead of the latter.

All three cases deal with situations within the terms of § 553. It would appear that instruction No. 25 was patterned on those cases, but since the entry here was not, under *any* theory of the case, from an alley or private road or driveway, the language of the instruction had no statutory foundation on which to rest. Appellants point to no provision of the Vehicle Code other than § 553, in support of their contention.

[2] The instruction did not contain a correct statement of the law. Had it been given it would have laid before the jury a right of way rule which the legislature has not see fit to enact. It follows that it was properly refused.

Appellants contend that another instruction—one on contributory negligence of parents—emphasized and aggravated the failure to give No. 25. They do not claim that the giving of the other instruction was error. If, as we have held, the refusal of No. 25 was proper, there is no reason to discuss this additional point.

The judgments are affirmed.

NOURSE, P. J., and JONES, Justice pro tem., concur.

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112 Cal.App.2d 41

LAMB v. HILL et al.

Civ. 4283.

District Court of Appeal, Fourth District, California.

June 25, 1952.

Ella Louise Lamb sued W. H. Hill, Sr., and Sue M. Hill, copartners doing business under the firm name and style of Mission Hills Bakery, and others for injuries allegedly sustained by reason of defendants' service to plaintiff of a chicken pie containing a splinter of bone. The Superior Court, San Diego County, C. M. Monroe, J., rendered judgment against plaintiff, and she appealed. The District Court of Appeal, Mussell, J., held that the customer was not entitled to expect entirely boneless chicken pie in every instance.

Affirmed.

Food 🔑25

Cafe owner was not liable, on grounds of negligence, for injuries sustained by customer as result of swallowing fragment of chicken bone contained in chicken pie purchased by customer, since customer was not entitled to expect an entirely boneless chicken pie in every instance.

◆

Johnson & Johnson and Harry V. Ashfield, San Diego, for appellant.

Nottbusch & Nottbusch, San Diego, for respondents.

MUSSELL, Justice.

In this action a general demurrer to plaintiff's complaint was sustained, with leave to amend, and plaintiff having declined to file an amended pleading, a judgment was entered against her, from which she appeals.

The facts upon which this action is based, and as alleged in the complaint, may be summarized as follows: On March 14, 1951, plaintiff entered the defendants' place of business, a bakery and cafe, in the city of San Diego, for the purpose of purchasing food, seated herself at a table provided by defendants, and for a consideration, purchased from the defendants a food product known and designated as "chicken pie". It is alleged that the condition of said pie was wholly latent and unknown to plaintiff; that said pie was manufactured and prepared by defendants prior to plaintiff's entry into said place of business and in the construction and baking of the same, the defendants so carelessly and negligently conducted themselves in and about the preparation and baking of the same as to cause a splinter of bone to be and remain concealed in said pie and that said defendants carelessly and negligently served the same to the plaintiff for her consumption on the premises; that while eating the pie, the said splinter of bone lodged in plaintiff's throat and esophagus; that it scratched and lacerated her throat, causing what is termed as a "spasm", which at the time caused a partial paralyses of her vocal cords; that as a proximate result, she was unable to speak or articulate for a period of several weeks and as a proximate result suffered pain, mental worry, anxiety and distress; that she still continues to suffer from "spasms" which interfere with her articulation; that she has been prevented from engaging in her usual vocation and business for a period of approximately six weeks and has suffered special and general damages, as set forth in the complaint.

The sole question presented is whether the complaint sets forth facts sufficient to constitute a cause of action against the defendants. This question must be answered in the negative.

This action is based on negligence and the facts pleaded do not establish a lack of due care on the part of the defendants. In Mix v. Ingersoll Candy Co., 6 Cal.2d 674, 59 P.2d 144, the plaintiff attempted to state a cause of action based upon negligence, alleging facts substantially as pleaded by plaintiff herein. In that case the court held that the restaurant keeper, in the exercise of due care, was not required to serve in every instance a perfect chicken pie, in that all bones are entirely eliminated; that the customer had no right to expect such a perfect product and that it was not negligence on the part of the restaurant keeper to fail to furnish an entirely boneless chicken pie. In that case the decision of the trial court in sustaining a demurrer to the complaint was affirmed and the decision is controlling in the instant action. See also Silva v. F. W. Woolworth Co., 28 Cal.App.2d 649, 83 P.2d 76.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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111 Cal.App.2d 853

In re STROBECK'S ESTATE.

LEWIS et al. v. BETHESDA LUTHERAN CHURCH et al.

Civ. 4281.

District Court of Appeal,
Fourth District, California.
June 20, 1952.

Proceedings in the matter of the estate of Emily Strobeck, deceased, in which Mrs. Elmer Lewis, and others, filed petition for partial distribution on ground that bequests to charitable institutions, consisting of Bethesda Lutheran Church, and others, had failed. The Superior Court of San Diego County, John A. Hewicker, J., entered order vacating former order admitting to probate a will of testatrix of October 5th, 1950, and admitting to probate both such will and a prior will, and Mrs. Elmer Lewis, and others appealed, and Bethesda Lutheran Church, and others, cross-appealed. The District Court of Appeal, Mussell, J., held that where charitable legatees had not had notice or knowledge that two wills were being offered for probate, and neither document had been filed with clerk on date of filing of notice of hearing of petition for probate, and when record would support reasonable inference that Judge did not intend to find, and could not legally find, that 1950 will was admissible to probate, vacation of order admitting same to probate was not an abuse of discretion.

Order affirmed in part and reversed in part.

1. Wills 🔑355

A party may be relieved from an order or other proceedings in probate by reason of mistake, inadvertence or excusable neglect. Code Civ.Proc. § 473.

2. Appeal and Error 🔑957(1)
Judgment 🔑363

Provision of Code of Civil Procedure permitting court to relieve a party from a judgment or order because of mistake, inadvertence or excusable neglect is addressed to the sound discretion of the trial court, and in the absence of a showing of a clear abuse in exercise of that discretion the appellate court will not disturb order of court below. Code Civ.Proc. § 473.

3. Judgment 🔑363

Provision of Code of Civil Procedure permitting court to relieve party from an order or other proceeding by reason of mistake, inadvertence or excusable neglect is remedial in character, and is to be liberally construed in order to dispose of cases upon their substantial merits, and to give party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present same. Code Civ.Proc. § 473.

4. Wills 🔑355

Where charitable legatees had no notice or knowledge that later will than that under which legatee claimed was being offered for probate on certain date, or that their rights would be materially affected by adjudication concerning such wills, and neither of such documents had been filed with clerk on date of filing of notice of hearing of petition for probate, court did not abuse its discretion in vacating order admitting latest will to probate at instance of charitable legatee, and especially so when record would support reasonable inference that judge had not intended to find, and could not legally find, that such will was admissible to probate. Code Civ.Proc. § 473.

5. Wills 🔑355

Order admitting will to probate without proof of execution and attestation as provided by statute was in excess of court's jurisdiction and void, and subsequent vacation of order on ground of excusable neglect, mistake or inadvertence could not have been an abuse of discretion. Code Civ.Proc. § 473; Probate Code, § 50.

6. Wills 🔑384

Where trial court had found as a fact that latest will purportedly executed by testatrix was not in fact executed by reason of fact that testatrix was in coma and unconscious at such time, order admitting such will to probate in conjunction with prior will was prejudicially erroneous.

7. Wills 🔑386

The question as to what documents or portions of a document constitute testatrix' will should be determined in first instance on application for probate.

Blewett, Blewett & Macey, Stockton, for Lewis and others.

Eugene A. Horton, San Diego, for Bethesda Lutheran Church and others.

MUSSELL, Justice.

These are appeals by the heirs at law of Emily Strobeck, deceased, and certain devisees named in her will and are from an order of the Superior Court of San Diego county dated April 26, 1951, (1) vacating and revoking former order entered October 27, 1950; (2) admitting to probate two wills of Emily Strobeck, in the above entitled estate.

Emily Strobeck died on October 7, 1950, and on October 16th a petition was filed for probate of her last will and testament by the executor named therein. This petition was not verified, no copy of a will was attached thereto, and the wills here involved were not filed with the clerk until the following day. A hearing was had on the petition, after notice, on October 27, 1950, at which time a will dated October 5, 1950, purporting to be signed by Emily Strobeck, was presented to the court for probate. Mrs. Swain, one of the subscribing witnesses to the purported will, testified that Mrs. Strobeck, at the time of the signing of the document, was "in a coma"; that the witness guided her (decedent's) hand when she signed the purported will; that she (decedent) was not moving her hand; and was not competent at that time to make a will; that she did not understand all that was then and there said; that she did not declare the document to be her will; that she did not know that she was signing a will or that there were other persons present in the room.

Following this testimony the attorney for the petitioner informed the court that there was another will, which he produced, dated June 30, 1945. The court then ordered proof of this will and a subscribing witness thereto testified to the due execution thereof. Testimony was also introduced showing that certain portions of this will had been scratched out by someone after its execution on June 30th. In this connection, the attorney for the petitioner testified that he was present at the time of the execution of the 1945 will and read it to Mrs. Strobeck; that there were no interlineations or writing in the will at the time of its execution other than the typewritten matter; that he was present at the time of the signing of the 1950 will, which was signed at about 8:45 P.M. on October 5th; that in the morning of that day Mrs. Strobeck's mind was pretty clear but "in the evening she had failed a great deal. She wasn't nearly so clear in the facts in the evening. I don't know that she really did understand." There was also testimony tending to show that the 1945 will was in the possession of Mrs. Strobeck until October 5, 1950, when it was handed to the attorney for the petitioner.

After hearing this testimony, the trial court (Hon. Arthur L. Mundo) stated "I am going to admit to probate this second will. Reject the first will." However, in the order admitting the will to probate and appointing an executor, which order apparently was prepared by the attorney for petitioner and filed with the clerk, the trial court found that Emily Strobeck was of sound, disposing memory and fully competent to make a will on October 5, 1950, and that her last will and testament, dated on said date, is her last will and testament; that the said will revokes any former will made by her and that the will dated June 30, 1945, is not the last will and testament of the decedent. The court then ordered that the will dated October 5, 1950, be admitted to probate as the last will of said decedent and denied admission to probate of the will dated June 30, 1945.

Letters testamentary were issued and on January 29, 1951, the heirs at law filed a contest of will after probate and on March 8, 1951, filed a petition for partial distribution, alleging, among other things, that since the testatrix had died two days after the execution of the 1950 will, the bequests to the charitable institutions named in the will failed by reason of the provisions of section 41 of the Probate Code and the property devised and bequeathed to them should be distributed to the heirs at law of the decedent.

The appellants, Bethesda Lutheran Church, Bethphage Mission of Axtell and Women's Foreign Mission of Augustana Synod, hereinafter referred to as "charitable legatees", then filed objections to the petition for partial distribution and a notice of motion to vacate the order admitting the will to probate. This motion was made pursuant to section 473 of the Code of Civil Procedure upon the ground that the order was taken through the mistake, inadvertence, surprise or excusable neglect of the charitable legatees and was based upon the pleadings, papers and records on file, statements and affidavits and other evidence.

It was stated in the affidavits in support of the motion, in substance, that the charitable legatees had no notice or knowledge that two wills were being offered to the court for admission to probate; that they received no notice of the court's order admitting the October 5th will to probate and denying probate to the will of June 30, 1945; that the said order was entered and made through the mistake, inadvertence, surprise or excusable neglect of the charitable legatees; that had said legatees known that two wills were before the court for consideration and adjudication, they would have appeared to protect their rights and interests in said proceedings.

In an affidavit, J. H. McKinney, attorney for petitioner, stated that the charitable legatees had no notice or knowledge that two wills of said decedent were being offered to the court for its consideration and adjudication on October 27, 1950, and that said legatees had no notice or knowledge that their rights in the estate of said decedent would be materially affected by the adjudication concerning the respective wills; that to the best of his recollection no notice of the order of the court or the adjudication therein made as between the two wills of said decedent had been given to the respective charitable legatees.

The heirs at law of the decedent opposed the motion to vacate and revoke the trial court's order. On April 23, 1951, the charitable legatees filed a contest to the October 5th will and on April 23rd, the trial court heard the motion to vacate the order made on October 27, 1950, and also a motion made by the charitable legatees to admit both wills of the decedent to probate. At this hearing attorney J. H. McKinney testified at length regarding the circumstances surrounding the execution of both wills, which he had prepared, and stated, among other things, that at the time of the signing of the 1950 will he did not remember whether the will was read to Mrs. Strobeck or not; that he didn't think she would have appreciated what was in it very much if she had looked at it "because she was very sick that night." The trial judge stated that he desired testimony as to the execution of the 1945 will, following which one of the subscribing witnesses to said will testified to its due execution and that the testatrix was of sound mind and mentally capable of making her will at that time.

Mrs. Swain again testified as to the circumstances surrounding the signing of the 1950 will by the testatrix and that the testatrix was "in a coma" and that "her eyes were shut when the will was signed."

The other subscribing witness to the 1950 will, Mrs. Swenson, testified as to Mrs. Strobeck's condition at the time the 1950 will was signed and stated that Mrs. Strobeck was then in a "deep coma"; that she did not talk at all and did not appear to recognize the witness in any way.

The trial judge (Hon. John A. Hewicker) then filed his findings of fact, in which he found that the order of the court, made by the Hon. Arthur A. Mundo and entered on October 27, 1950, admitting to probate the will of Emily Strobeck, dated October 5, 1950, and denying probate of the will of Emily Strobeck, dated June 30, 1945, was taken against the Bethesda Lutheran Church, Bethphage Mission of Axtell and Women's Foreign Mission of Augustana Synod by reason of their mistake, inadvertence, surprise or excusable neglect; that the order of the court signed October 27, 1950, admitting to probate the will of Emily Strobeck, dated October 5, 1950, and denying probate to the will of Emily Strobeck, dated June 30, 1945, was erroneously drafted by the attorney for the executor and does not state the order as actually intended and given by the judge in open court on October 27, 1950; that the order intended and given by the judge in open court on October 27, 1950, was to admit to probate the June 30, 1945, will of Emily Strobeck and to deny probate to the October 5, 1950, will; that the will of Emily Strobeck purportedly executed on October 5, 1950, was not in fact executed by Emily Strobeck by reason of the fact that she was in a coma and unconscious at the time of its purported execution; that the will of Emily Strobeck bearing date June 30, 1945, was duly signed, executed and witnessed by the said Emily Strobeck and is her last will and testament. The court then entered an order vacating and revoking the former order entered October 27, 1950, by Judge Mundo, and admitted to probate both the 1945 and 1950 wills of Emily Strobeck.

The charitable legatees appeal from that portion of the order which admits to probate the purported 1950 will and no appeal is made by them from the remaining provisions of the order. The heirs at law appeal from the entire order.

[1–3] The first question presented is whether the trial court had authority or abused its discretion in vacating and revoking the order made by Judge Mundo on October 27, 1950. Section 473 of the Code of Civil Procedure provides, among other things: (1) That the court may upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and (2) That the court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgments or orders as entered, so as to conform to the judgment or order directed. A party may be relieved from an order or other proceeding in probate by reason of mistake, inadvertence or excusable neglect. In re Estate of Layton, 217 Cal. 451, 461, 19 P.2d 793, 91 A.L.R. 480; In re Estate of Grigsby, 219 Cal. 236, 238, 26 P.2d 17. It is also settled law that section 473 is addressed to the sound discretion of the trial court "and in the absence of a clear showing of abuse in the exercise thereof an appellate court will not disturb the order of the court below". In re Estate of Moreland, 49 Cal.App.2d 484, 487, 121 P.2d 867, 868; Phillips v. Cleaver, 89 Cal. App.2d 253, 255, 200 P.2d 545. As was said in Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, 149:

> "Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present it."

And as was said in Burbank v. Continental Life Ins. Co., 2 Cal.App.2d 664, 667, 38 P.2d 451, 453:

> "Furthermore, it has been the fixed policy of the law always to allow a controversy to be tried and determined on its merits (Kalson v. Percival, supra [217 Cal. 568, 20 P.2d 330]); and to that end the appellate tribunals are disposed to affirm an order to that effect (Waybright v. Anderson, 200 Cal. 374, 253 P. 148), and in determining an appeal from such an order will resolve any doubts in favor of the applicant for such relief. Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Gorman v. California Transit Co., 199 Cal. 246, 248 P. 923; Brill v. Fox, 211 Cal. 739, 297 P. 25. Moreover, it is well settled that independent of statutory provisions a trial court has the inherent power on its own motion to correct mistakes in its proceedings and within a reasonable time to annul its orders and judgments inadvertently made. Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Harris v. Minnesota Investment Co., 89 Cal.App. 396, 265 P. 306; Consolidated Construction Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 P. 238. As said in Freeman on Judgments (vol. 1, p. 432), such inadvertent or improvident acts are a species of irregularity and are exceptions to the general rule as to erroneous judgments."

[4] Applying the foregoing legal rules to the situation presented by the record before us, we cannot hold as a matter of law that the trial court was not authorized to vacate and revoke, or abused its discretion in vacating and revoking, the order made on October 27, 1950. The charitable legatees had no notice or knowledge that two wills were being offered for probate at the hearing on said date and, in fact, on the date of the filing of the notice of the hearing of the petition for probate, neither of the documents subsequently offered for probate had been filed with the clerk. The record supports a reasonable inference that Judge Mundo did not intend to find and could not legally find that the

1950 will was admissible to probate under the facts presented. The uncontradicted testimony, both at the hearing on October 27, 1950, and at the hearing on the motion made under section 473, is that Mrs. Strobeck, on the evening of October 5, 1950, was incapable of making a will and that a valid will was not executed by her on that date.

[5] As an additional reason for granting relief under section 473 it should be noted that the requirements for the execution and attestation of a will are set forth in section 50 of the Probate Code and there is no right to make testamentary disposition except upon compliance with those provisions. In re Walker's Estate, 110 Cal. 387, 390, 42 P. 815, 1082, 30 L.R.A. 460. In the instant case the record shows without question that the trial court (Judge Mundo) admitted the 1950 will to probate without proof of execution and attestation as provided by the statute. Under such conditions, the order admitting the document was in excess of the court's jurisdiction and void, Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 5 Cal.2d 35, 39, 53 P.2d 127; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 288, 109 P.2d 942, 132 A.L.R. 715, even though the trial court had jurisdiction of the subject matter of the estate.

[6] As heretofore stated, the order from which this appeal is taken is in two parts. In the second part the trial court admitted to probate both of the wills here involved. We conclude that this part of the order was prejudicially erroneous and should be set aside. At the hearing on the motion under section 473, on April 23, 1951, the court reviewed the testimony taken at the hearing on October 27, 1950, and heard further testimony relative to the circumstances under which the purported will of October 5, 1950, was signed. After having specifically found as a fact "That the will of Emily Strobeck purportedly executed on October 5, 1950, was not in fact executed by Emily Strobeck by reason of the fact that she was in a coma and unconscious at the time of its purported execution", the court entered an order admitting to probate the purported will. Clearly, this was error and the order in that respect finds no support in the record.

[7] The record indicates that portions of the 1945 will were stricken out by someone after its execution and the question of whether these changes were made by the testatrix was not determined nor was a determination made as to whether portions of said will were revoked by her. The question as to what documents or portions of a document constitute such a will should be determined in the first instance on application for probate. In re Estate of Salmonski, 38 Cal.2d 199, 208, 238 P.2d 966.

The part of the order of the trial court made on April 26, 1951, vacating and revoking the former order entered October 27, 1950, is affirmed and the second part of the April 26th order admitting to probate two wills of Emily Strobeck is reversed without prejudice to further proceedings on a petition to probate the will dated June 30, 1945. Appellants each to pay their own costs.

BARNARD, P. J., and GRIFFIN, J., concur.

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111 Cal.App.2d 910

CURTIS v. CURTIS.

Civ. 18902.

District Court of Appeal, Second District, Division 1, California.

June 23, 1952.

Appeal by husband from an order vacating a default judgment of divorce entered by the Superior Court of Los Angeles County, Bernard Lawler, J. The District Court of Appeal of the State of California, Second Appellate District, Division One, Hanson, J., pro tem., held that it was within the discretion of the trial court to vacate the default judgment to promote justice and prevent fraud.

Order affirmed.

Divorce 🔑161

Where husband obtained default divorce judgment on complaint which contained erroneous allegation that no child had been born to the union it was within discretion of court to vacate judgment in order to promote justice and prevent fraud.

Barry Sullivan, Los Angeles, for appellant.

Hal R. Clark, Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an appeal by a husband from an order vacating a default judgment of divorce he obtained upon a complaint wherein he alleged under oath that no child had been born to the union when he well knew the allegation was perjurious.

The husband, it appears, has been living separate and apart from his wife and child for a period of over 12 years. In that period he has not contributed anything to the support of the wife and on the average has contributed less than one dollar per week for the support of the child, even though he is earning $300 per month.

The wife did not answer the complaint within the time allotted by statute. The record does not show the date when the interlocutory decree was granted, but it is apparent that it was on a day after August 13, 1951, and prior to September 10, 1951. The motion to vacate the decree accompanied by the wife's affidavit and proposed answer was dated September 10, 1951, but upon what date it was served on the husband is not disclosed by the record. The wife in her affidavit excuses her failure to answer sooner on the ground that she was greatly upset by the husband's averment he had no child with her and that as soon as she regained her normal composure she went to her attorney and finding him out of town, delayed taking further action until his return.

No abuse of discretion on the part of the court is disclosed by the record. Plainly, under the facts the court exercised its discretion "to promote justice and prevent fraud." Williams v. Reed, 43 Cal.App. 425, 185 P. 515, 518.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

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111 Cal.App.2d 732

PEOPLE v. LARUM.

Cr. 4782.

District Court of Appeal, Second District,
Division 3, California.
June 17, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Fred Miller, J., of violating the statute making it an offense to receive money bet on the result of a horse race, or purported horse race, and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal Law 🔑304(2)

It is common knowledge in southern California locality that horse races are run at Santa Anita.

2. Gaming 🔑71

Transaction in which detective stated to defendant that he "would like two to win on Sir Butch in fifth at Santa Anita" and thereupon handed two one dollar bills to defendant saying, "this is on the nose" would be commonly understood to constitute making of wager on horse racing. Pen. Code, § 337a, subd. 3

3. Gaming 🔑98(2)

Evidence sustained conviction for violating statute making it offense to receive money bet on result of horse race, or purported horse race. Pen.Code, § 337a, subd. 3.

Lloyd Ruthvan Larum, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was charged with six offenses of violation of section 337a of the Penal Code. Two of the charged offenses were violations of subdivision 3 of the section which makes it an offense to "receive, hold, or forward * * * money" etc., bet on the result of a horse race or purported horse race. Other counts of the information charged violations of other subdivisions of the section consisting of the acts which constituted the two violations of subdivision 3. Defendant was found guilty of two violations of subdivision 3 and not guilty of the other charged violations. He made a motion for a new trial which was denied, and he was sentenced to imprisonment in the county jail. He appeals from the judgments and the order denying his motion for a new trial. The sole ground of the appeal is that the evidence was insufficient to support the judgments.

One Burns, a detective of the district attorney's office, testified that on the 14th of February, 1951, he encountered defendant in a cocktail bar in Long Beach and played shuffle board with him; defendant went to the side entrance of the bar and "apparently" received some money from a person, after which Burns asked defendant to place a bet on "Gold Note running in the seventh race at Santa Anita"; defendant asked, "to win?" and Burns said "Yes." Burns handed defendant two one dollar bills. On the 16th of February Burns entered the bar and found defendant playing shuffle board; defendant asked, "can I do anything for you?" and Burns said "yes, I would like two to win on Sir Butch in the fifth at Santa Anita" and handed defendant two one dollar bills saying, "this is on the nose." Burns and another detective named Bowers had copied the numbers from the bills. Defendant was arrested and two bills with corresponding numbers were found on his person with a considerable amount of other currency. Officer Bowers testified that he had found upon examining the sport pages of the newspapers that a horse named Sir Butch was running in the fifth race at Santa Anita on February 16th. There was no evidence that Gold Note was a horse or that he was running in a race. The case was tried to the court after waiver of jury trial and the evidence consisted of a transcript of testimony given at defendant's preliminary examination. Defendant did not testify.

[1] Defendant contends that there was no evidence that Gold Note and Sir Butch were race horses or that there were any horse races run at Santa Anita on the dates the wagers were made. The argument is without merit. It is of common knowledge in this locality that horse races are run at Santa Anita. The bets that were made "to win" sufficiently proved there were contests of some sort between beasts, and whether these were purported race horses or beasts of some other sort is immaterial. But it is of common knowledge that horses are raced at Santa Anita, and without evidence that the races in question were actually run there was sufficient evidence to prove that there were purported races between purported race horses.

In a multitude of cases that have passed through appellate procedure, wagers on horse races were made in the vernacular which was employed by the witness Burns and the defendant in making and accepting the bets in question.

[2, 3] The conversations and the passing of the money would be commonly understood as wagers on horse racing, and in the absence of any explanation by defendant that the transactions had a different meaning or purpose, the court could scarcely have failed to find they were wagers. The evidence was sufficient. See People v. Jacquaino, 63 Cal.App.2d 390, 146 P.2d 697.

The attemped appeal from the verdicts is dismissed. The judgments and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

112 Cal.App.2d 37

ROSE et al. v. ARNWINE et al.

Civ. 4276.

District Court of Appeal, Fourth District, California.

June 25, 1952.

Action by Samuel Rose and wife against Guy Arnwine and wife on a promissory note secured by a pledge of a third trust deed. The defendants cross-complained for damages for conversion of third trust deed. The Superior Court, San Diego County, Dean Sherry, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Griffin, J., held that the evidence supported court's finding that the third deed of trust was valueless at the time of and prior to the foreclosure sale and that defendants suffered no damage as the result of any claimed conversion.

Judgment affirmed.

Pledges ⇨36

In action on a note secured by a pledge of a third trust deed, wherein defendants cross-complained for damages for conversion of third trust deed, evidence was sufficient to support court's finding that third trust deed was valueless at the time of and prior to the foreclosure sale and that defendants suffered no damage as the result of any claimed conversion.

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Jennings, Engstrand & Henrikson, La Mesa, for appellants.

James B. Abbey, Garfield & Garfield, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action against defendants to recover upon a promissory note for $500, made on May 17, 1948. It was secured by a pledge of a third trust deed for $4,215, executed by Harley V. Cooper, on April 24, 1948.

Defendants answered and in effect admitted the due execution of the note, that it was past due, and had not been paid. By way of cross-complaint they alleged that plaintiffs were guilty of conversion of the third trust deed in its principal sum, and sought damages accordingly. The court found against defendants on the cross-complaint and in favor of plaintiffs and rendered judgment accordingly. Defendants appeal. There is little controversy pertaining to the facts in reference to the claimed conversion.

Defendants owned a small parcel of property on a hillside near Spring Valley. They constructed what plaintiffs described as a "home-made" house on it, the value of which is one of the main factors in dispute. Defendants sold the property, through plaintiffs' agent, Wilbur Young, to one Harley B. Cooper for $10,500, on April 23, 1948. The property was taken subject to a first trust deed for approximately $4,000. Under the terms of sale the purchaser agreed to assume this trust deed, pay $1,000 cash, and give a second trust deed for $2,350, payable to the agent Young for a loan made by him to the purchaser. He assigned the second trust deed to plaintiffs. Cooper then executed to defendants the note and third trust deed here in question, which was payable 90 days from the close of escrow. Money which the purchaser thought would arrive to make the payments on the trust deeds failed to materialize and the payments on the third deed of trust became delinquent on July 30, 1948. Demand was made for payment but no payment was made thereon. In May, 1949, the first and second deeds of trust became delinquent. Plaintiffs, to protect their interests, commenced making payments on the first deed of trust and paid all delinquent taxes and insurance. Defendants borrowed $500 from plaintiffs and, before its maturity, assigned to them the third deed of trust as security. During this time Cooper borrowed $700 from plaintiffs. Cooper paid that money to defendants to apply on the third deed of trust but defendants failed to pay any part of it to plaintiffs.

According to plaintiffs' testimony, plaintiffs applied at the title company to foreclose on the third deed of trust but were told that they were not entitled to do so since they were only holding it as security; that plaintiffs were then advised to foreclose on the second deed of trust which they did do. Defendants endeavored to make some form of financial arrangements so as to protect their interests. Plaintiffs made an offer to them to substitute their second deed of trust for a third trust deed position if a first trust deed loan could be arranged. Defendants were unsuccessful in this endeavor.

On October 6, 1949, a foreclosure sale was had under the second deed of trust. Defendant, Mr. Arnwine, attended the sale. Plaintiffs bid in the property for $2,600, the money they claimed they had in the place, and Mr. Rose told Arnwine, at that time, if he would bid $100 more, he could have it, or if he would give plaintiffs the money they had in it, he would give him the property. Arnwine did nothing.

At the trial the parties stipulated that the third trust deed, since the foreclosure of the second trust deed, had no value. Defendants claim that plaintiffs should have foreclosed the third deed of trust and thereby protected defendants' security and equity in the property, and that by foreclosing the second deed of trust plaintiffs "fraudulently" designed to render defendants' security valueless and "to defraud" them of their interests therein. The court found that this allegation was not true.

Considerable testimony was taken in re good faith of the plaintiffs, and particularly as to the value of the property and the possibility of the third deed of trust having any value at all at the time of the foreclosure sale under the second deed of trust. The court found it was valueless "prior to the commencement of said foreclosure proceedings", and that if any conversion resulted defendants were not damaged as a result of it.

The court found generally in favor of plaintiffs on all other facts above set out; that the "forced sale value" of the property at the time of foreclosure was $6,160 which, at that time, was subject to a first trust deed of $4,000, a second trust deed of $2,325, the third trust deed pledged in connection with the $500 note, and certain taxes and insurance paid by plaintiffs, amounting to $243.63; that during the time the third deed of trust was pledged, Rose made every possible effort to collect it and to protect the security pledged, and that he was the holder of the $500 note in good faith and for valuable consideration.

Defendants argue that the facts conclusively show a conversion. They cite 21 Cal.Jur. p. 323, sec. 31; 37 Cal.Law Review, p. 539, and such cases as Mitchell v. Automobile Owners Ind. Underwriters, 19 Cal.2d 1, 118 P.2d 815, 137 A.L.R. 923; and Revert v. Hesse, 184 Cal. 295, 193 P. 943.

If the evidence is sufficient to support the finding of the trial court that the third trust deed was valueless prior to the foreclosure sale, and that defendants therefore suffered no damage by the alleged conversion, it is unnecessary to discuss this proposition.

Counsel for defendants claim that the trial court did not calculate the outstanding indebtedness against the property in the proper manner and that the court erroneously fixed the "forced sale" value, rather than the fair market value, as the proper means in determining the equitable value of the third deed of trust, citing Sacramento Southern R. R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979, and Milton Kauffman, Inc., v. Smith, 82 Cal.App.2d 302, 186 P.2d 11.

There is testimony by plaintiff, Mr. Rose, a broker, that he considered its original sale value at about $7,000; that the house was in a dilapidated condition at the time of the foreclosure sale, and that he considered its fair market value at that time to be $6,200 to $6,500. It was agreed that an inheritance tax appraiser fix the value as of October 6, 1949. His appraisal showed a valuation of $8,985, "but if sold at forced sale" it would be 30 per cent less. Two other appraisers fixed its value at $5,500 to $6,000, as of September 12, 1949, due to its run-down condition and type of construction.

The calculations arrived at by the trial court are sufficiently established. It clearly appears that a sale under foreclosure of the third trust deed would have been as much of a "forced sale" as a sale under the second trust deed. The evidence is sufficient to support the ultimate finding that the third deed of trust was valueless at the time of and prior to the forced sale, and that defendants suffered no damage as a result of any claimed conversion.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

111 Cal.App.2d 933

CALIFORNIA HORSE RACING BOARD v. LOS ANGELES TURF CLUB, Inc.

Civ. 18735.

District Court of Appeal, Second District, Division 3, California.

June 24, 1952.

Rehearing Denied July 9, 1952.

Hearing Denied Aug. 21, 1952.

Action by the California Horse Racing Board against the Los Angeles Turf Club, Inc., to recover license fees due in connection with licensing of horse racing. From a judgment of the Superior Court, Los Angeles County, George A. Dockweiler, J., in favor of the defendant and from an order denying a motion for a new trial, the plaintiff appealed. The Court of Appeal, Parker Wood, J., held that the amount owing to the state from breakage could not be reduced by off setting against breakage the amount of a minus pool arising when amount available for distribution was less than amount required for distribution to ticket holders.

Judgment reversed and purported appeal from order denying motion for new trial dismissed.

1. Theaters and Shows 🔑3

Under statute authorizing operators of licensed race tracks to retain breakage on first $27,000,000 of gross amount of money handled in pari-mutuel pool, but requiring remainder to be paid daily to racing board as part of license fee, licensee was required to pay entire remainder to board without deduction of any amount because of existence of "minus pool" arising when amount available for distribution to ticket holders was less than amount required for distribution. Business and Professions Code, § 19485.1.

2. Statutes 🔑221

In action to recover from licensed turf club that portion of license fee attributable to breakage, testimony as to usage and custom in operation of race tracks was inadmissible in construction of license statute. Business and Professions Code, § 19485.1.

3. Estoppel 🔑62(2)

An alleged agreement between secretary of horse racing board and assistant secretary and controller of licensed turf club regarding effect of a minus pool in interpretation of statute requiring payment of breakage as part of license fee did not estop board from recovering license fees payable under statute. Business and Professions Code, § 19485.1.

4. Estoppel 🔑62(2)

The secretary of horse racing board is without power to bind state by his declaration with respect to interpretation of statute requiring payment of a portion of breakage as part of license for operation of race track, and his authority as agent of state could not be expanded by estoppel. Business and Professions Code, § 19485.1.

Edmund G. Brown, Atty. Gen., James E. Sabine, Deputy Atty. Gen., and Edward Sumner, Deputy Atty. Gen., for appellant.

Victor Ford Collins and Arnold M. Cannan, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to recover license fees allegedly due in connection with licensing horse racing. Plaintiff appeals from a judgment for defendant.

Plaintiff, as the administrative agency charged with the administration of the law relating to horse racing, issued a license to defendant to conduct a horse racing meeting at Santa Anita Park for 50 days beginning December 26, 1949, and ending March 4, 1950. Defendant conducted the racing at that place during said time.

This action involves the interpretation of section 19485.1 of the Business and Professions Code which relates to the deduction and disposition of breakage and the payment of license fee attributable to breakage. That section provides as follows: "Notwithstanding any other provision of this code, each licensee shall, as to any payment made to a person who has wagered by contributing to the pool, also deduct the odd cents by which the amount payable as to each dollar wagered by such person exceeds a multiple of five cents ($0.05), which are known as breakage. In such case the total amount of the moneys so deducted as breakage on the first twenty-seven million dollars ($27,000,000) or less of the gross amount of money handled in the pari-mutuel pool operated by him during the period of the license may be retained by the licensee; and the remainder shall be paid daily during each racing meeting by licensees to the board in addition to and as a part of the license fee required by Section 19485. The amount of the license fee attributable to the breakage shall be reported and paid as a separate item."

At all times after January 21, 1950, the gross amount handled by defendant during that racing meeting exceeded $27,000,000.

On February 25, 1950, the total wagers contributed to the place pool in the seventh race was $257,215. After deducting therefrom the 6 per cent license fee provided for plaintiff by section 19485 of said code and 7 per cent commission provided for defendant by section 19597 of said code, the sum of $223,777.05 remained for distribution to holders of place tickets in the seventh race. After that race was finished, it was ascertained that the holders of place tickets who were entitled to distributions from the place pool had contributed $229,945, or $6,167.95 more than was available for distribution.

On February 25, 1950, the total wagers contributed to the show pool in the seventh race was $423,080. After deducting therefrom the 6 per cent license fee provided for plaintiff and the 7 per cent commission provided for defendant, the sum of $368,079.60 remained for distribution to holders of show tickets in the seventh race. After that race was finished, it was ascertained that the holders of show tickets who were entitled to distributions from the show pool had contributed $390,607, or $22,527.40 more than was available for distribution.

Although the amount available for distribution to holders of place and show tickets in the seventh race on February 25th was $28,695.35 ($6,167.95 and $22,527.40) less than the amount contributed to those pools by the ticket holders, defendant distributed to holders of the place and show tickets $1.05 for each $1.00 wagered by them, that is, defendant distributed to those ticket holders as a profit or bonus 5 per cent of the amount wagered by them. In other words, since the total amount wagered by those holders was $620,552 ($229,945 plus $390,607) the 5 per cent distributed to the holders, as a profit or bonus, amounted to $31,027.60. The total amount, therefore, which was distributed to the holders of place and show tickets in the seventh race exceeded the amount available for distribution by $59,722.95 ($28,695.35 and $31,027.60). (The total of $620,552, contributed by ticket holders, and the $31,027.60, paid as the 5 per cent profit or bonus, made a total of $651,579.60 to be paid. The total sum available for distribution was $591,856.65 [$223,777.05 and $368,079.60]. Difference between $651,579.60 and $591,856.65 is $59,722.95.)

The odd cents, or breakage, deducted by defendant with respect to distribution from pools on said February 25th to persons who had contributed to pools in the first to sixth races, inclusive, and the eighth race, and to the win pool in the seventh race, amounted to $16,467.82. Defendant refused to pay this sum to plaintiff.

The amounts of breakage deducted by defendant from pools on subsequent days in that racing meeting, which amounts defendant refused to pay to plaintiff, were as follows: February 28th, $9,338.96; March 1st, $12,589.60; March 2d, $11,585.60; March 3d, $15,724.12. The total of those amounts of breakage, which defendant refused to pay to plaintiff, is $65,706.10. Defendant has since paid to plaintiff the sum of $5,593.15, leaving a balance of $59,722.95. This balance, which defendant has retained from the breakage, is the exact amount by which the payments made to holders of place and show tickets in the seventh race on February 25th exceeded the amount available for distribution. In other words, the defendant retained from the breakage in the win pool of February 25th and all the pools on said subsequent days the aggregate sum of $59,722.95, which was an amount sufficient to reimburse itself (1) for the $28,695.35 which it paid to satisfy the deficiencies in the place and show pools in the seventh race on February 25th, and (2) for the $31,027.60 which it paid as a 5 per cent profit or bonus in that race.

The court found that although neither the law nor any rule of the racing board requires the same, when the amounts in the pools to be distributed to the holders of winning tickets are insufficient to pay the holders the full amount wagered plus a profit of five cents for each dollar wagered, it is a universal custom to pay the amount wagered plus a minimum profit for each dollar wagered; the amount of this minimum profit is a multiple as provided by law for determining the amount payable on winning tickets, which, in California, is five cents for each dollar wagered; said "last explained situat*ed* is what is known at race tracks as a minus pool"; breakage is the balance remaining in the pools after deducting the tax to the state and commission to the track, as provided by law, and the amounts actually paid to the winners; it is a universal custom where the pari-mutuel system is used that in computing breakage there shall first be taken into consideration the amounts of the minus pools paid by the track and deducting such minus pools from the amounts not paid to the winners for the race meeting before arriving at the amount of breakage to be paid to the state or retained by the racing association; on February 25, 1950, in the seventh race, after paying fees and commissions from the total amount wagered, there remained insufficient money to pay the winners any profit, or enough to refund to the winners the full amount wagered by each winner; the defendant, in reliance upon said custom, contributed to the amount to be repaid to the winners sufficient money which enabled them to pay the winners the amount wagered plus a profit of five cents on each dollar wagered; shortly after the enactment of said section 19485.1 it was agreed between plaintiff, acting through its secretary, and defendant, acting through its assistant secretary and controller, that the proper interpretation of said section was that in the event a minus pool was caused after $27,000,000 gross had been handled, then in computing the breakage to which the state would be entitled as an additional license fee there should first be deducted the amount of the minus pool; on February 25, 1950, in the seventh race there were minus pools aggregating the sum of $59,722.95, and defendant contributed said sum to the amount available for distribution to the winners in order to pay them the amount wagered plus a profit of 5 per cent on each dollar; defendant paid said sum in reliance upon the agreement that such sum should be deducted from the gross breakage to which plaintiff was entitled, and by reason thereof plaintiff is estopped to deny the agreement in regard to the interpretation of said section 19485.1; defendant was entitled to withhold from the amounts collected as breakage on February 25th and 28th and on March 1st, 2d and 3d, which otherwise would have been payable to the plaintiff, the sum of $59,722.95, and by reason thereof nothing is due to plaintiff.

Appellant (racing board) contends that the breakage referred to in said section 19485.1 of the Business and Professions Code which is to be paid to the state as an additional license fee, after $27,000,000 has been handled, means the net breakage in each pool of each race on each day, after deducting the ordinary or fixed percentages allowed by statute—6 per cent for the state and 7 per cent for the track. It argues that the section is clear and unambiguous, and that the testimony introduced by respondent (track) regarding custom and usage was immaterial; that the action here pertains to a section indicating how odd cents should be treated and does not pertain to a section relating to breakage without a definition of that term.

Respondent contends that the breakage so referred to means the net breakage as a unit in all pools in all races in the entire racing meeting (after $27,000,000 has been handled), after deducting said fixed percentages and deducting any amounts the track has paid on any day during such entire racing period to satisfy minus pools —including the 5 per cent profit or bonus. It argues that the section is uncertain and ambiguous in that it merely uses the word "breakage" and does not specify whether breakage should be computed (1) as a unit on all pools in all races during the entire period, or (2) on all pools in all races on each day, or (3) on all pools in each race on each day, or (4) on each pool in each race on each day.

[1] Prior to the enactment of said section 19485.1 in 1947, all breakage was retained by the licensee (track) as additional commission. Since that enactment, the breakage on the first $27,000,000 of the gross amount handled "may be retained by the licensee" and "the remainder *shall be paid daily*" to the racing board "in addition to and as a part of the license fee". (Emphasis added.) Said section is the statutory authority for distribution by the licensee in multiples of five cents rather than in exact amounts. Under that section the licensee is directed to deduct, from amounts payable to contributors to the pool, the odd cents in excess of a multiple of five cents. Breakage is defined therein as the odd cents so deducted. The licensee is given permission, under the section, to retain the breakage on the first $27,000,000 gross handled, but is directed to pay the remainder of the breakage daily to the racing board as a part of the license fee. There is no reference therein to a "minus pool," and there is no provision therein that any offset may be made against the odd cents or breakage required to be paid to the board. There is no provision in that section or in the law which requires a licensee to add or contribute to the amount available for distribution in order to pay said minimum profit or bonus of five cents or any amount to the winners. The section is not ambiguous. It purports to deal only with the deduction of the odd cents and the distribution of them. It states clearly that a certain amount of the breakage may be retained by the licensee and that the remainder must be paid daily to the state or board as a part of the license fee. Any offset against the breakage that is due to the state would result in a failure to pay the required license fee for the privilege of conducting the racing meeting. Respondent argues that it was not intended that the track should be penalized by being required to make up the difference between plus breakage and minus breakage by paying such difference to the state out of its own pocket; and that such a construction of the section would be working a hardship and injustice upon the track. Requiring the licensee to pay the full license fee, if there should be a minus pool after $27,000,000 gross has been handled, would not be penalizing the licensee or working a hardship or injustice upon it. The full license fee consists of the fixed percentage allowed by statute, Bus. & Prof. Code, sec. 19485 and the breakage after the first $27,000,000 has been handled. If it were proper to offset a minus pool against the breakage due to the state (after $27,000,000 had been handled), it would seem that it would also be proper to offset a minus pool, occurring before $27,000,000 has been handled, against the fixed statutory percentage. Certainly it would not be contended that a minus pool should be offset against the part of the license fee consisting of the fixed statutory percentage. In applying for and accepting the license which was issued, respondent agreed to comply with the orders, regulations, and laws relating to horse racing, including of course an agreement to pay the license fee. Respondent took its chances on not "winning" a minus pool. Respondent states in its brief that ordinarily there is plus breakage, but on rare occasions there is minus breakage or a minus pool. The matter of paying the profit or bonus of 5 per cent to the winners was a voluntary act on the part of the licensee. The licensee was not entitled, however, to make such a donation at the expense of the state. Such profit or bonus was not deductible from the breakage due to the state. The breakage referred to in said section 19485.1 means the net breakage on each pool of each race on each day after deducting the fixed percentages allowed by statute.

[2] Since the said section 19485.1 is clear and unambiguous, the testimony as to usage and custom should not have been received.

[3, 4] The alleged agreement between the secretary of plaintiff (racing board) and the assistant secretary and controller of defendant (licensee), regarding the interpretation of said section 19485.1 in the event there should be a minus pool, did not constitute an estoppel against plaintiff. The trial judge said in part in ruling on the motion for a new trial that he believed that estoppel had in effect taken place with respect to the board, and that on looking at the equities in the situation it would be inequitable to force the track to pay the money. The secretary of the racing board did not have the power to bind the state by his declaration as to the interpretation of said section, and his authority as an agent of the state could not be expanded by estoppel. See Boren v. State Personnel Board, 37 Cal.2d 634, 643, 234 P.2d 981.

By reason of the above conclusions, it is not necessary to determine the other contentions of the parties.

The judgment is reversed. The purported appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

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111 Cal.App.2d 615

TODD et ux. v. STANDFIELD et al.

Civ. No. 8093.

District Court of Appeal, Third District,
California.
June 13, 1952.

Action by Abraham Todd and wife against Roy Standfield and another for damages resulting from collision of automobile, owned by Todd and driven by his wife, with the rear of truck, driven by Standfield and owned by his co-suitor, after Standfield had completed backing truck out of driveway and across highway. The Superior Court, Merced County, R. R. Sischo, J., entered judgment on verdict for plaintiffs and defendants appealed. The District Court of Appeal, Adams, P. J., held that evidence justified the verdict.

Judgment affirmed.

1. Automobiles 🔑245(2, 67)

In action by driver and by passenger of automobile which struck rear of truck after truck had just completed backing out of driveway and across highway, whether truck driver could or should have seen the approaching automobile and whether driver of automobile was contributorily negligent was for jury. Vehicle Code, § 553.

2. Trial 🔑260(8)

In action by driver and by passenger of automobile which struck rear of truck after truck had completed backing out of driveway and across highway, requested instruction, which purported to interpret generally the Vehicle Code provision relating to right of way of vehicle entering highway from private road, was adequately covered in given instruction relating specifically to the responsibilities of the truck driver, and was properly refused. Vehicle Code, § 553.

3. Trial 🔑244(1)

It is error to give and proper to refuse instructions that overemphasize issues, theories or defenses.

4. Trial 🔑267(1)

It is not necessary for a court to give instructions in the particular language in which those instructions are requested.

5. Trial 🔑232(1)

If instructions cover the subject matter and fairly and fully state the law applicable, they are sufficient.

6. Damages 🔑132(1)

Award of $20,000 to wife, who could no longer be employed as domestic and who had been in cast 8 weeks and who continued to suffer from extreme headaches and from an injury to her eyes and from injury to her shoulder, and to husband whose automobile was damaged and who bore his wife's medical expenses, was not so excessive as to shock the sense of justice or raise a presumption that it was the result of prejudice or passion.

7. Appeal and Error ⚷1004(3)

In action for injuries and property damage resulting from automobile collision, reasonableness of award to plaintiffs was for the jury first, and for the trial court on motion for a new trial, and award would not be set aside unless it was so grossly disproportionate to sums reasonably warranted as to shock the sense of justice and raise presumption that it was the result of passion and prejudice.

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Vernon F. Gant, Modesto, for appellants.

Linneman, Burgess, Telles & Van Atta, Dos Palos, for respondents.

ADAMS, Presiding Justice.

Plaintiffs, Abraham Todd and Ida Mae Todd, husband and wife, brought this action against Roy Standfield and fictitious defendants, alleging that on August 10, 1950, at 7:30 a. m., Standfield so carelessly and negligently drove and operated a certain flatbed truck as to cause same to collide with a Ford sedan automobile driven by Mrs. Todd, causing injuries to her and to the Ford sedan. In a second count Abraham Todd alleged that he had been compelled to employ medical services for his wife, and had incurred other expenses for damage to the car driven by his wife, for all of which the plaintiffs sought damages.

Standfield appeared and in answer to plaintiffs' complaint denied negligence on his part, and alleged contributory negligence on the part of Mrs. Todd. One C. A. Makin appeared as one of the fictitious defendants and alleged that he was the owner of the truck driven by Standfield who was his employee. Makin also denied negligence on the part of Standfield and alleged contributory negligence on the part of Mrs. Todd.

Trial by a jury resulted in a verdict in favor of plaintiffs in the sum of $20,000. A motion for a new trial was made by said defendants, and denied by the court, which court also denied a motion by defendants for a judgment notwithstanding the verdict.

Defendants have appealed from both the judgment on the verdict and the order denying the latter motion, asserting as ground for reversal that the evidence shows that Mrs. Todd was guilty of contributory negligence, that the court erred in instructing the jury, and that the award of damages is excessive.

[1] Perusal of the transcript of the testimony in the case reveals the facts to be as follows: Makin, the owner of the truck, instructed Standfield to deliver an electric pole to one Coleman, and 15 or 16 20′ steel reinforcing rods to one Cecil Burdell. Standfield unloaded the electric pole at Coleman's, at which time he took from the end of same a red flag which he placed in his pocket. He then tied the reinforcing rods into the side of the truck in such a manner that they extended beyond the rear end of the truck a distance of 6 to 8 feet. About 7:30 a. m. Mrs. Todd was driving eastward along Blossom Street, as the highway running from South Dos Palos to the city of Dos Palos, in Merced County, was known. This highway was paved, completely straight for more than a mile to the west; the weather was clear. After making his delivery at Coleman's Standfield backed his truck out of the Coleman field on the north side of and onto Blossom Street, just as Mrs. Todd was approaching thereon, and the collision followed. Mrs. Todd was rendered unconscious and was unable to recall the circumstances, but Robert Lee, who was driving a 1½ ton cattle truck following Mrs. Todd's car at a distance of 150 to 200 yards, testified that he was driving behind the Todd car at approximately 35 miles per hour, and gaining upon it; that when Mrs. Todd was but 40 or 50 feet from the road leading out of the Coleman field he saw defendants' truck back rapidly across the highway and come to a stop only after passing completely across it; that Mrs. Todd swerved her car to the right off the paved portion of the road (which was also shown by her tire marks on the pavement), apparently seeking to go behind defendants' truck, but failed in this and the steel rods protruding from de-

fendants' truck crashed through the side of her car. Standfield testified that before backing out he had looked down the highway to the west but had seen nothing approaching. However, the jury and the court were fully justified in believing as a fact from the testimony aforesaid that Standfield could or should have seen the two approaching vehicles, and that there was no contributory negligence on Mrs. Todd's part. Certainly there was none as a matter of law. Section 553 of the Vehicle Code provides that: "The driver of a vehicle about to enter or cross a highway from any private road or driveway * * shall yield the right of way to all vehicles approaching on said highway." Also see Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, and cases there cited.

[2] Regarding the asserted error in the failure of the trial court to give certain instructions offered by appellants. The court read section 553 of the Vehicle Code. An instruction offered, which appellants contend should have been given, reads: "The driver of any vehicle about to enter or cross a highway from an alley not exceeding the width of 16 feet, or any private road or roadway, shall yield the right of way to all vehicles approaching on said highway. This simply means that a vehicle entering a public highway from a private driveway shall yield to a vehicle within the intersection or a vehicle approaching so closely on the public highway as to constitute an immediate hazard. It is only when such car on the public highway is approaching so near as to constitute an immediate hazard that one may not emerge from a private way onto the highway." It was refused because it was given in substance elsewhere. The instruction given elsewhere, which was also presented by appellants, reads: "If you find from the evidence in this case that the defendant Standfield drove his vehicle from a private driveway onto a public highway at a time when the plaintiff's vehicle was sufficiently distant from the intersection as not to constitute an immediate hazard, then I instruct you that the defendant Standfield had the right of way and it was the duty of the plaintiff under such circumstances to yield the right of way to said defendant and to slow down and stop, if, necessary, in order to avoid a collision." Said instruction covered appellants' contentions sufficiently, so that it cannot be said that their view as to the law was not imparted to the jury.

Appellants also criticize the court regarding other instructions offered by them, but we do not deem it necessary to prolong this opinion by comment upon each and every of them. The record shows that appellants offered 16 instructions on the question of negligence which were given, 6 offered and given on the question of damages, and 3 which were given as modified; and that 16 offered by them were refused.

[3–5] It is often stated that it is error to give and proper to refuse instructions that over-emphasize issues, theories or defenses, and that it is not necessary for a court to give instructions in the particular language requested; that if the subject matter is covered and the law applicable is fairly and fully stated, that is sufficient. See Dodge v. San Diego Elec. Ry. Co., 92 Cal.App.2d 759, 208 P.2d 37, and cases there cited.

In the case before us, which is not a complicated one, the instructions given sufficiently covered the applicable law, and we are satisfied that appellants suffered no injustice as the result of any either given or refused.

[6] As for appellants' third contention, that the damages awarded are excessive, the trial court, on motion for a new trial, refused to reduce them, and we are not disposed to do so. As was said by this court in Sumrall v. Butler, 102 Cal.App.2d 515, 524, 227 P.2d 881, 888: "The rule to be applied by an appellate court in determining whether or not an award made by a jury is excessive has been stated many times. Unless the reviewing court can say that the award made by a jury is so grossly disproportionate to sums reasonably warranted by the facts as to shock the sense of justice and raise the presumption that [it is] the result of passion and prejudice the award must stand. Potter v. Empress Theatre Co., 91 Cal.App.2d 4, 13-14, 204 P.2d 120. '"The amount of damages is

such cases is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'"' Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 585, 203 P. 768."

The evidence in the case before us shows that Mrs. Todd was employed as a domestic, and that, as a result of her injuries, the probability was that she would not be able to perform the duties of such a servant thereafter. There was evidence that she sustained serious injuries to her head, her eyes, her shoulder and her back, and moderate injuries to her hand, her right knee and her left hip. The seriousness of the head injury is indicated by the fact that she was unconscious from the time of the accident at 7:30 a. m. on August 10th until Saturday, August 12th, and that she suffered a complete loss of memory of incidents occurring prior to the accident. As a result of her injury she was placed in a cast extending from a point below her hips to her arm pits, and her arm was held in a horizontal position. She remained in this cast approximately eight weeks. She was in the hospital for a period of 19 days and remained in bed thereafter for three weeks, and it was not until the middle of December or the early part of January that she was able to do even a substantial part of her own housework. After the accident she was subject to extreme headaches which still persisted at the time of the trial, though with less frequency and severity, and she sustained injury to her eyes, and suffered from the injury to her shoulder at the time of the trial. Also at the time of the trial she remained under her doctor's care, and there was medical testimony that she might well have permanent pain in the lumbar portion of her back, and that the separation of the collar bone from the shoulder was permanent.

[7] It was for the jury first, and for the trial court on the motion for a new trial, to pass upon the reasonableness of the award. We cannot say that it was so excessive as to shock the sense of justice or raise a presumption that it was the result of prejudice or passion.

The judgment and the order appealed from are affirmed.

PEEK and VAN DYKE, JJ., concur.

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111 Cal.App.2d 820

SHULTZ et ux. v. BEERS et ux.

BUTTE COUNTY v. SHULTZ et al.

Civ. 8097.

District Court of Appeal, Third District,
Califorina.
June 19, 1952.

Quiet title action by Ralph Howard Shultz and his wife, against Thomas B. Beers, and his wife, wherein the County of Butte filed its complaint in intervention seeking to quiet title in itself. Defendants claimed title by adverse possession. The property involved was conveyed, in 1882, to the county for use as road, and deed provided that property would revert to grantor if such use should cease. The Superior Court, Butte County, Warren Steel, J., entered decree for the county, and defendants appealed. The District Court of Appeal, Peek, J., held that, since 1882, neither the original parcel nor its accretions, were or had been subject to being acquired by adverse possession.

Judgment affirmed.

1. Deeds 🔑93

In construing deeds, true intent and purpose of grantor must be ascertained by consideration of whole instrument, not of detached clauses.

2. Deeds 🔑155

Deed, which restricted land conveyed to use for road, provided for it to revert to grantor if put to any other use, and further restricted use by prohibiting construction of buildings, sale of intoxicating liquor, commission of waste, or cutting of timber except as required for road, manifested intent to convey entire parcel, not just that needed for roadway, subject to right to enter and terminate grantee's interest upon violation of the conditions.

3. Estates ⚿7

Conditions subsequent are not wholly void, but are not favored by the law and can be created only by appropriate language which does more than merely designate subject for which the property is to be used.

4. Deeds ⚿155

Grantee of deed conveying fee simple on condition subsequent is in the same position as an owner in fee simple absolute unless he breaches the condition, and grantor has no actual estate remaining in him, but merely has right or power to terminate and take grantee's estate upon breach of the condition.

5. Adverse Possession ⚿8(2)

Where land was conveyed to county in 1882 for use as road, and deed provided that land would revert to grantor when such use ceased, but conditions in deed were not breached, neither the original land conveyed, nor its accretions, were subject to being acquired by adverse possession.

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Ware & Ware, Chico, for appellants.

Raymond A. Leonard, Dist. Atty., Oroville, Robert E. Laughlin, Chico, for respondent.

PEEK, Justice.

This is an appeal by Thomas B. and Lela Beers, husband and wife, the defendants in intervention from a decree quieting title to the real property in question in the County of Butte, the plaintiff in intervention.

In 1882 John Bidwell, by quitclaim deed, conveyed to the County a narrow parcel of land along the Sacramento River comprising approximately 11½ acres. It is bounded by what is now Sutter Avenue on the east, the Sacramento River on the west, and Chico Creek on the south. The deed contained the following language: "Said land is to be used for the sole use of a road to the Bridge and when it shall cease to be so used, or shall be used for any other purpose it shall revert to the party of the first part." Additional reservations were set forth therein prohibiting the construction of buildings, the sale or gift of intoxicating liquor, the commission of waste and the cutting or clearing of timber or brush except as required for the road. Over the intervening years the Sacramento river gradually changed its course to the west and as a consequence the particular parcel now has been enlarged by such natural accretion until it contains approximately 30 acres of land. Sutter Avenue, which has been used continually for road purposes during this entire period is approximately 60 feet wide and runs along the easterly portion. The total area actually used as a roadbed is approximately 2½ acres. In 1900 John Bidwell died, leaving all of his property to his wife, Annie Bidwell. In 1908 she conveyed all of the parcel here in question, excepting the 2½ acres constituting the actual roadbed, to the State of California in perpetuity for the stated object of preserving the natural beauty thereof and specifically reserving to herself a life estate therein. For a number of years thereafter the property was supervised by the Division of Parks and Forestry of the State of California. Mrs. Bidwell died in 1918 and in 1934 the Wells Fargo Union Bank and Trust Company, as executor of her estate conveyed all of the reversionary interest of John and Annie Bidwell in all of said real property to the Title Insurance and Guaranty Company which, in turn, in 1950 conveyed that interest to the State of California. Thereafter the State of California, pursuant to the provisions of Chapter 73, Statutes of 1950, First Extraordinary Session, transferred all of its right, title and interest in and to the specific property to the County of Butte.

In 1947 Ralph and Stella Shultz, husband and wife, instituted a quiet title action against Thomas B. and Lela Beers, husband and wife. It appears that Stella and Lela are sisters, being the daughters of one Joseph Webster, who has been involved in proceedings concerning the same property for many years. Upon the hearing in that proceeding and after its submission, the trial judge ordered the submission set aside and the case reopened to permit the County of Butte to intervene. Ultimately the County filed its complaint in intervention by which it sought to quiet title to the same property; the main issues in that case being the County and the Beers; the other defendant intervenors did not appear. Following the entry of judgment for the County quieting its title to the property the Beers appealed, contending that they acquired title thereto by adverse possession dating from 1939. Their claim is to the entire parcel, except the 2½ acres actually used for road purposes. Their argument in support of their contention is that by the use of the particular wording in the deed of 1882 as heretofore quoted, Bidwell manifested an intention to convey only so much of the land as would be used solely as a roadway and which in fact was so used; and that therefore that which was not so used was reserved to the grantor or reverted to him by non-user, and hence was subject to the adverse possession of defendants.

[1,2] We cannot agree with appellants' interpretation of the deed. It has long been the rule that in construing deeds "the true intent and purpose of the maker must be ascertained by a consideration of the whole instrument, not of detached clauses." Schroeder v. Wilson, 89 Cal.App.2d 63, 200 P.2d 173, 174; Pico v. Coleman, 47 Cal. 65, 67; Whitcomb v. Worthing, 30 Cal.App. 629, 631, 159 P. 613. Examining the deed here in question in light of the rule as stated, it is readily apparent that Bidwell, by the particular language used, manifested a clear intent to convey the entire parcel including all of his right, title and interest therein to the grantee subject to the right of the grantor or his successors to enter and terminate the same in the event of the violation of any of the conditions therein set forth. Any other interpretation would render meaningless the provisions contained in the deed against the erection of buildings, against the sale of intoxicating liquor, against the cutting of timber or clearing the land and against the commission of waste. Obviously such restrictions were not intended to apply only to that portion of the land exclusively used for a roadway.

[3] Thus it appears that Bidwell by the specific conditions expressed in the deed evidenced a clear intent to reserve to himself and his successors the right to terminate the estate granted upon the breach of any of the expressed conditions. Although conditions subsequent are not favored by the law, that is not to say that such a condition is wholly void but only that something more than mere designation of the subject for which the property is to be used is necessary; that is, such a condition "can be created only by apt and appropriate language." Fitzgerald v. County of Modoc, 164 Cal. 493, 129 P. 794, 44 L.R.A.,N.S., 1229. See also Papst v. Hamilton, 133 Cal. 631, 633, 66 P. 10.

[4] It should be noted that "when the grantor conveys the fee simple on condition subsequent, he has no actual *estate* remaining with him. The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute. The interest of the grantor in such case is not, strictly speaking, a residue of the estate left in him; it is merely a right or power to terminate the estate of the grantee and retake the same, if there is a breach of condition." Parry v. Berkeley etc. Foundation, 10 Cal.2d 422, 425, 74 P.2d 738, 740, 114 A.L.R. 708.

[5] Again turning to the record before us we find it to be wholly barren of any evidence of breach of any of the conditions imposed by the deed or of any evidence that the grantor or his successors entered or terminated the estate for any breach of any condition. It necessarily follows, therefore, that as the property is and has been owned by the County since 1882 neither the original parcel nor its accretions are or have been since that date subject to being acquired by adverse possession, Humboldt County v. Van Duzer, 48 Cal.App. 640, 644, 192 P. 192, and hence appellants' claim to title by adverse possession is entirely unsupported.

Since the further contentions of appellants are predicated upon the correctness of the issues raised in their first contention, our conclusion in that regard makes unnecessary any consideration of those contentions.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

111 Cal.App.2d 623

Petition of LEEPER.

Cr. 2350.

District Court of Appeal, Third District, California.

June 13, 1952.

Proceedings in the matter of petition for order fixing bail and for stay of execution. The trial court refused application, and applicant appealed. The District Court of Appeal held that record on appeal, consisting of affidavits concerning petitioner's physical condition, and affidavit of physician for Department of Corrections that such condition, if same existed, might be corrected during incarceration, did not warrant holding that trial court had unjustifiably refused to grant stay or fix bail.

Petitioner's motions denied.

1. Bail 🔑44

Criminal Law 🔑1001

Where applicant for stay of execution and for bail pending appeal from conviction alleged that he was suffering from an acute prostatic condition which required remedial surgery, and affidavit of physician stated that condition was such that delay in surgical treatment might jeopardize patient's life was opposed by affidavit of medical consultant of Department of Corrections which stated that, assuming petitioner's physical condition to be such, facilities were afforded by Department of Corrections during incarceration which would afford such treatment, showing was not such as to warrant holding that trial court had unjustifiably refused to grant stay or fix bail on ground of physical condition of petitioner.

2. Bail 🔑44

Criminal Law 🔑1001

That petitioner for stay of execution and bail pending appeal had elected to represent himself in appeal from convictions of perjury and conspiracy to commit grand theft and on certain appeals in civil suits, was not sufficient reason for considering his status as different from that of person represented by counsel and did not require grant of bail and stay of execution.

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Thomas B. Leeper, in pro. per.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

PER CURIAM.

Petitioner has applied to this Court pursuant to Rule 32, Rules on Appeal, for a stay of execution of a judgment of conviction on a pending appeal and for bail. Conformably to said Rule petitioner shows that application for such stay was made to the trial court and was refused; likewise that application for bail was made to the trial court and denied.

Petitioner was indicted in Yolo County on charges of perjury and conspiracy to commit grand theft. The charges were tried before a jury which returned verdicts of guilty on both counts. Petitioner's motion for a new trial and for arrest of judgment were denied by the trial court and the court then made its order sentencing petitioner. He has appealed to this Court.

In substance petitioner advances the following contentions in support of his motions for stay and for bail. First, he alleges that he is suffering from an acute prostatic condition which requires remedial surgery; next that he is acting as his own attorney in the matter of this appeal and also in several other appeals on matters involving certain alleged testamentary dispositions of one Frank Weber, deceased. Petitioner in this respect says it is necessary he be allowed his freedom pending appeal in order that he may attend to these matters. Then coming to the appeal pending in this Court in respect of his convictions, petitioner sets forth a number of contentions as to errors alleged to have been committed by the trial court during the trial proceedings and also charges misconduct of the prosecuting attorneys.

[1] As to petitioner's physical condition and his need for medical and surgical care, the record before the trial court when that court denied petitioner's motions for stay and for bail was conflicting. The same is true of the record here. Petitioner presents an affidavit of a physician and surgeon who states that since January 16, 1952 he has had petitioner under his care and that he presents a history of prostate trouble which has become increasingly severe. He diagnosed it as benign prostatic hypertrophy with marked urinary obstruction, with recommendation of surgical removal of the prostate. The affiant concludes with the statement that his patient's health and possibly his patient's life would be jeopardized by delay in the recommended treatment. Opposed to this is the affidavit of the medical consultant of the Department of Corrections, a licensed physician and surgeon, who avers that, assuming petitioner is suffering from the condition set forth in the affidavit of his own physician, the facilities afforded by the Department of Corrections are such that all necessary care, treatment and surgery can be afforded during his incarceration. Affiant concludes with the statement that petitioner's incarceration in the State institution will not endanger his health or life. In an amended petition it is averred by petitioner that he will be 69 years of age on August 3d next, that his condition has become worse since his trial and he declares that his condition cannot improve unless he be released from confinement. He concludes, however, that he thinks he can postpone the needed operation until he can do the necessary law work in respect of the various appeals which he is handling in propria persona. We think that, so far as petitioner's physical condition is concerned, it cannot be said the showing made here would warrant a holding that the trial court unjustifiably refused to grant stay or fix bail.

[2] As to the contention of petitioner that his motions should be granted because he is handling his own appeal herein and prosecuting in pro. per. his civil appeals, acting as his own counsel throughout, nothing more need be said than that these matters appear from the record to be at his own election without necessity, financial or otherwise, dictating the course petitioner has elected to pursue. That petitioner has elected to represent himself affords no reason for considering that his status is different from that of a person represented by counsel. People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001.

We have examined the complete record on appeal with respect to petitioner's contentions on the merits. Our examination warrants our conclusion that with respect to these matters also there is no basis for a holding by this Court that the trial court unjustifiably denied stay or refused bail. We do not, from what we have said herein, wish in any manner to indicate that the Court's rulings upon petitioner's application for stay and bail determine, or are to be taken as determining, the merits of petitioner's appeal. What we have said is limited solely to our decision upon the motions.

The temporary stay which was granted upon the filing of petitioner's application for stay is terminated. Petitioner's motions for stay of execution pending appeal, and for admission to bail, are, and each of them is, denied.

111 Cal.App.2d 760

DOWD v. DOWD.

No. 15013.

District Court of Appeal, First District,
Division 1, California.
June 19, 1952.

As Corrected June 23, 1952.

Divorce action wherein the Superior Court of the State of California, in and for the City and County of San Francisco, Frank T. Deasy, J., entered an interlocutory decree granting the wife a divorce on grounds of extreme cruelty, and the husband appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that the immediately effective division of the community property made by the interlocutory decree was erroneous but was correctible by modification of the decree to provide for such disposition upon entry of the final decree.

Modified and affirmed.

1. Trial 🔑105(1)

In absence of objection, evidence adduced by means of leading questions and by reference to allegations of complaint would be competent.

2. Appeal and Error 🔑854(4)

Trial court's denial of motion to strike testimony would be sustainable if legally proper upon some other ground, even though reason assigned by trial court for denying motion was incorrect.

3. Trial 🔑96

Where neighbor's testimony in divorce case to effect that husband had struck his wife was hearsay but her testimony that she had seen the results of blows was not hearsay, motion to strike all of such witness' testimony was too broad and was properly denied.

4. Divorce 🔑127(4), 147

Existence of corroboration of material facts given in evidence by wife in divorce suit is question of fact, and sufficiency of corroboration should be determined in light of purpose of requirement for corroboration, which is the prevention of collusion.

5. Divorce 🔑127(4)

Principal object of corroboration rule is to prevent collusion between parties, and where it is clear from evidence in contested action that there is no collusion, court is justified in granting decree upon evidence which is only slightly corroborated, if court is otherwise satisfied that prevailing party is entitled to decree.

6. Divorce 🔑130

Evidence sustained decree granting wife divorce on grounds of extreme cruelty.

7. Divorce 🔑252, 286

Under Civil Code section making it duty of trial court, upon granting divorce on grounds of cruelty, to assign community property to respective parties in proportions deemed just, court must award more than one-half of property to party who has suffered wrong, and how much more than one-half rests in sound discretion of trial court, subject to power of revision vested in appellate court by another section of civil code, but every intendment is in favor of what trial court did, even though it awarded all to innocent party. Civ. Code, § 146.

8. Divorce 🔑249(1, 6)

Trial judge, in awarding wife divorce on grounds of extreme cruelty, did not abuse his judicial discretion in awarding wife family home and directing husband to sell parcels of community property and apply proceeds in reduction of indebtedness upon family home, where wife was thereby enabled to rent rooms for $90 per month and apply same to support of her four minor children. Civ.Code, § 146.

9. Divorce 🔑254, 287

Immediately effective division of community property made by interlocutory divorce decree was erroneous, but was correctible by modification of decree to provide for such disposition upon entry of final decree.

Albert Picard, San Francisco (Raymond N. Baker, San Francisco, of counsel), for appellant.

Davis & Colvin and Norman D. Watson, Reynold H. Colvin, San Francisco, for respondent.

FRED B. WOODS, Justice.

Defendant H. J. Dowd has appealed from an interlocutory decree which granted the plaintiff Cecilia K. Dowd a divorce upon the grounds of extreme cruelty, awarded her the family home, directed him to sell two other parcels of community property and apply the proceeds in reduction of the indebtedness upon the family home, and ordered him to pay her $50 a month for her support and $25 a month each for the support of the four minor children placed in her custody.

Appellant urges as grounds for reversal of the decree: "(1) The decree is unsupported by the evidence and was rendered without any corroborating testimony. (2) The court abused its judicial discretion in awarding the entire community property to plaintiff without giving due consideration to all the facts of the case and the condition of the parties. (3) The decree is erroneous and improper in compelling an immediate and present division of the community property contrary to the law."

[1–6] (1) *As to the sufficiency of the evidence,* it appears that in her complaint respondent alleged a course of conduct and not less than twelve specific acts of appellant, any considerable portion of which, if proven, would constitute an adequate basis for awarding her a divorce upon the ground of extreme cruelty.

Upon the trial, these questions were asked of her, and these answers given:

"Q. You have read the complaint here on file, that is the first amended complaint? A. Yes.

"Q. And the allegations therein are true? A. Yes."

"Q. Mrs. Dowd, during the time of your marriage, your husband, the defendant, has engaged to excess in the use of alcohol, is that correct? A. Yes.

"Q. He has stayed out at night and refused to tell you where he had been? A. Yes.

"Q. And he has called you vile names? A. Yes.

"Q. And he has struck you on occasions? A. Yes.

"Q. And done physical harm to you, and violence? A. Yes,"

conduct and acts specifically alleged in the complaint. Appellant, present in person and by counsel, interposed no objection of any kind to any of these questions. Appellant, in turn, testified that he never struck respondent at any time, never used foul language towards her, never did her any physical harm at any time or place, but was intoxicated a few times.

Appellant's challenge of the sufficiency of respondent's testimony is based upon the fact that it was adduced by means of leading questions and by reference to the allegations of the complaint. But in the absence of any objection on those grounds the evidence became and is competent.

Appellant claims that respondent's testimony was insufficiently corroborated. The corroborating witness was a neighbor, Mrs. Vida B. Quinn, who had known respondent for about seven years. Her corroboration of the alleged acts of cruelty came in through the following questions and answers: "Q. Have you ever seen the defendant, H. J. Dowd, while he was in a state of extreme intoxication? A. Yes, I have.

"Q. On numerous occasions? A. Not more than twice that I know of.

"Q. Have you ever seen the plaintiff, Cecilia K. Dowd, when she had been struck or physically hurt by her husband? A. Yes, I have.

"Q. You have seen the result of those blows? A. Yes, I have.

"Mr. Colvin [plaintiff's counsel]: That is all."

(Cross-examination) "Mr. Picard [defendant's counsel]: Q. Just a minute. You say you saw the results of the blows; were you present when the blows were struck? A. No, I was not.

"Q. All you know Mrs. Dowd told you that she was struck, is that true? A. That is true.

"Mr. Picard: I move that that all be stricken out on the ground that it is now hearsay.

"The Court: Well, we will ask Mrs. Dowd—you were struck?

"The Plaintiff: Yes.

"The Court: And you told this witness that?

"The Plaintiff: Yes.

"Mr. Picard: Still it is hearsay.

"The Court: Under the section of the Code, the hearsay rule is discretionary with the Court. The Code so says.

"Mr. Picard: All right, that is all.

"Mr. Colvin: That is all."

The motion that "all be stricken out" as hearsay was too broad. The testimony that she had seen plaintiff when plaintiff had been struck, had seen the results of blows was not hearsay. Her statement that respondent had been struck by the defendant was hearsay. The reason assigned by the trial court for denying the motion to strike was incorrect but the denial is sustainable if legally proper upon some other ground. Mrs. Quinn's testimony as to the results of blows and her statement that she had seen the defendant while in a state of intoxication is some corroboration, though slight.

The existence of corroboration of material facts given in evidence by the respondent is, of course, a question of fact. The sufficiency of the corroboration should be determined in the light of the purpose of the requirement for corroboration, the prevention of collusion. That, too, presents a question of fact. "The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree." Tompkins v. Tompkins, 83 Cal.App.2d 71, 76, 187 P.2d 840, 842, corroboration of one of a series of acts, in a contested case; see, also, Keener v. Keener, 18 Cal.2d 445, 449, 116 P.2d 1; Krull v. Krull, 105 Cal. App.2d 56, 60, 233 P.2d 13; LaVigne v. LaVigne, 96 Cal.App.2d 531, 534, 216 P.2d 75; Cairo v. Cairo, 87 Cal.App.2d 558, 561–562, 197 P.2d 208; McGann v. McGann, 82 Cal.App.2d 382, 386–387, 186 P.2d 424; Serns v. Serns, 70 Cal.App.2d 527, 529, 161 P.2d 417; Ungemach v. Ungemach, 61 Cal.App.2d 29, 34, 36–39, 142 P.2d 99. Unlike Truax v. Truax, 62 Cal.App. 2d 441, 145 P.2d 88, upon which appellant relies, this corroborating testimony does relate to conduct narrated by the respondent. We have examined the other cases which appellant invokes but find them inapplicable. Among them is Farrand v. Farrand, 77 Cal.App.2d 840, 176 P.2d 773, in which there was corroboration but the reviewing court concluded that the acts proven (mere drunkenness) were not, under the circumstances of that case, acts of cruelty which caused grievous mental suffering. In Dean v. Dean, 97 Cal.App.2d 455, 218 P.2d 54, there was no corroboration at all by a third party, as we read the decision. Gleason v. Gleason, 13 Cal. App.2d 231, 56 P.2d 973, was decided upon the basis of corroboration of inconsequential points only.

In the case now before us, we can not say as a matter of law that there was insufficient corroboration.

[7, 8] (2) *We find no abuse of judicial discretion in the award made of the community property.* In making that award, the trial court had in mind, among other things, the welfare of the four minor children, who ranged in age from three to ten years. The family home, awarded to the wife and mother, was sufficiently large to enable her to rent rooms and thereby have an income of $90 per month. But the home, valued at $24,000, was encumbered for the payment of an indebtedness exceeding $12,000. Other community property consisted of improved realty at Loma Mar, valued at $7,000, and a one-third interest in unimproved realty in Sonoma County, an interest valued at $2,166.66. It was the community interest in the Loma Mar and Sonoma County properties which appellant was ordered to sell, the proceeds to be applied in payment of the indebtedness on the family home.

The facts support the disposition made of the community property. In granting a divorce to one of the parties on the ground of the extreme cruelty of the other, it became the duty of the trial court to assign the community property to the respective parties "in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just." (Civ. Code, sec. 146.) This is construed as meaning that the court must award more than one half to the party who has suffered the wrong. How much more than half, rests in the sound discretion of the trial court, subject to the power of revision vested in an appellate court by the provisions of section 148 of the code. Every intendment is in favor of what the trial court did, even though it awarded all to the innocent party. See Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289; Nelson v. Nelson, 100 Cal.App.2d 348, 350, 223 P.2d 636; Jackson v. Jackson, 93 Cal.App.2d 101, 107, 208 P.2d 997; Cairo v. Cairo, supra, 87 Cal.App.2d 558, 562–563, 197 P.2d 208; Hill v. Hill, 82 Cal.App.2d 682, 696–697, 187 P.2d 28; and Arnold v. Arnold, 76 Cal.App.2d 877, 883–885, 174 P.2d 674, reviewing earlier cases.

[9] (3) *Immediately effective division of the community property in the interlocutory decree* was erroneous but is correctible by modification of the decree to provide for such disposition upon entry of the final decree. Slavich v. Slavich, 108 Cal.App.2d 451, 239 P.2d 100; Wilson v. Wilson, 76 Cal.App.2d 119, 129–133, 172 P.2d 568.

The interlocutory decree is modified by striking therefrom all words presently disposing of the community property and inserting words to the effect that the final decree shall assign to the parties the portions of the community property mentioned in the interlocutory decree, including the order that appellant sell the Loma Mar and Sonoma County properties and apply the proceeds of sale to payment of the indebtedness upon the family home awarded to the respondent. As so modified, the judgment is affirmed as of the date of its entry. Respondent will recover her costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

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111 Cal.App.2d 899

WENDELL v. WENDELL et ux.

Civ. 15096.

District Court of Appeal, First District, Division 1, California.

June 23, 1952.

Rehearing Denied July 23, 1952.

Hearing Denied Aug. 21, 1952.

Action by divorced wife against divorced husband and another to have a divorce decree, obtained by the husband in 1910, set aside as being fraudulent. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the wife, having remarried with knowledge of divorce, was estopped from asserting invalidity of divorce.

Affirmed.

1. Judgment 🔑443(1)

Extrinsic fraud that deprives an adversary of fair notice of a hearing may exist even though such was accomplished by mistake and actual fraud is not required.

2. Divorce 🔑161

A divorce, obtained by husband on false affidavits as to wife's address, was, when secured, subject to being set aside because of fraud, whether or not the falsity was a result of mistake or actual fraud.

3. Divorce 🔑161

In action by divorced wife to have a divorce obtained by husband in 1910 decleared invalid for fraud, evidence sustained trial court's finding that wife knew, at the time of divorced husband's marriage in 1914 and wife's marriage in 1915, that the divorce existed.

4. Divorce 🔑172

Wife who remarried with knowledge of and in reliance on divorce secured by husband was estopped to deny the validity of the divorce.

Philip Gordon, Los Angeles, for appellant.

Morris Oppenheim, San Francisco, for respondent.

PETERS, Presiding Justice.

By this complaint filed on October 31, 1949, plaintiff, Mollie Wendell, first wife of Abraham Wendell, seeks to attack and have set aside, on the ground of fraud, a divorce secured by Abraham in 1910, even though both parties thereafter remarried, Abraham in 1914, and Mollie in 1915. The trial court held, among other things, that, under the circumstances, Mollie was estopped from challenging the decree. Mollie appeals. There is no merit to this appeal.

Mollie was born in Poland about 1880. She and Abraham were married in England in 1898. Thereafter, Abraham migrated to New York City where he was joined by Mollie in 1902 or 1903. Thereafter, the parties lived together at various places in New York City and Brooklyn. They had three children.

Mollie testified that Abraham deserted her in 1908 or 1909, leaving her without funds. She also testified that thereafter the two corresponded and that she kept him informed of her address. This correspondence was in Yiddish.

[1, 2] In 1910, Abraham, in San Francisco, obtained an interlocutory decree of divorce upon the alleged ground of Mollie's desertion. The affidavits for publication of summons and mailing in that proceeding gave the then address of Mollie as "176 East Broadway" in New York City. That is a non-existent address. Mollie did not have any actual knowledge of the divorce action during its pendency. Whether this false address was given fraudulently or as a result of mistake does not clearly appear. In either event, the divorce decree, when secured, was subject to being set aside as having been secured on false affidavits as to residence. Rivieccio v. Bothan, 27 Cal.2d 621, 165 P.2d 677; Parsons v. Weis, 144 Cal. 410, 77 P. 1007; Wells v. Zenz, 83 Cal. App. 137, 256 P. 484; Aldrich v. Aldrich, 203 Cal. 433, 264 P. 754. Extrinsic fraud that deprives the adversary of fair notice of a hearing may exist even though such was accomplished by mistake. Actual fraud is not required. Antonsen v. Pacific Container Co., 48 Cal.App.2d 535, 120 P.2d 148; Rogers v. Mulkey, 63 Cal.App.2d 567, 147 P.2d 62; Chung Gee v. Quan Wing, 103 Cal. App.2d 19, 229 P.2d 50; Wells v. Zenz, 83 Cal.App. 137, 256 P. 484. Thus, this divorce, when secured, was subject to being set side because of this fraud.

[3] Mollie testified that she did not learn of the divorce until 1949, and also testified that until then she did not even know of the existence of divorce as an institution. She explained this lack of knowledge by testimony that she cannot read or write, that she is an immigrant, and that she has always lived where the neighbors spoke Yiddish. If this testimony were uncontradicted, and had it been believed by the trial court, it would have warranted, under the authorities cited above, setting the divorce decree aside. But this testimony is not uncontradicted, and was not believed by the trial court.

The record shows that Abraham married his present wife, Minnie, in 1914. Mollie married a Charles Miller in 1915, and admittedly lived with him as his wife until his death in 1923. Mollie attempted to explain her remarriage on the theory that she did not know of Abraham's divorce, but simply believed that because Abraham had remarried she could do likewise.

There is substantial, ample and credible testimony, by many witnesses, that Mollie knew of Abraham's remarriage in 1914, and at that time knew of the divorce. The trial court found that ever since 1914 "plaintiff had knowledge that defendant Abraham Wendell had obtained a decree of divorce from plaintiff; and in this behalf the Court further finds that subsequent to the entry of the said final decree of divorce, plaintiff, well knowing that she, the said plaintiff, and the defendant, Abraham Wendell, were divorced, and relying thereon and ratifying the final decree aforesaid, did during the year 1915 marry one Charles Miller in the City of New York, State of New York; and the Court further finds that during the year 1914 at the said City of New York, State of New York, plaintiff stated to defendant Abraham Wendell, that he, the said defendant Abraham Wendell, ought to have a wife; and the Court finds that plaintiff introduced said defendant Abraham Wendell to the defendant Minnie Wendell and stated to the defendant Abraham Wendell that defendant Minnie Wendell would make a good wife for him; and that thereafter and on the 8th day of May, 1914, defendant Abraham Wendell and defendant Minnie Wendell intermarried in the said City of New York, and then and there became and ever since have been and now are, husband and wife; and that at the time of the said marriage of defendant Abraham Wendell and defendant Minnie Wendell, plaintiff had knowledge of the said marriage and had knowledge of the said divorce, and the Court further finds from the testimony that plaintiff has admitted under oath that she, the said plaintiff, did marry the said Charles Miller in the year 1914, [sic 1915] and has likewise admitted under oath that she knew of the marriage of said defendant in the year 1914; and the Court further finds that subsequent to the marriage of defendants Abraham Wendell and Minnie Wendell, and subsequent to the marriage of plaintiff and the said Charles Miller, plaintiff visited the home of said defendants in the City and County of San Francisco on a number of occasions, and that plaintiff well knew of the said final decree and well knew that the marriage of plaintiff and said defendant Abraham Wendell had been dissolved by this Court; and that by reason of all and singular the premises, plaintiff is estopped and concluded from maintaining this action and from calling the validity of the said interlocutory and final decrees of divorce into question * * *."

These findings are supported by ample, substantial and credible testimony. While it is true that Mollie and some of her witnesses denied some of this evidence, that conflict was for the trial court. It has resolved that conflict against Mollie. Its findings, being supported, are binding on this court.

[4] If the findings be accepted as true, then, it is quite clear, that even though the divorce secured in 1910 may have been invalid, the trial court was justified in concluding that by her remarriage, under the circumstances disclosed by the evidence, Mollie was estopped from challenging the validity of that divorce. The law is well settled in this state that one who remarries with knowledge of and in reliance on a divorce secured by the other spouse, is estopped to deny the validity of the divorce. Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988; Kelsey v. Miller, 203 Cal. 61, 263 P. 200; In re Kyle, 77 Cal.App.2d 634, 176 P.2d 96; Rediker v. Rediker, 35 Cal.2d 796, 221 P.2d 1, 20 A.L.R.2d 1152.

The other contentions of appellant are so lacking in merit that they require no consideration.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

111 Cal.App.2d 827

PEREZ v. PEREZ.

Civ. 14958.

District Court of Appeal, First District,
Division 2, California.
June 20, 1952.

Wife obtained a divorce decree with alimony provisions. Thereafter the husband moved to recall execution and strike alimony provisions from decree on ground that it had been obtained by wife through fraud and deceit. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker and William F. Traverso, JJ., entered orders granting the motion, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that Superior Court had power to set aside alimony provisions on ground of alleged fraud.

Orders affirmed.

1. Divorce 🔑246, 263

Where divorced wife participated in hearing on divorced husband's motion to recall execution and strike alimony provisions from interlocutory divorce decree, and she failed to object to the form of the notice, alleged defect in the notice for failure to state grounds on which motion would be made, was waived. Code Civ. Proc. § 1010.

2. Motions ⚷21

Statute providing that notice of a motion, other than for a new trial, must state when, and grounds on which it will be made, and the papers, if any, on which it is to be based, does not require statement of other evidence than papers. Code Civ. Proc. § 1010.

3. Motions ⚷37

Statute permitting use of affidavits on motion does not render other evidence inadmissible. Code Civ.Proc. § 2009.

4. Divorce ⚷282

Where appellant did not object in trial court to alleged error in admission of oral evidence without notice on motion to recall execution and strike alimony provisions from interlocutory divorce decree, appellant could not complain on appeal of consideration of such evidence.

5. Judges ⚷32

Validity of minute order of first judge who heard evidence, granting motion of divorced husband to recall execution and strike alimony provisions from an interlocutory divorce decree was not affected because of the fact that the formal order was signed by second judge who did not hear the evidence.

6. Divorce ⚷246, 263

Where divorced husband's affidavit which accompanied notice of motion to recall execution and strike alimony provisions from interlocutory divorce decree, expressly stated that provisions for alimony and execution were obtained through fraud and deceit consisting in representations of wife that she did not want anything except a divorce, issue of fraud was sufficiently alleged, though not mentioned in notice of motion, since affidavits would be treated as part of the notice of motion.

7. Divorce ⚷246

Court had power to set aside alimony provisions of interlocutory divorce decree on ground that provisions for alimony and execution were obtained through alleged fraud and deceit of wife, consisting in alleged representations of wife that she did not want anything except a divorce.

Phil F. Garvey, San Francisco, James A. Himmel, San Francisco, for appellant.

Gladstein, Andersen & Leonard, San Francisco, for respondent.

NOURSE, Presiding Justice.

Two appeals from separate orders granting defendant's motion to recall execution and strike alimony provisions from an interlocutory decree of divorce are presented together.

[1] The first point raised by the appellant is that the court was without jurisdiction to hear the motion because the notice thereof did not state the grounds upon which it would be made as required by section 1010 of the Code of Civil Procedure. The point is without merit. In participating in the hearing and in failing to object to the form of the notice the question of its sufficiency was waived. Hecq v. Conner, 203 Cal. 504, 265 P. 180; Peers v. Stoll, 32 Cal.App.2d 511, 90 P.2d 119; Simonini v. Jay Dee Leather Products Co., 85 Cal.App.2d 265, 193 P.2d 53.

[2–4] The second point states error in the trial court when it heard oral testimony in support of the motion whereas the notice stated that it would be heard on the accompanying affidavit. The record does not show that any objection was made to this procedure. Section 1010, Code of Civil Procedure reads in part: "* * * the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and *the papers, if any,* upon which it is to be based." It does not require the statement of other evidence than papers. Although sec. 2009, Code of Civil Procedure permits the use of affidavits on motions, other evidence is admissible. 18 Cal.Jur. 656; Younglove v. Steinman, 80 Cal. 375, 377, 22 P. 189. Even if oral evidence had not been admissible without notice, appellant could not complain on appeal of its consideration when he did not object below. Holzer v. Read, 216 Cal. 119, 123, 13 P.2d 697; 2 Cal.Jur. 263. There is no reason whatever why this general rule should not apply to the hearing of a noticed motion, where waiver of requirements of such notice is readily accepted. See Hecq v. Conner, 203 Cal. 504, 265 P. 180.

[5] One of the grounds upon which appellant relies is that the formal order signed by Judge Traverso is a nullity because Judge Traverso did not hear the evidence.

In Reimer v. Firpo, 94 Cal.App.2d 798, 800–801, 212 P.2d 23, 25, the court held: "It is quite clear that, when a case requiring findings is tried, the trial is not complete but is still in process of determination until findings are signed and filed. Until that time, the trier of the fact may change his mind, and, even though an order has been made directing the entry of judgment, may order a different judgment to be entered. * * * It is equally clear that no successor of (the judge) on the trial bench, and no associate of his on that bench, had the legal power to complete the incomplete trial by signing the findings." As authority the following is quoted from Guardianship of Sullivan, 143 Cal. 462, 467, 77 P. 153, 155: "A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury. He cannot be compelled to accept a decision upon the facts from another judge or another jury." In that case it was held that another judge of the same court than the one who had heard the evidence had jurisdiction to give the decision, that the right to have the same judge decide can be waived, but that it is error for another judge to decide the case without such waiver. See also Hughes v. DeMund, 96 Cal.App. 365, 368, 274 P. 405; DeMund v. Superior Court, 213 Cal. 502, 505, 2 P.2d 985; McAllen v. Souza, 24 Cal. App.2d 247, 251, 74 P.2d 853; Bartholomae Oil Corp. v. Superior Court, 18 Cal.2d 726, 728, 117 P.2d 674.

However in this case there is a serious question whether any findings were required. In the recent case Parker v. Parker, 107 Cal.App.2d 215, 217, 236 P.2d 828, 829, this court said: "The trial court was not required to make findings. 'The universal practice in this state is not to require findings on an order made after motion.' Waymire v. California Trona Co., 176 Cal. 395, 399–400, 168 P. 563, 565." The Waymire case is based on Waller v. Weston, 125 Cal. 201, 204, 57 P. 892 which holds that findings of fact are only required as to issues of fact specified in sec. 590, Code of Civil Procedure to wit, matter alleged in a complaint and controverted by answer and new factual matter in the answer. In Euclid Candy Co. v. International Longshoremen, etc., 49 Cal.App.2d 137, 142, 121 P.2d 91 this court held that findings of fact had no place in an order granting a temporary injunction although based on a transcript of 1,400 pages. See also Pessarra v. Pessarra, 80 Cal.App.2d 965, 969, 183 P.2d 279. If on the basis of these cases we hold that no findings were required then the minute order of Judge Shoemaker was the final order, appealable under Rule 2(b)(2) as there was no express direction for a written order and the formal written order of Judge Traverso was a nullity. Pessarra v. Pessarra, 80 Cal.App.2d 965, 969, 183 P.2d 279, supra. Even if we should hold that over and above the order granting defendant's motion an express order recalling the execution and striking provisions of interlocutory and final decrees of divorce had some separate significance, then still it could be said that where no findings were required the original order of Judge Shoemaker had disposed of all the issues and that then another judge of the court could perform the more or less perfunctory act of entering the formal order (compare 48 C.J.S., Judges, § 56, page 1020 and Bartholomae Oil Corp. v. Superior Court, 18 Cal. 2d 726, 728–29, 117 P.2d 674. It would seem therefore that this argument cannot avail appellant.

[6] It is argued that the issue of fraud is neither alleged nor proved. The affidavit of the husband expressly states that the provision for alimony and the execution were "obtained through fraud and deceit" consisting in representations of the wife that she did not want anything except a divorce. The accompanying affidavit is treated as part of the notice of motion and if the affidavit sufficiently apprises the opposing

party of the grounds on which the motion will be made a defect of the notice in that respect is cured. Hecq v. Conner, 203 Cal. 504, 506, 265 P. 180. There is no express allegation in the affidavit as to when defendant gained knowledge of the fraud, although it may possibly be derived from his allegation that he was never served with a copy of Interlocutory or Final Decree and that he "is totally unfamiliar with the terms thereof except as he has presently been advised by counsel."

[7] The power of the court to set aside the decree on the ground of extrinsic fraud is sustained in McGuinness v. Superior Court, 196 Cal. 222, 231–232, 237 P. 42, 40 A.L.R. 1110; Raps v. Raps, 20 Cal. 2d. 382, 387, 125 P.2d 826; Dei Tos v. Dei Tos, 105 Cal.App.2d 81, 232 P.2d 873, and Cross v. Tustin, 37 Cal.2d 821, 825, 236 P.2d 142.

The orders are affirmed.

GOODELL and DOOLING, JJ., concur.

111 Cal.App.2d 641

MURRAY et al. v. SAN LEANDRO ROCK CO. et al.

Civ. 15139.

District Court of Appeal, First District, Division 1, California.

June 16, 1952.

Rehearing Denied July 16, 1952.

Hearing Denied Aug. 14, 1952.

Action by Margaret Murray, automobile passenger, and Martin Murray, automobile owner, against the San Leandro Rock Co., a California corporation, and others, for damages resulting from automobile collision. Verdict was for defendants, and the Superior Court of the State of California in and for the County of Alameda, S. Victor Wagler, J., denied Margaret Murray's motion for new trial and granted Martin Murray's motion for new trial on ground of insufficiency of evidence, and Margaret Murray appealed from judgment entered on verdict against her, and defendants appealed from order granting Martin Murray new trial. The District Court of Appeal, Bray, J., held that where there was substantial evidence that Margaret Murray had sustained no injuries from accident, denial of new trial was not abuse of discretion, and that there was sufficient evidence showing defendants' liability to support granting a new trial to Martin Murray.

Judgment and order affirmed.

1. Appeal and Error 🔑1002

Where, in action by automobile owner and passenger for damages sustained in collision, evidence was conflicting and jury found for defendants, District Court of Appeal was bound by judgment against passenger, notwithstanding that trial court granted owner's motion for new trial on ground of insufficiency of evidence.

2. Damages 🔑185(3)

In action by automobile passenger for injuries sustained in collision, there was substantial evidence that passenger's psychoneurotic condition was not caused by accident but existed prior thereto.

3. New Trial 🔑72

Where, in automobile passenger's action for injuries sustained in collision, there was conflict in evidence as to cause of passenger's injuries and most of medical testimony to effect that psychoneurotic condition was caused by accident was based upon subjective symptoms as related by passenger, denial of motion for new trial after verdict for defendants was not abuse of discretion.

4. Appeal and Error 🔑1015(1)

Order granting new trial will not be disturbed on appeal unless a verdict in favor of moving party would not have found sufficient legal support in evidence adduced at trial.

5. New Trial 🔑70

In action by automobile owner for damages to automobile sustained in collision, there was substantial evidence which would support finding that sole proximate cause of accident was defendants' negligence, and hence sufficient evidence to grant new trial in favor of owner after verdict for defendants.

6. Damages ⚷160

In action for damages to automobile, objection to question as to estimates for repair of automobile, that it was "incompetent, outside the scope of the pleadings" was not well taken where complaint properly alleged damage for repairs to automobile.

7. Damages ⚷160

In action for damages to automobile, fact that repairs to automobile had not been made would not constitute fatal variance between complaint alleging damage for repairs to automobile and proof of estimate for repairs of automobile.

8. Appeal and Error ⚷231(1)

Failure to urge certain grounds as objection to question on trial precludes urging such grounds on appeal.

9. Appeal and Error ⚷231(3)

Where, in action for damages to automobile, defendants objected to estimates for repair of automobile as being "incompetent, outside the scope of the pleadings", if defendants intended objection to go further than being objection for variance, they should have so informed court, and failure to do so precluded urging further grounds on appeal.

10. New Trial ⚷68

Trial ⚷105(1)

Where, in action for damages to automobile, testimony as to amount of estimate of repairs was not properly objected to, defendants thereby implied that estimate was properly based on reasonable value of necessary repairs, and hence there was evidence of damage and granting of new trial after verdict for defendants was within discretion of court.

11. Appeal and Error ⚷221

Where, in action for damages to automobile, issue given to jury was cost of repairs, defendants who did not at trial raise question that difference in value of automobile might have been less than amount of repairs, could not raise same on appeal.

Popper & Burnstein, Oakland, Kroninger & Zographon, Oakland, for appellants Margaret and Martin Murray.

Ricksen, Freeman & Johnson, Stanley C. Smallwood, Oakland, for San Leandro Rock Co.

BRAY, Justice.

Plaintiff Margaret Murray sued for damages for alleged personal injuries. Plaintiff Martin Murray sued for damages to his automobile. The jury found for defendants on both counts. On motions for new trial the court denied Margaret's motion and granted Martin's motion on the ground of insufficiency of the evidence. Plaintiff Margaret appeals from the judgment entered on the verdict against her. Defendants appeal from the order granting Martin a new trial.

Questions Presented

Margaret's appeal—sufficiency of the evidence to justify the verdict.

Defendants' appeal—alleged abuse of discretion in granting new trial.

Facts. (1) On Issue of Liability.

Plaintiffs' son Keith was driving with his mother in Martin's 1936 De Soto sedan in a general westerly direction on East 14th Street in Oakland. Both Keith and his mother testified that they had turned into that street about three blocks from its intersection with 29th Avenue, and that at all times they were in the north, or right, lane. Keith had slowed the car on seeing the yellow traffic light, gave a stopping signal and completely stopped as the light turned red. Both testified that they had been at a complete stop behind the pedestrian crosswalk approximately 11 seconds before defendant Lawrence, driving defendants' truck in the scope of his employment, drove it into the right rear of the car. Keith testified that he first saw the truck directly behind him as he was travelling about 20 miles per hour. He saw it next as it swerved to the left behind him. While he was stopped he heard the sound of brakes, looked in his rear window and saw defendants' truck appearing to come from the center lane and bearing down on him.

Defendant Lawrence testified on direct examination that he did not change lanes prior to the accident, and although he was looking straight ahead he did not see the automobile until he hit it. On redirect he said that plaintiffs' automobile came to his right side about 35 feet from the intersection and then turned in front of him and that was when he hit it. Police Officer Gardiner testified that Lawrence immediately after the accident stated that he had glanced off to the left for just a second, and when he looked back the car in front had stopped approximately six feet in front of him.

[1] Thus it appears that the evidence was conflicting. If the jury believed Lawrence's story as last told (it was for the jury to reconcile that story with the one told on direct examination) there was substantial evidence to support a finding that the cause of the accident was Keith's negligence in turning in front of the truck. So far as the appeal from the judgment is concerned, the conflict in the evidence apparently having been resolved in defendants' favor, we are bound by that determination.

2. Margaret's Alleged Injuries.

But in considering Margaret's attack on the action of the trial court in denying her a new trial and yet granting her coplaintiff one, it would appear that the court believed that the evidence established defendants' liability (certainly the weight of the evidence supports that conclusion) but that the evidence failed to establish that Margaret had been injured, and that the jury's verdict was based on that theory rather than on nonliability of defendants. Therefore, we are required to consider the evidence on the implied findings of both court and jury that plaintiff received no injuries in the accident.

[2, 3] Lawrence testified that the car and truck moved 3 feet after the impact. The police officer estimated 6 feet. Apparently Keith claimed it went further. Margaret testified that when the truck hit, she was bracing herself and was thrown about in the car, although she struck nothing. Keith was not hurt and was not thrown around. After the impact Keith drove the car across the street. Margaret then got out and called the police from a grocery store. When the officer arrived she told him she was not injured and did not want an ambulance. Three days later she went to see Dr. Walker and Dr. Toffelmier because her spine was sore and the skin on her back was stinging. She took 8 months off from work (salary, $200 per month). She lost weight from 160 to 138 pounds, but has gained it back. At the time of trial she was still under care for disorders in the veins and nervous system. She has pains in her scalp and the back of her head. She testified that prior to the accident, she had many of her complaints except the tingling sensation, the head pains and those in and about the veins. In 1931 she was injured in the lower spine which caused her pain occasionally right up to the time of this accident. About a year before this accident she had injured both shoulders in an accident, causing pain for about a year. Dr. Toffelmier, orthopedist, testified that when Margaret came to him a few days after the accident she complained of pain in her back and wrists. He concluded that she had sprained her shoulder and her back region in the accident. The x-rays were negative. There were no objective symptoms of injury. There were some signs of tenderness. Dr. Hudson reported to him that Margaret's complaints were "multiple and vague and rather exotic," having no physical basis and primarily based upon a long standing psychoneurosis. After consulting Dr. Hudson Dr. Toffelmier felt she should have psychiatric treatment. Six days after the accident he wrote that she had sustained a slight contusion of the left chest. On being informed that Margaret had testified that in the accident she had not struck anything he could not account for the contusion. Toffelmier testified that her trouble might have been caused by the 1931 accident, and that her posture had been poor for years. After seeing Toffelmier Margaret visited some twenty or more doctors, some of whom testified. The consensus of opinion of these doctors was that Margaret is a psy-

choneurotic. Dr. Barr first saw her in 1947. She then complained of pain in her low back, stiffness and soreness in fingers and wrist. He then diagnosed her condition as "fibrocitis which is rather a catch basket of psychosomatic rheumatic complaints and sometimes added inflammatic components and with psychoneurosis with mental depression." Dr. Hudson, Dr. Truman, Dr. Allen, Dr. Tuchler, Dr. Gill, Dr. Nesche, all believed there had been a long standing neurosis. Whereas Dr. Hudson and Dr. Nesche and Dr. Truman, doctors of internal medicine, testified that this accident *might* have aggravated her condition, and Dr. Tuchler, a psychiatrist, testified that the accident *did* cause a flare-up, causing new signs and symptoms, on the other hand, Dr. Gill, an orthopedic specialist, believed plaintiff's complaints were solely neurotic and not based on the accident, and even Dr. Truman thought nothing in her condition was a result of any injury on June 24, 1949. The report of Dr. Adams, read into evidence without objection, indicates that this psychiatrist also believed that plaintiff's complaints were based upon a neurotic condition. The report does not express an opinion on whether or not the accident had anything to do with her complaints, such as to aggravate a prior condition. (The general tenor of this report is that the accident was more of an excuse to go to doctors for treatment; that her need to seek doctors was a neurotic one. His reasoning was that the plaintiff went to doctors to be patted and soothed (as by her father who died when plaintiff was 7 years old—which death caused her to break out in a rash) and because she was flaunting her mother with whom she always had poor relations). Dr. Lagen testified that in 1950, subsequent to the accident, he diagnosed the condition of plaintiff's right hand as having a lack of sympathetic control of the blood vessels which may occur as the result of emotional strain, shock, etc.; that shock attending an automobile accident if sufficient could cause the condition. Some of the other doctors disagreed with this diagnosis. Plaintiff Martin testified that Margaret had always been a nervous person, but appeared more so since the accident; that there had been some improvement in the condition of her veins. While there is evidence from which the jury might have concluded that Margaret received some injury in the accident, or some additional shock to her psychoneurotic condition, there is substantial evidence, at least (if not the weight of the evidence), to show that plaintiff was not injured in any degree in the accident and that most of her present troubles are imaginary and those which are not, were caused and existed prior to the accident. Plaintiff cites Gamberg v. Industrial Acc. Comm., 138 Cal.App. 424, 32 P.2d 413, which held that under the facts of that case there was no substantial conflict in the evidence as to plaintiff's injuries. Here, however, there was such substantial conflict. Moreover, most of the conclusions of the doctors who felt Margaret had been injured in the accident were based upon subjective symptoms as related by Margaret. Apparently neither the court nor the jury placed too much faith in her statements. There was no abuse of discretion in the denial of Margaret's motion for new trial.

Defendants' Appeal

[4-9] Defendants contend that the test of whether a trial court has abused its discretion in granting a new trial to a plaintiff where the jury has found for the defendant is—was there substantial evidence to support a verdict for plaintiff had the jury found one? This is the settled rule in California. Orders granting a new trial will not be disturbed on appeal "unless we may say that a verdict in favor of the moving party would not have found sufficient legal support in the evidence adduced at the trial." Empire Investment Co. v. Mort, 169 Cal. 732, 736, 147 P. 960, 962. In granting plaintiff Martin a new trial the trial court impliedly found that the sole proximate cause of the accident was defendants' negligence. As pointed out before, there is substantial evidence to support that conclusion. Defendants then contend there is no substantial evidence as to the money value of the damage to plaintiff's automobile. The evidence demonstrates the physical damage. The photograph of the damaged car and the testimony of Keith Murray show that the impact tore off the trailer hitch, caved in the rear trunk and back portion of the car. As to the pecuniary damage the testimony is meager. It consists solely of the following testimony by plaintiff Martin: His counsel asked him if he had received estimates for the repair of the automobile. He replied that he had received one from Peabody Motors. When asked the amount of that estimate, he answered, "about $175." Defendants' only objection to this question was that it was "incompetent, outside the scope of the pleadings." The court ruled, "I will have to overrule it on that ground." An examination of the complaint shows that the objection was not well founded, as the complaint contained proper allegations of damage to plaintiff Martin for repairs to the automobile in the sum of $179. (The fact that the repairs had not been made would not constitute a fatal variance between the complaint and the proof.) While the question was objectionable on other grounds, defendants' failure to urge them precludes their being urged now. It is apparent from the record that while the defendant used the word "incompetent" in his objection (and such objection would bar hearsay testimony) the court and counsel assumed when defendant objected "incompetent, outside the scope of the pleadings," that defendant meant that the evidence was incompetent because outside the pleadings. At the beginning of the testimony on this subject defense counsel had stated that he was going to object to testimony concerning an estimate on the ground that the complaint had alleged that the automobile had been repaired. The court obviously in stating that the objection *on that ground* was overruled, believed the objection to be so limited. In fact, when a proper objection was later made to further evidence on this point, the court promptly sustained it. If defendants intended their objection to go further than it appeared to go, they should have so informed the court. "Objections to evidence must be specific and state the correct grounds of inadmissibility before complaint can be made on appeal of the trial court's ruling." Hatfield v. Levy Bros., 18 Cal.2d 798, 809, 117 P.2d 841, 847. "It may be conceded that the affidavits were incompetent to prove the facts mentioned (Code Civ.Proc. § 2009), but if such affidavits were admitted without any objection or without proper objection, appellants may not now raise the point." Soares v. Ghisletta, 1 Cal.App.2d 402, 404, 36 P.2d 668, 669; see also Toomes v. Nunes, 24 Cal.App.2d 395, 75 P.2d 94.

[10, 11] Plaintiff's counsel next showed a written estimate of Peabody Motors to Martin and asked him if it was the estimate he received. He replied that it was. "Q. And that is an estimate of total cost of $174.71, is that correct?" No objection was made to this question. He replied, "That's right." Then plaintiff's counsel offered the written estimate in evidence. Defendants properly objected and the court sustained the objection. Nothing further occurred concerning the pecuniary value of the damage to the car. Summing up the evidence on this subject:—In the accident the car received physical damage which was specifically shown. Plaintiff testified that he had received an estimate of $174.71 to repair the car. Was that sufficient evidence to have supported a verdict in plaintiff's favor in that amount had the jury given it? Under the peculiar circumstances of this case we believe it was. True, as contended by defendants, there is no testimony that that sum was the reasonable value of the repairs necessarily required by the accident. The amount of the estimate could be material only if it was based on the reasonable value of the necessary repairs. In not objecting to plaintiff's testifying to the amount of the estimate defendants thereby implied that it was a properly based estimate. At least, in permitting it to get before the jury, the duty then devolved upon defendants to show that it was not a properly based estimate. "It has been held that 'incompetent evidence admitted without objection is to be regarded as sufficient to establish the fact.'" Seaford v. Smith, 86 Cal.App.2d 339, 344, 194 P.2d 792, 794. The jury would have the

right to infer from its admission without objection that the $174.71 was the reasonable cost of repairing the damage to the car, shown by the photograph and Keith Murray's testimony to have been caused by the accident. The jury properly could have awarded plaintiff Martin the $174.71. The court therefore acted within its discretion in granting the new trial. "The measure of damages in cases of this character is the difference in the value of the property immediately before and immediately after the injury, subject to the proviso that, if the property be susceptible of repair at an expense less than such difference the measure of damages is the reasonable cost of the repairs. * * *" Menefee v. Raisch Improvement Co., 78 Cal.App. 785, 788, 248 P. 1031, 1032. Defendants at no time during the trial raised the question that the difference in value of the 1936 De Soto might have been less than the amount of the repair bill. They offered no instruction that the jury might not award the cost of the repairs unless it appeared that such cost was less than the difference in value. The sole issue given the jury was the question of the cost of the repairs. Defendants having failed to raise the issue at the trial, cannot raise it now. Moore v. Levy, 128 Cal. App. 687, 18 P.2d 362, where a judgment was reversed because the only evidence of the reasonable value of the repairs and their necessity was the testimony of the plaintiff, admitted over proper objection, as to the amount of a repair bill he had received, is not applicable here because proper objection was made to the introduction of the bill. The situation here is somewhat analagous to that in Menefee v. Raisch Improvement Co., supra, 78 Cal. App. 785, 789, 248 P. 1031, 1032, where without objection the repair bill was introduced in evidence. The court said, concerning the effect of the admission of the bill: "The statement was hearsay and insufficient alone to prove the reasonable value of the repairs, their necessity, or that the time consumed in making them was reasonable [citations] * * *; but, having been admitted without objection, the statement therein that certain material and labor had in fact been furnished not having been contradicted, the court was justified in accepting it as evidence tending to prove the fact stated. [Citation.]"

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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111 Cal.App.2d 723

HAWTHORN v. CITY OF BEVERLY HILLS et al.

Civ. 18982.

District Court of Appeal, Second District, Division 3, California.

June 17, 1952.

Rehearing Denied July 3, 1952.

Hearing Denied Aug. 14, 1952.

Proceeding in mandamus by Carl L. Hawthorn against City of Beverly Hills, and others, as members of the City Council, commanding defendants to grant petitioner leave of absence from his former employment with defendant city. The Trial Court, Frank G. Swain, J., entered orders overruling demurrer and denying motion to quash temporary restraining order, and directing issuance of a peremptory writ of mandate, and defendants appealed. The District Court of Appeal, Vallee, J., held that salary payable to fireman who is member of State Employees Retirement System, in lieu of temporary disability, is not salary as such, but is compensation within meaning of Workmen's Compensation Act, and consequently within contemplation of constitutional provision giving Legislature plenary power to create a complete system of workmen's compensation, and statute could not have violated constitutional provision requiring general laws to have uniform operations and prohibiting special laws, privileges and immunities.

Appeal from order overruling demurrer to petition dismissed, order denying defendants motion to quash temporary restraining order and judgment affirmed.

1. Workmen's Compensation 🔑50, 51, 2084

The Workmen's Compensation Act embodies a complete and exclusive code of laws on that subject, and is to be liberally construed with the purpose of extending its benefits for the protection of persons injured in course of their employment, with the Act to be taken as a whole and scrutiny not to be confined to particular section under review, but all parts are to be read as connected whole, with every section to be given effect if possible. Labor Code, § 4850.

2. Workmen's Compensation 🔑801

The term "compensation" as used in Workmen's Compensation Statutes is a technical one and includes all payments conferred by the Act upon an injured employee, and does not have the same meaning as does compensation with reference to payment to employee of wages or salary for services performed. Labor Code, §§ 4850–4854.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

3. Municipal Corporations 🔑200(5)

The compensation received by city fireman under provision of Labor Code that when city fireman who is member of State Employees Retirement System is disabled by injury arising out of and in course of his duties, he shall be entitled to leave of absence without loss of salary for period of one year in lieu of temporary disability payments, is not salary as such, but is compensation for his injury within the meaning of the Workmen's Compensation Act. Labor Code, §§ 4850–4854.

4. Statutes 🔑72

In view of fact that salary payable to fireman for period of one year in lieu of temporary disability payments for injuries arising out of duties is workmen's compensation and not payment of salary as such, distinction in statute providing for such payment, between firemen who are members of State Employees Retirement System and those who are not, is not in violation of requirement of constitutional provision that general laws have uniform operation, since Constitution provides, **in case of** workmen's compensation, that Legislature has unlimited power to enforce complete system of workmen's compensation. Labor Code, §§ 4850–4854; Const. art. 1, §§ 11, 12; art. 4, § 25, pars. 19, 28, 33; art. 20, § 21.

5. Municipal Corporations 🔑176(3), 957(1)

In view of fact that payments to firemen who are members of State Retirement System of year's salary in lieu of temporary disability payments for injury arising out of duties is in nature of workmen's compensation within meaning of constitutional provision giving Legislature plenary power to create a complete system of workmen's compensation, provision could not be unconstitutional as tax on city, or as an attempt to regulate municipal affairs of chartered city.

6. Mandamus 🔑107

When it had been determined by industrial accident commission that injury to fireman arose out of and in course of duty and that fireman was entitled to leave of absence and salary in accordance with provision of Labor Code, mandamus was a proper remedy to compel city council to pay salary. Labor Code, § 4550.

7. Mandamus 🔑12

Where there is no room for discretion in the performance of an act which the law specially enjoins as a duty resulting from an office, mandamus is proper remedy to enforce performance.

Richard C. Waltz, City Atty., Beverly Hills, for appellants.

Henry McClernan, City Atty., Glendale, John H. Lauten, Asst. City Atty., Glendale, and Joseph R. Roark, Deputy City Atty., Glendale, for Amicus Curiae on behalf of appellants.

Charles A. Son and John W. Hill, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants from a judgment directing that a writ of mandate issue commanding them to grant petitioner a leave of absence from his former employment with defendant city, referred to as the city, from December 21, 1949, to October 30, 1950, with full salary of $3,616.16, less a credit of $1,165.71, on account of temporary disability payments which he has retained. Defendants also appealed from an order denying their motion to quash the temporary restraining order and from an order overruling their demurrer to the petition. Since the latter order is not appealable, the appeal therefrom will be dismissed.

On December 21, 1949, petitioner was, and for many years prior thereto had been, employed by the city as a fireman engaged in active fire fighting and prevention service. On that day he sustained an injury arising out of and in the course of his duties, resulting in his temporary disability until October 30, 1950. Prior to the injury the city had elected to have its firemen become members of the State Employees' Retirement System,[1] and petitioner was a member of the System at the time of the injury.

Petitioner filed an application with the Industrial Accident Commission for adjustment of his claim on account of the injury. The Commission found that petitioner "is entitled to a leave of absence without loss of salary, in lieu of disability payments, during the time he is disabled by said injury, for a period not exceeding one year from date of injury." An award of medical treatment was made. The Commission did not award the salary for want of jurisdiction. Petitioner received temporary disability payments of $1,165.71 from the State Compensation Insurance Fund, the city's insurer, which he retained as a credit to the city.

The civil service ordinance of the city and the rules adopted thereunder provided that the city council could terminate the employment of firemen when they attained the age of fifty-five. Petitioner became fifty-five years of age January 13, 1950, and his employment was terminated January 31, 1950. The city paid him his salary until January 31, 1950. The city did not pay him salary after that date; however, he was paid the normal temporary disability compensation of $30 a week by the Fund. The sum sued for is the difference between the amount of unpaid salary during disability and the normal temporary disability compensation which plaintiff retained.

Section 4850 of the Labor Code as amended in 1949 [2] provides that when a city fireman who is a member of the State Employees' Retirement System is disabled by injury arising out of and in the course of his duties, "he shall become entitled, regardless of his period of service with the city, to leave of absence while so disabled without loss of salary, in lieu of disability payments under this chapter, for the period of not exceeding one year. * * * If the employer is insured, the payments which, except for the provisions of this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured. This section refers to temporary disability only."

The refusal of defendants to pay petitioner his salary during the full period of disability is predicated solely on their claim that section 4850 is unconstitutional. They concede that the money is due if section 4850 is constitutional. Their contention is bottomed on the premise that "the salary sued for is not Workmen's Compensation." The premise is fallacious.

[1] The Workmen's Compensation Act embodies a complete and exclusive code of laws on the subject.[3] It is to be liberally construed with the purpose of extending its benefits for the protection of persons injured in the course of their employment.[4] The Act must be taken as a whole, and scrutiny is not confined to the particular section under review. All are parts of a connected whole and the several sections are to be read in connection with every

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1. Gov.Code, secs. 20010, 20021, 20450, 20568.
2. Stat.1949, ch. 1143, p. 2042. The section was again amended in 1951. (Stat.1951, ch. 1378, p. 3299.)
3. 2 Campbell's Workmen's Compensation 1399, sec. 1682 and cases cited.
4. Labor Code, sec. 3202, 1 Campbell's Workmen's Compensation 23, sec. 29.

other section. Section 4850 is to be given effect, if possible.

The Workmen's Compensation Act is division IV of the Labor Code. "Compensation" means compensation under division IV and includes every benefit or payment conferred by that division upon an injured employee.[5] Part 2 of division IV treats of computation of compensation. Chapter 2 of part 2 (secs. 4550–4854) is titled "Compensation Schedules." Section 4550 provides that where liability for compensation exists under the Act, such compensation shall be furnished or paid by the employer and shall be as provided in chapter 2, which includes section 4850 that defendants say is unconstitutional.

Article 3 of chapter 2 contains a schedule of temporary and permanent disability payments. Article 7 of chapter 2 of division IV (secs. 4850–4854) treats of payments to city policemen and city firemen who are members of the State Employees' Retirement System. Section 4850 provides that if a city policeman or city fireman who is a member of the System is disabled by injury or illness arising out of and in the course of his duties he shall be entitled to leave of absence while so disabled "without loss of salary, in lieu of disability payments under this chapter, for the period not exceeding one year." As we have noted "this chapter" is chapter 2, titled "Compensation Schedules." Section 4851 imposes the duty on the Industrial Accident Commission to determine whether the disability referred to in section 4850 arose out of and in the course of duty, and, in a disputed case, to determine when such disability ceases. Section 4852 provides that the provisions of article 7 do not diminish or affect the right of such employee to the medical, surgical, and hospital benefits prescribed by division IV. Section 4853 provides that whenever such disability of a city policeman or city fireman continues for a period beyond one year he shall thereafter be subject, as to disability indemnity, to the provisions of division IV other than section 4850 during the remainder of the period of his disability or until the effective date of his retirement under the State Employees' Retirement Act, and the leave of absence shall continue. Section 4854 provides that no disability indemnity shall be paid to such policeman or fireman concurrently with wages or salary payments.

[2] The term "compensation" is a technical one and includes all payments conferred by the Act upon an injured employee.[6] "Compensation" of an employee in the form of wages or salary for services performed, does not have the same meaning as the word "compensation" in the Workmen's Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained.[7] Wages and salary may, under some circumstances, be paid as compensation in lieu of the normal temporary disability payments prescribed by the Act.[8] Such payments do not constitute salary or gratuities, but are payments of compensation under the Act.

[3] We think it manifest that the normal schedule of compensation for temporary disability of city firemen, members of

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[5] Labor Code, sec. 3207. Section 5001 also defines "compensation": "Compensation is the measure of the responsibility which the employer has assumed for injuries or deaths which occur to employees in his employment when subject to this division. * * *"

[6] Labor Code, sec. 3207; Evans v. Los Angeles R. Corp., 216 Cal. 495, 14 P.2d 752; City of Oakland v. Lyckberg, 95 Cal.App. 71, 72–74, 272 P. 606; City of Sacramento v. Central California T. Co., 78 Cal.App. 215, 219–220, 248 P. 307.

[7] City of Sacramento v. Industrial Acc. Comm., 74 Cal.App. 386, 391–393, 240 P. 792.

[8] Evans v. Los Angeles Ry. Corp., 216 Cal. 495, 14 P.2d 752, in which it was held that payment of full salary required by a city ordinance could be considered as compliance with the Workmen's Compensation Act and that the greater amount was justified by the peculiarly hazardous character of a fireman's work; Sacramento v. Central California T. Co., 78 Cal.App. 215, 219, 220, 248 P. 307; London G. & A. Co. v. Industrial Acc. Comm., 92 Cal.App. 298, 268 P. 670; Morrison v. Industrial Acc. Comm., 29 Cal.App.2d 528, 534–535, 85 P. 186; Industrial Indemnity Exchange v. Ind. Acc. Comm., 80 Cal.App.2d 480, 182 P.2d 309.

the State Employees' Retirement System, was not considered by the Legislature to be full and complete compensation for injuries received in their extra-hazardous occupation, and that the salary paid to a city fireman under section 4850 is compensation for his injury within the meaning of the Workmen's Compensation Act. The requirement for payment of salary is a part of the Act. It is one of the compensation schedules prescribed by chapter 2 of part 2. The Commission has jurisdiction to determine whether the disability arose out of and in the course of duty. If the disability continues longer than a year a fireman thereafter receives the normal temporary disability allowance, and the leave of absence continues. The provision in section 4853 that after one year a city fireman shall be subject "as to disability indemnity" to the provisions of division IV other than section 4850, and that the leave of absence shall continue, clearly implies that the salary payment prescribed by section 4850 is disability indemnity. For a period of one year from the date of injury a city fireman is subject, as to disability indemnity, to section 4850; thereafter he is subject, as to disability indemnity, to the other provisions of the Act. The payment required by section 4850 is not salary as such; it is compensation for injury received in the strict sense of that term as defined by sections 3207 and 5001. It is in place of the normal temporary disability allowance under chapter 2. The additional compensation provided by section 4850 is in the same category in this respect as additional compensation because of serious and wilful misconduct of the employer, which is held to be additional compensation for injury received.[9]

Hawthorn v. Industrial Acc. Comm., 101 Cal.App.2d 568, 225 P.2d 966, does not stand for the proposition that payment of salary pursuant to section 4850 is not workmen's compensation, as defendants argue. The only question in that case was whether the Industrial Accident Commission had jurisdiction under sections 4850–4854 to make the award of salary to petitioner. The court held it did not; that, as provided in section 4851, it only had jurisdiction to determine whether the disability referred to in section 4850 arose out of and in the course of duty.[10] When the fact of disability was established and the salary was fixed by law as the measure of compensation the Commission had neither the power nor the duty to fix the amount of compensation by an award.

[4] The assertion of unconstitutionality is that section 4850 violates the provisions of the state Constitution requiring general laws to have a uniform operation and prohibiting special laws, privileges and immunities.[11] Defendants argue that there is no reasonable basis for a distinction between firemen who are members of the State Employees' Retirement System and firemen who are not. It is not necessary to dilate at length on this point. As the payment of salary prescribed by section 4850 is workmen's compensation, it is without merit.

Article XX, sec. 21, of the Constitution reads in relevant part: "The Legislature is hereby expressly vested with plenary power, *unlimited by any provision of this Constitution*, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate *any or all* of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. * * *

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute * * *. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined." (Italics added.)

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[9] Labor Code, sec. 4553; E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 192–193, 193 P. 105, 16 A.L.R. 611.

[10] See Aetna Life Ins. Co. v. Industrial Accident Comm., 38 Cal.2d 599, 241 P.2d 530.

[11] Const. art. I, secs. 11, 21, art. IV, sec. 25(19) (28) (33).

Section 21 of article XX gives the Legislature plenary, unlimited power in legislating within its scope,[12] subject only to the Constitution of the United States. No other provision of the state Constitution is a limitation of the power of the Legislature under this section. Section 4850 is therefore not unconstitutional legislation contrary to the provisions of the state Constitution requiring that general laws have a uniform operation and prohibiting special laws, privileges and immunities.[13]

[5] What we have said disposes of the contention of *amicus curiae* that section 4850 is an unconstitutional tax on the city in violation of article XI, section 12, of the Constitution which prohibits the Legislature from imposing taxes upon cities. Its further contention that section 4850, as applied to a charter city, is an unconstitutional attempt to regulate municipal affairs in violation of article XI, sections 6 and 8 of the Constitution, need not be considered as defendant city is not a charter city.[14]

[6, 7] Mandamus is a proper remedy. The act of defendants' complying with section 4850 is purely ministerial. Under the Workmen's Compensation Act the Industrial Accident Commission is vested with jurisdiction to determine whether the liability referred in section 4850 arose out of and in the course of duty. It has so determined. It is without jurisdiction to enforce the liability. The liability is enforcible by the courts under section 21 of article XX of the Constitution. Where there is no room for discretion in the performance of an act which the law specially enjoins as a duty resulting from an office, mandamus is proper.[15]

The appeal from the order overruling the demurrer to the petition is dismissed. The order denying defendants' motion to quash the temporary restraining order and the judgment are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

111 Cal.App.2d 600

COMSTOCK v. CORONET HEATING SUPPLY CO. Inc.

Civ. 19053.

District Court of Appeal, Second District, Division 2, California.

June 13, 1952.

Proceeding by Doris W. Comstock against Coronet Heating Supply Company, Inc., wherein defendant filed cross-complaint for breach of alleged contract to give defendant exclusive distributorship and for breach of alleged warranty of the products to be distributed, and plaintiff filed demurrers to each cause of action. The Superior Court, Los Angeles County, Julius V. Patrosso, J., sustained the demurrers and dismissed the cross-complaint and defendant appealed. The District Court of Appeal, McComb, J., held that the cross-complaint failed to allege facts from which it was possible to ascertain how or in what manner defendant had been damaged by the alleged breach of contract and of warranty by plaintiff.

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[12] Marshall v. Foote, 81 Cal.App. 98, 103, 252 P. 1075.

[13] See Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 410–414, 156 P. 491; Thaxter v. Finn, 178 Cal. 270, 273–278, 173 P. 163; E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 192–193, 193 P. 105, 16 A.L.R. 611; Moore Shipbuilding Corp. v. Industrial Acc. Comm., 185 Cal. 200, 202–205, 196 P. 257, 13 A.L.R. 676; Dominguez v. Pendola, 46 Cal.App. 220, 224, 188 P. 1025; DeCarli v. Associated Oil Co., 57 Cal.App. 310, 207 P. 282; 53 A.L.R. 1290; 103 A.L.R. 907; 159 A.L.R. 926.

[14] See, however, City of Sacramento v. Industrial Accident Commission, 74 Cal. App. 386, 240 P. 792; 7 Op.Atty.Gen. 158.

[15] Code Civ.Proc. sec. 1085; 16 Cal.Jur. 798, sec. 26.

Order affirmed.

1. **Contracts** 🔑337(3)
   Pleading 🔑18
   Sales 🔑435(5)

Cross-complaint for breach of alleged contract to give complainant exclusive distributorship and for breach of alleged warranty of the product to be distributed failed to allege facts from which it would be possible to ascertain how or in what manner cross-complainant was damaged by the alleged breaches, and was demurrable on grounds of uncertainty and unintelligibility.

2. **Contracts** 🔑337(3)
   Pleading 🔑18

Where damages do not necessarily result from breach of a contract, an injured party must specifically plead facts showing the damage which has resulted to him, and a general allegation of damages is insufficient as against a special demurrer for uncertainty and/or unintelligibility.

Gordon Leslie Cooper, Los Angeles, for appellant.

No appearance for respondent.

McCOMB, Justice.

From an order dismissing defendant's second amended cross-complaint after sustaining of a demurrer thereto with leave to amend, of which leave defendant did not avail itself, defendant appeals.

Facts: Defendant filed a second amended cross-complaint in two causes of action,[*]

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[*] Omitting the title of the court and cause the second amended cross-complaint reads as follows:

"The defendant and Cross-Plaintiff alleges:

"I

"That the Cross-defendants, the Modern Heat-Panel, Inc. is a California Corporation, having its principal office in Los Angeles County, California; that the Cross-defendant, Modern Metal Products Company, Inc., is a California corporation, having its principal office in Los Angeles County, California; that the Cross-defendant, Modern Heat-Panel, Inc., is a California Corporation, having its principal office in Los Angeles County, California; that the Cross-defendant, the Modern Metal Products Company and the Modern Metal Products Company, Inc., are fictitious firm names.

"II

"That at all times mentioned herein, the Cross-defendants were manufacturers of heat panels, also known as Modern Heat Panels, Model heat panels and Coronet Heating Panels.

"III

"That on or about the 21st day of July, 1949, the Cross-Plaintiff and the Cross-defendants entered into an agreement in writing, by the terms of which the Cross-defendants gave Cross-Plaintiff the exclusive sales rights of both the Modern and Coronet heating panels in the territory comprising of California from Bakersfield north to its Northern border and including the entire states of Oregon and Washington; that by the terms of said agreement, it was further agreed that the Cross-defendants furnish Cross-plaintiff with the Modern and Coronet Heating panels at $51.85 each, net, on the 45,000 B.T.U. dual heaters ordered in one thousand heater lots.

"IV

"That believing and relying upon said agreement the Cross-Plaintiff ordered one thousand heaters, as per the agreement on or about the 28th day of July, 1949, and in furtherance of said agreement said Cross-plaintiff arranged with the following named firms in Northern California to handle said heating panels, to wit:

"(1) Oakland Sheet Metal Supply Co., Oakland; and

"(2) Western Plumbing Supply Co., San Jose and Stockton; and

"(3) Fresno Plumbing Supply Co., Fresno; and

"(4) Dalziel Plumbing Supply Co., San Francisco

"(5) Federal Pipe & Supply Co., San Francisco, and

"(6) Grinnel Co., San Francisco, Oakland, Sacramento;

"(7) P. E. O'Hair, and

"(8) Richmond Sanitary Co., Oakland; and

"(9) Jordan Supply Co., San Mateo.

"That Cross-Plaintiff's representatives continued to call on said jobbers from June in 1949 to July, 1950; that during said period of time, the Cross-plaintiff sold to the Oakland Sheet Metal Supply Co., four hundred and forty four heaters; and to the Western Plumbers Supply Co., one hundred and fifteen heaters; and to the Fresno Plumbing Supply Co., sixty the first cause of action predicated upon plaintiff's breach of a contract giving defendant the exclusive right to sell plaintiff's product in a given area; the second

two heaters; and to the Federal Pipe and Supply Co., fifty two heaters; that said jobbers in turn installed said heaters in the homes and in the vicinity of said jobbers; that the Cross-defendants warranted that said heaters so sold would be in good condition; that the said heaters were not in good condition and that every heater was defective in that the paint burned off of the grill of said heaters and the grills had to be replaced.

"V

"That in about July of 1950, the painted grills were replaced by a baked enamel grill, which corrected the defect in said heaters; that from July, 1949 to July, 1950, Cross-Plaintiff expended and invested in the marketing, advertising, plant expansion, replacement of defective grills and in the procuring of jobbers as hereinabove mentioned, the sum of five thousand dollars ($5,000.00).

"VI

"That by July of 1950 the Cross-Plaintiff had procured the jobbers hereinabove mentioned, all of which were in the northern part of California; that as a direct result of the work on the part of the Cross-plaintiff in the securing of the Jobbers, advertising, installing of said heaters in Northern California, together with having replaced the grills with enamel grills, the said Cross-Plaintiff established a market in Northern California reasonably earning a profit of $10,000.00 for the year of July, 1950 to July, 1951.

"VII

"That on July 5, 1950, the Cross-defendant, Modern Metal Products Company, wrote the Cross-Plaintiff a letter stating that it had established the Jordan Supply Company as their exclusive Jobber for Northern California; that the Jordan Supply Company was contacted by Cross-Plaintiff in June of 1949 and Cross-Plaintiff received an order from the Jordan Supply Company for two wall heaters as samples, prior to July 5, 1950.

"VIII

"That in February of 1950 and without the consent of the Cross-Plaintiff, the Cross-defendant, Modern Metal Products Company, employed Charles H. White of Burlingame, California, which was within the territory given by the Cross-defendants to Cross-Plaintiff, to circulate a price list ten per cent below that of which the Cross-defendants agreed to furnish the said heat panels to Cross-Plaintiff, and employed the said Charles H. White to solicit customers of the Cross-Plaintiff's in Northern California, the territory given to Cross-Plaintiff by the Cross-defendants.

"IX

"That by reason of the conduct of the said Cross-defendants, the said Cross-defendants in employing the said Charles H. White, as hereinabove alleged, and the Jordan Supply Company, as hereinabove alleged, the Oakland Sheet Metal Supply Company of Oakland, California, sold one hundred heaters in March of 1950, and one hundred and twenty heaters in June of 1950; that in August of 1950, the Oakland Sheet Metal Supply Company stated that the Jordan Supply Company was offering to sell said heaters to the customers of the Oakland Sheet Metal Supply Company at less than cost to the Oakland Sheet Metal Supply Company, and for that reason the Oakland Sheet Metal Supply Company discontinued serving as Jobber for the Cross-Plaintiff; that in March of 1950 the Jordan Supply Company offered 45,000 B.T.U. Natural Gas heaters F.O.B. to Customer's place of business at $56.00 each, in the territory represented by the Oakland Sheet Metal Supply Company.

"X

"That in February of 1950, the Cross-defendants authorized Charles H. White of Burlingame, California, to offer the 45,000 B.T.U. Heaters at $52.00 each, less 10% in single units to the consumer. The market established by Cross-Plaintiff for said heater for a single unit was $118.00.

"That the net profit derived by Cross-plaintiff in the sale of said heaters was $8.00 per heater sold.

"XI

"That Cross-Plaintiff has performed all of the things to be performed by said Cross-Plaintiff, and by reason of the breach of the agreement as hereinabove alleged on the part of the Cross-defendants, Cross-Plaintiff has been damaged in the sum of $15,000.00 as hereinabove alleged and in the further sum of $8.00 for each heater sold in the district of Northern California, North of Bakersfield and in the states of Oregon and Washington.

"Wherefore, Cross-Plaintiff prays for a judgment against the Cross-defendants, and each of them, in the sum of $15,000.00; for the sum of $8.00 for each heater sold in the district of Northern cause of action predicated upon the theory that plaintiff had breached its warranty with defendant guaranteeing that merchandise purchased from plaintiff by defendant would be in good order.

Plaintiff filed a demurrer to both counts of the second amended cross-complaint on the ground that each cause of action was uncertain and unintelligible in that it could not be ascertained from the facts alleged in either cause of action in what manner defendant had been damaged. The demurrer was sustained with leave to amend. Defendant having failed to amend within the period allowed by the court, an order dismissing the second amended cross-complaint was entered.

[1] *Question: Was the demurrer to the second amended cross-complaint on the ground of uncertainty and unintelligibility properly sustained?*

Yes. A mere reading of the second amended cross-complaint shows that facts are not alleged in either purported cause of action from which it is possible to ascertain how or in what manner defendant was damaged by the alleged breach of contract by plaintiff.

Where, as in the instant case, damages do not necessarily result from the wrongful breach of a contract, an injured party must specifically plead the facts showing the damage which has resulted to him because of the wrongful act of the other party to the contract, and a general allegation of damages is insufficient as against a special demurrer for uncertainty and/or unintelligibility. (Judson Manufacturing Co. v. Lutge, 174 Cal. 566, 567, 163 P. 1017; Hamberger-Polhemus Co. v. Hind-Rolph & Co., 81 Cal.App. 624, 627 [4] et seq., 254 P. 615.)

For the foregoing reasons the order is affirmed.

MOORE, P. J., and FOX, J., concur.

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111 Cal.App.2d 679

RAMEY et al. v. MYERS et al.

Civ. 18888.

District Court of Appeal, Second District,
Division 1, California.

June 16, 1952.

Rehearing Denied July 14, 1952.

Hearing Denied Aug. 14, 1952.

Eugene B. Ramey, Jr., and Maude Ramey brought action against a real estate agent and a realtor and others to recover secret profits realized in acting for plaintiffs in trade of realty. The Superior Court of Los Angeles County, Allen W. Ashburn, J., entered judgment for plaintiffs, and certain

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California north of Bakersfield and in the States of Oregon and Washington and for costs, and for such other and further relief as Court deems just.

"Gordon Leslie Cooper
Gordon Leslie Cooper
Attorney for Defendant
& Cross Plaintiff

"For a Second Cause of Action, Cross-Plaintiff alleges:

"I

"Cross-Plaintiff incorporates Paragraphs I and II of The Second Amended Cross-Complaint, and by reference makes it a part of this cause of action, the same as if said paragraphs were set forth herein in full.

"II

"That on July 28, 1949, the Cross-defendants sold to Cross-Plaintiff one thousand of the Modern Heat Panels, at a cost of $51.85 each, and that Cross-defendants warranted said heat panels to be in good order, and thereby induced the Cross-plaintiff to purchase the same at said price.

"III

"That the said Modern Heat Panels were not in good order, whereby Cross-Plaintiff was damaged in the sum of $5,000.00.

"Wherefore, Cross-Plaintiff prays judgment against the Cross-defendants, and each of them, in the sum of $15,000.00 damage; that the Cross-defendants be required to account to Cross-Plaintiff for $8.00 for each heater sold within said district, and any and all profits collected by said Cross-defendants within the district described in Cross-Plaintiff's Second Amended Cross Complaint from the sale of said heaters; for costs and for such other and further relief as is just."

of the defendants appealed. The District Court of Appeal Drapeau, J., held that complaint sufficiently alleged existence of a gratuitous agency between one of the plaintiffs and the real estate agent and the realtor, so that Superior Court was justified in instructing jury on issues of agency, fiduciary relationship, and right to recover secret profits.

Judgment affirmed.

1. Pleading 🔑18

It is not necessary to plead with the same exactness as required at common law. Code of Civil Procedure, §§ 452, 475.

2. Pleading 🔑407

Defects in form, which are subject to special demurrer, but which can be cured by amendment, are waived where no special demurrer is interposed.

3. Brokers 🔑37

In action against real estate agent and realtor to recover alleged secret profits realized in assisting plaintiffs in trading their property, complaint sufficiently alleged existence of a "gratuitous agency" between plaintiffs and real estate agent and realtor, justifying instructions on issues of agency, fiduciary relationship, and right of plaintiffs to recover secret profits.

4. Principal and Agent 🔑48

Though a gratuitous agent cannot be compelled to enter on performance of any agency nor be mulcted in damages for his failure to do so, if he does enter on such performance, he is, in common with all other agents, bound to exercise utmost good faith in dealings with his principal, and a gratuitous agent has no greater license to indulge in misrepresentations, concealments, or other breaches of good faith than an agent for hire.

5. Principal and Agent 🔑69(2)

A gratuitous agent cannot, while acting for his principal, make any secret profits for himself out of the transaction being conducted by him, without being accountable to the principal.

6. Principal and Agent 🔑62(1)

In absence of special circumstances, moneys received by one in capacity of agent are not his, and the law implies a promise to pay them to the principal on demand.

7. Principal and Agent 🔑78(1)

A principal's right to recover from agent moneys received by agent in his capacity as agent does not depend on any deceit of agent, but is based on duties incident to agency relationship and on fact that all profits resulting from the relationship belong to the principal.

8. Principal and Agent 🔑78(8)

The statute providing measure of damages in a suit based on fraud in sale or exchange of property, does not limit a principal's recovery from agent for secret profits to those damages even though profits may have been acquired through fraudulent representations of agent to principal. Civil Code, § 3343.

◆

L. H. Phillips and Blase A. Bonpane, Los Angeles, for appellants.

Manasse & Crowley, Hollywood, Herbert Manasse, Hollywood, for respondents.

DRAPEAU, Justice.

Plaintiffs, mother and son, owned two parcels of real property: one in Indiana and the other located on Normandie Avenue in Los Angeles, Mr. Ramey and defendant Myers had been friends for a number of years. Mr. Myers was a licensed real estate agent and was associated with defendant Buckley, a Los Angeles realtor.

In March of 1948, plaintiffs were being evicted and Mr. Ramey telephoned defendant Myers to see if he could help to find them "a place to live with income." By appointment, the two men met at the Buckley office. Thereafter, Mr. Myers showed several pieces of property to Mr. Ramey, among them a rooming house and a property on Sunset Boulevard. The latter consisted of two separate buildings with a vacant lot to the west, and contained twenty apartments and six rooms which were being converted into living quarters.

On their first visit to Sunset, defendant Myers told Mr. Ramey that the unfinished rooms would be completed before delivery of the property; that the income was about $1200 per month, could be increased to $1600 with a small amount of work;

that the owner was asking $70,000 for the property and had it listed for sale with the Buckley Company. At a later visit, Mr. Myers told Ramey that Mrs. Rondeau was the owner and wanted $77,000. He also advised plaintiffs that an apartment house would be a better investment than a rooming house; that Sunset was a good buy and a wonderful investment.

Within a few days, plaintiffs agreed to trade in their Indiana and Normandie properties on the Sunset apartments, and Mr. Myers and his wife called at plaintiffs' home one evening with some papers for plaintiffs to sign. One was authority to borrow $40,000 on Sunset. Another was an agreement giving Buckley Company the right to sell the Normandie and Indiana properties. At this meeting, Mr. Myers assured plaintiffs that he would take care of everything and plaintiffs would get a good deal.

A day or two later, i. e., on March 11, 1948, an escrow was opened with the Wilshire Escrow Company in Los Angeles, defendant Myers dictating the instructions over the telephone. At this time Mr. Buckley told Mr. Ramey that Sunset was a good buy and produced a good income; and that Mrs. Rondeau, who was a very good businesss woman, was the owner.

By the terms of the escrow, the equities in the Indiana and Normandie properties were to be exchanged for the equity in Sunset. The equity of plaintiffs in their two properties was placed at $30,000 which was to be applied against the purchase price of $70,000 for Sunset, plaintiffs assuming two trust deeds aggregating $40,000 for the balance of the purchase price.

About a week after opening of the escrow, defendant Myers handed to Mr. Ramey a statement typed on a Buckley Company letterhead showing that the rentals of the Sunset property aggregated $1,116.00 per month.

When Mr. Ramey, accompanied by Mr. Myers, went to take possession of the Sunset apartments at the close of escrow on May 18, 1948, he discovered that the basement rooms had not been completed as promised; also that the city of Los Angeles would not permit occupancy of the rooms because of violations of the Health and Safety Code. Plaintiff complained of these matters to defendant Buckley, who told him that a lawsuit had been filed to protect his (Ramey's) rights and that everything would be taken care of. The suit referred to had been filed the day before the close of escrow, and the costs thereof were paid by defendant Buckley.

During the month of June, 1948, the rentals from the property were $600 instead of $1,116.00 as shown by defendants' statement.

Prior to the purchase of Sunset by the plaintiffs, to-wit, on February 20, 1948, the Rondeaus gave defendant Buckley an option to purchase said property for a stated price of $55,500. And during the pendency of the Wilshire escrow, defendant Buckley opened an escrow at Citizens National Bank in order to have his niece, defendant Helen M. Catherman, take title to Sunset for him in the exercise of his option. He also opened another escrow at the Hollywood State Bank to refinance the indebtedness against Sunset.

Both of plaintiffs' properties were conveyed to said Catherman, and she in turn conveyed them to third parties. She also executed the deed of the Sunset property to plaintiff Ramey.

Mrs. Catherman received no remuneration for acting as defendant Buckley's nominee in these and many other transactions. And it was not until after the Wilshire escrow was closed, i. e., sometime in 1949, that Mr. Ramey discovered who she was and that Mr. Buckley had, and exercised, the option to purchase Sunset.

By the instant action, plaintiffs sought to recover $30,000 damages resulting from the alleged fraud and double dealing of defendants.

There was evidence that Catherman conveyed the Normandie property to one Moore for a total consideration of $15,194.87; and that the sale of the Indiana property netted $14,654.84, a total of $29,849.71. This sum plus $40,000 in trust deeds assumed by plaintiffs, brought the total price of the Sunset property to $69,849.71. The Sunset property was conveyed to Catherman on behalf of Buckley for a total consideration of $48,825.00.

The trial court instructed the jury on two theories of the case: (1) agency, fiduciary relationship and plaintiffs' right to recover secret profits; (2) fraud on the part of the seller.

The jury brought in a verdict for $20,000 against defendants Myers and Buckley. Their motion for a new trial having been denied, they appeal from the judgment based on the verdict.

It is here urged that the issues of agency, fiduciary relationship and the right to secret profits were not with the scope of the pleadings, hence the admission of evidence in support thereof was erroneous.

At the start of the instant trial, defendants objected to the introduction of any evidence on the questions of secret profits and agency. This for the reason that the complaint sounded in fraud and did not allege that defendants were the agents of plaintiffs.

In overruling this objection, the trial court commented:

> "Although plaintiffs do not directly plead agency, that is, that defendants were their agents, they do set forth in some detail the relationship between Myers and Ramey so as to show a confidential relationship, or agency. Of course, they have to prove agency. There is so much set forth in the complaint as to Myers being the adviser and personal friend of the plaintiff Ramey that I cannot say at this time whether or not he was the agent of plaintiff. I am going to permit the evidence to go in and overrule your objections. Was there any objection in the law and motion department to plaintiffs' pleadings?
>
> "Mr. Bonpane: No, your Honor. We did not file any motion or demurrer. We did not think it was necessary because we felt that this was clearly a straight fraud action, and we planned to make our objections in the event that the plaintiffs attempted to prove agency."

[1] "It is not necessary in this state to plead with the exactitude required by common law. Section 452 of the Code of Civil Procedure provides that 'In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.' Section 475 of the Code of Civil Procedure declares that 'The court must, in every stage of an action, disregard any error * * * or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties.' Many decisions apply this rule. (Citation of authorities.)" Steiner v. Rowley, 35 Cal.2d 713, 719, 221 P.2d 9, 12.

[2] And, as stated in Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 321, 188 P.2d 782, 787: "Even if the agency relation were only alleged by interference, as contended by appellants, or if the allegations as to the manner in which Tarman took a concealed adverse interest in the transaction were uncertain or ambiguous, such defects of form, which are subject to special demurrer but can be cured by amendment, were waived where no special demurrer was interposed. Hill v. Haskin, 51 Cal. 175; Colton v. Onderdonk, 69 Cal. 155, 157, 10 P. 395, 58 Am. Rep. 556; People v. McDonald, 200 Cal. 716, 717, 255 P. 180; Abos v. Martyn, 31 Cal.App.2d 705, 708, 88 P.2d 797."

The complaint alleged that Myers, a real estate salesman, was working for Buckley, a realtor, and that his dealings with plaintiffs were within the scope of his authority as agent for Buckley.

> "That the Plaintiff, Eugene B. Ramey, is, and at all times herein mentioned, was a singer and voice coach with no business experience, particularly in connection with real estate transactions, and for many years last past has relied on the Defendant, Robert M. Myers, as a friend."

Also, that Ramey told Myers he wanted to sell or trade his two parcels of real estate for a piece of income property in Los Angeles. Myers replied that he could accomplish this very easily and get Ramey a "good deal". Thereafter, Myers showed Ramey several pieces of property, including the Sunset property which he advised him would be a "good buy and a wonderful investment". That "relying on the friendship and confidential relationship" between him and Myers, plaintiff "agreed to purchase the Sunset Boulevard property and signed an instrument purporting to bind him for the purchase." At the same time plaintiff executed deeds in blank to the properties he owned and delivered them to defendants Myers and Buckley; and the latter proceeded to open an escrow with defendant Wilshire Escrow Company for the purpose of exchanging plaintiff's properties for the Sunset Boulevard property.

[3] We are of the opinion that the complaint sufficiently alleges the existence of a gratuitous agency between plaintiff Ramey and defendants Myers and Buckley.

> [4, 5] "While a gratuitous agent cannot be compelled to enter upon the performance of any agency nor be mulcted in damages for his failure to do so, when he does enter upon such performance, he is, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal. A gratuitous agent has no greater license to indulge in misrepresentations, concealments, or other breaches of good faith than an agent for hire. Thus, a gratuitous agent cannot, while acting for his principal, make any secret profit for himself out of the transaction being conducted by him, without being accountable to the principal." 2 Cal.Jur.2d 774, sec. 105 and authorities there cited.

[6–8] As stated by our Supreme Court in Savage v. Mayer, 33 Cal.2d 548, 551, 203 P.2d 9, 10: "In the absence of special circumstances, moneys received by one in the capacity of agent are not his, and the law implies a promise to pay them to the principal on demand. De Leonis v. Etchepare, 120 Cal. 407, 409–410, 52 P. 718; see also Oil Well Core Drilling Co. v. Barnhart, 20 Cal.App.2d 677, 67 P.2d 696; 1 Mechem, Agency (1914) § 1342. It follows that the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal. Thus section 3343 of the Civil Code, which provides the measure of damages in a suit based upon fraud in the sale or exchange of property, does not operate to limit a principal's recovery to those damages even though the profits may have been acquired through fraudulent representations to him. Adams v. Harrison, 34 Cal.App.2d 288, 299–300, 93 P.2d 237; see also recent cases which allowed full recovery of secret profits without discussing section 3343; Kinert v. Wright, 81 Cal.App.2d 919, 185 P.2d 364; Thompson v. Stoakes, 46 Cal.App.2d 285, 115 P.2d 830; Schwarting v. Artel, 40 Cal. App.2d 433, 105 P.2d 380."

In Anderson v. Thacher, 76 Cal.App.2d 50, 65, 172 P.2d 533, 541, this court stated: "An agency may be created not only by written instrument or by word of mouth but may be implied from the conduct of the parties, Brand v. Mantor, 6 Cal.App.2d 126, 130, 44 P.2d 390."

The evidence hereinbefore recited not only established the existence of agency, but it also tended to prove the concealment of facts vital to the plaintiffs with resultant profit to defendants.

In the circumstances presented by the record, the trial court very properly instructed the jury on the issues of agency, fiduciary relationship and the right of plaintiffs to recover secret profits. The refusal of the court to give certain instructions requested by defendants, and its modification of certain instructions given did not result in prejudice to defendants.

For the reasons stated, the judgment is affirmed.

DORAN, Acting P. J., concurs.

WHITE, P. J., deeming himself disqualified, did not participate.

111 Cal.App.2d 893

CANNIS v. DI SALVO TRUCKING CO. et al.

Civ. 15086.

District Court of Appeal, First District, Division 1, California.

June 23, 1952.

Action by Percy A. Cannis against the Di Salvo Trucking Company and another for damages from an automobile-truck collision. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., entered judgment on a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that in view of fact that basic issue presented to jury was whether plaintiff was guilty of negligence in making a left turn, error in giving an instruction which set out the law applicable to "U" turns in business districts or in residential districts, and failure to define what constituted a business or residential district, could not have been prejudicial.

Judgment affirmed.

1. Appeal and Error ⚷1066

Where basic issue presented to jury was whether automobile driver was guilty of negligence in making left turn, error in giving instruction which set out law applicable to "U" turns in residential districts and in business districts, and failure to define what constituted a residential or business district, could not have been prejudicial. Vehicle Code, § 541.

2. Appeal and Error ⚷1066

The giving of an abstractly correct instruction not applicable to the facts may constitute reversible error where the jury may have been misled.

3. Appeal and Error ⚷1170(9)

Where it does not appear that the jury was or could have been misled by an erroneous instruction, judgment will not be reversed. Const. art. 6, § 4½.

◆

Ricksen, Freeman & Johnson, Oakland, Stanley C. Smallwood, Oakland, for appellant.

Keith, Creede & Sedgwick, San Francisco, for respondents.

PETERS, Presiding Justice.

Percy A. Cannis brought this action to recover for personal injuries suffered by him in a collision between his automobile and a truck operated by Thomas P. Hamby, then working in the course and scope of his employment with the Di Salvo Trucking Company. The jury returned verdicts in favor of defendants. Plaintiff appeals.

Appellant's main argument is that the trial court committed prejudicial error in instructing on the law applicable to making "U" turns in residential and business districts, without also giving the jury the statutory definitions of such districts. He also points out that there was no evidence that plaintiff was making a "U" turn at the time of the accident. Respondents, while conceding that there was no evidence that plaintiff was making a "U" turn at the time of the accident, and for that reason admitting that the giving of the instruction was error, contend that such error was not prejudicial. The sole point to determine on this appeal is whether the admitted error in the giving of this instruction without clarifying instructions, requires a reversal. This depends, of course, on the facts.

The accident occurred in front of the Golden Brand Bottling Company on Barneveld Avenue, a north-south street in San Francisco, just about where Barneveld Avenue branches into a "Y," with Loomis Street becoming the westerly prong of the "Y," and McKinnon Avenue the easterly prong.

There were only two eyewitnesses who testified as to the facts surrounding the accident. They are the two participants, appellant and respondent Hamby.

Appellant's version is as follows: At about 9:30 a. m. of May 4, 1949, he was driving his coupé automobile south on Barneveld at about twenty to twenty-five miles per hour, intending to visit the Golden Brand Bottling Company, which was on his left side of the street. As he approached the "Y" above mentioned, and while about 100 to 150 feet north of Golden Brand, he decreased his speed, drove closer to the center of Barneveld and gave a left-turn arm signal. Just before he reached a point opposite to the south gate of Golden Brand, because of approaching northbound traffic, he lowered his arm to indicate a stop. He remained stopped for four or five seconds, looked into the rear-view mirror inside his car, saw a large truck about 100 feet behind him in the same lane of traffic, and then looked into his rear-view mirror located outside the car on the left side, and saw no approaching traffic. He then raised his left arm to indicate a left turn, and proceeded to turn at about five miles per hour. He was intending to park in the parking area on the side of the south gate, or to park in that gateway. In either event, he would have parked at right angles to the curb. In other words, he was not intending to make a "U" turn. When he had proceeded a short distance after starting his turn, he heard the screeching of brakes and tires, and then came the collision. At no time prior to the accident did he see the pickup truck being driven by respondent Hamby. He suffered serious injuries in the accident.

Hamby's version of the facts, evidently believed by the jury, was far different from that given by appellant. He was driving a G.M.C. pickup truck south on Barneveld at about twenty-five to thirty miles per hour. A short distance ahead of him was a tractor and semitrailer traveling in the same direction and at about the same speed. This was apparently the truck observed by appellant in his rear-view mirror. As that truck approached the "Y" in Barneveld Avenue, it veered to the right to go up the westerly prong of the "Y," that is, Loomis Street. When that occurred, Hamby first saw appellant's car about 100 feet ahead of him and about 150 feet from the scene of the ultimate collision. Appellant was then going at about twenty miles per hour. Hamby believed that appellant was going straight down Barneveld, so he honked his horn to indicate an intent to pass. When the right front wheel of Hamby's truck was just about even with the left rear wheel of appellant's coupé, appellant made a sharp left turn directly in front of Hamby. Appellant's car was then traveling five to ten miles per hour. Hamby was positive that appellant did not stop before making the left turn, and also testified that he saw no arm signal of any kind given by appellant.

The sole contention of appellant is that prejudicial error was committed in the giving of an instruction presented by respondents in the language of section 541 of the Vehicle Code, without also giving the definitions of "business" and "resident" districts as set forth in that code, in view of the fact that there is no evidence as to the nature of the district.

The complained of instruction reads as follows:

> "Section 541 of the same code provides as follows:
>
> "(a) No vehicle in a business district shall be turned so as to proceed in the opposite direction, except at an intersection.
>
> "(b) No vehicle in a residence district shall be turned so as to proceed in the opposite direction when any other vehicle is approaching from either direction within 200 feet, except at an intersection."

This instruction was the last of a series of instructions given by the court quoting some of the provisions of the Vehicle Code. Thus, the court gave the statutory definition of a "street" or "highway" contained in section 81; the basic speed law as set forth in section 510; the duties of the overtaking driver in passing to the left, § 528, and to the right, § 529; the limitations on turning a vehicle as set forth in section 544; and the regulation as to arm signals as set forth in section 546. Then the court gave the challenged instruction. Immediately after the challenged instruction, the court gave an instruction on imminent peril, and then gave the following: "The law did not require that before Mr. Cannis was entitled to make his left-hand turn that it be absolutely safe for him to do so. The only requirement of the law in this regard was that he take what precautions a reasonably prudent person would have taken under the circumstances reasonably appearing to him at that time; and if you find from the evidence that Mr. Cannis did this, then I instruct you that he was not guilty of negligence."

No instruction was given to the effect that a violation of section 541 constituted negligence *per se,* or even negligence; in fact, the last-quoted instruction implies the contrary.

Appellant urges that no definition was given of "residential" and "business" districts. See § 89, Vehicle Code, defining "business" district, and § 90 for a definition of "residence" district. In support of his contention that it was error to fail to give these definitions, appellant places his greatest reliance on Vicino v. Amador, 71 Cal. App. 604, 236 P. 369, 370. In that case the plaintiff and defendant were proceeding in opposite directions on the highway. Defendant made a left turn in front of plaintiff, and a collision resulted. A judgment for plaintiff was reversed because of instructions to the effect that the jury should consider whether defendant made the turn "in a closely built up district, where there was no intersection of streets," and if defendant did make such a turn "in a closely built up district" he was guilty of negligence as a matter of law. There was no definition given of a "closely built up district," and no evidence as to the nature of the district. The court first held that it was error not to have defined the phrase "closely built up district," and then demonstrated that such error was prejudicial because the jury was instructed that such conduct, if it occurred, required a verdict for the plaintiff. There can be no doubt that the court held that the failure to define "a closely built up district" was error, but it is equally apparent that the court held that such error became prejudicial because of the direction to find for the plaintiff if the accident happened in such a district. This last-mentioned error does not appear in the instant case.

The other case mainly relied upon by appellant is Adrian v. Guyette, 14 Cal.App. 2d 493, 58 P.2d 988. Guyette was one of several defendants, it being claimed that his car first hit another car which hit plaintiff. The evidence was that Guyette was traveling between thirty-five and fifty miles per hour just prior to the accident. There was no evidence as to the nature of the district. The trial court instructed in regard to the prima facie speed limit in a residence district, and gave the statutory definition of such a district, but left it to the jury to determine the nature of the district. The court held this to be prejudicial error, stating, 14 Cal.App.2d at page 505, 58 P.2d at page 994: "In the instant case the evidence was conflicting on the speed at which young Guyette was proceeding west on Eleventh Street just prior to the accident. It was variously estimated at between 35 and 50 miles an hour. According to his own testimony, if he were driving in a residence district he was guilty of *prima facie* negligence in driving faster than 25 miles an hour and the jury might have concluded that he was actually guilty of negligence *per se.* * * * As he was driving outside a business or residence district, this result could not have followed unless the jury concluded that his speed was in excess of 45 miles an hour. The majority of the witnesses placed his speed at the latter figure or less. The verdict of the jury might easily have been based on the erroneous assumption that the portion of Eleventh street was in a residence district and that the speed of from 35 to 40 miles an hour, which young Guyette admitted, was negligence *per se* which was in itself sufficient to make him responsible for the injuries to plaintiffs. Under these circumstances, we regard the instructions to which we have referred as prejudicially erroneous requiring reversal of the judgment."

[1] Obviously, that case has no application to the problem here presented. In the instant case we have an instruction as to the rules applicable to a "U" turn in a residence or business district. No definition of such districts was given. The photographs introduced into evidence show quite clearly that it was an industrial district. Most important, however, is the fact that the evidence shows that the appellant was making a left turn and not a "U" turn. No one contends to the contrary. A reading of the evidence and of the instructions demonstrate that the basic

issue presented to the jury was whether appellant was guilty of negligence in making his left turn. That depended upon whether the jury believed appellant or Hamby. On that issue the jury was fully and fairly instructed. Under the circumstances, error in the giving of the "U" turn instruction and the failure to elaborate on it could not have been prejudicial.

[2, 3] Of course, where the jury may have been misled, the giving of an abstractly correct instruction, not applicable to the facts, may constitute reversible error. Ketchum v. Pattee, 37 Cal.App.2d 122, 98 P.2d 1051. But it is equally clear that before a judgment will be reversed for an erroneous instruction it must appear that the jury was or could have been misled. Art. VI, § 4½ of the California Constitution; Hamm v. San Joaquin, etc. Canal Co., 44 Cal.App.2d 47, 111 P.2d 940; Mehollin v. Ysuchiyama, 11 Cal.2d 53, 77 P.2d 855; Cunningham v. Coca-Cola Bottling Co., 87 Cal.App.2d 106, 198 P.2d 333. The proper rule was stated as follows in Sortino v. Loneoak, 66 Cal.App.2d 876, 883, 153 P.2d 428, 432:

> "It is not reversible error for the court to instruct the jury upon a principle of law, even though there may be an entire absence of evidence on that particular subject, unless it also appears that the jury was misled and prejudiced thereby. That prejudice does not appear in the present case.
>
> "It has been uniformly held that 'An instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant.' [Citing several authorities.]"

In the present case the instruction given and the failure to give the explanatory instructions could not possibly have misled the jury. That being so, there was no prejudice.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

ELBERT, Limited v. CLARE et al. *

Civ. 18932.

District Court of Appeal, Second District, Division 1, California.

June 24, 1952.

As Modified on Denial of Rehearing July 21, 1952.

Hearing Granted Aug. 21, 1952.

Elbert, Ltd., brought a partition action against Elizabeth Clare and others. The Superior Court, Los Angeles County, Arthur Crum, J., rendered judgment favoring plaintiff, and Catherine Obersmith appealed. The District Court of Appeal, Doran, J., held, inter alia, that there could be no partition, in the circumstances, between a lien holder and the owner of the fee.

Reversed.

Partition ⚷16

Street improvement bond owner whose treasurer's deed, issued pursuant to foreclosure of bond, had been declared void and who was left with merely a lien against property was not entitled to partition in action against claimant under tax deed, the validity of which was not attacked. Code Civ.Proc. § 752; St.1911, p. 730, as amended.

Arthur E. Briggs, Los Angeles, for appellant.

John F. Bender and Gizella M. Allen, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment. As respondent's brief recites, "The action is one to partition real property situate in Los Angeles County, and was brought pursuant to the provisions of Section 752, Code of Civil Procedure.

"Plaintiff claimed title to the property by treasurer's deed issued by the City Treasurer, San Fernando City, pursuant to foreclosure of street improvement bond issued pursuant to the Improvement Act of 1911 [St.1911, p. 730, as amended].

"Defendant claimed title to the property by tax deed to the State of California for non-payment of taxes, and tax deed from the State of California to defendant's predecessor in interest, Elizabeth Clare; and by quitclaim deed from said Elizabeth Clare to defendant.

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* Subsequent opinion 254 P.2d 20.

"Defendant's predecessor in interest paid to the State of California $250.00 for the aforementioned tax deed.

"Plaintiff made no attack as to the validity of the tax deed, but defendant did at the trial attack the validity of plaintiff's treasurer's deed; and to support that attack, introduced into evidence the following:

"(a) The street improvement bond, the basis for the treasurer's deed;

"(b) Request by owner for foreclosure;

"(c) The notice of sale of property;

"(d) The certificate of sale to plaintiff's predecessor in interest;

"(e) The City Treasurer's record book of transactions; and

"(f) The notice to redeem.

"The trial court rendered judgment that the defendant was the owner of the property; that plaintiff's treasurer's deed and the certificate of sale upon which said treasurer's deed was based were both void; that plaintiff was the owner of the street improvement bond in question; that the amount due thereon constituted a lien against the property; that the amount paid by defendant's predecessor in interest for the tax deed and the amount due on said bond both constituted liens against the property; and that said liens were on a parity. That the property should be sold by a referee and the proceeds derived therefrom be applied, first, to the payment of referee's fees and expenses; second, to plaintiff and the defendant for their costs of action; third, to the plaintiff and the defendant on their respective liens, prorata; fourth, to the plaintiff and the defendant on their respective liens, pro rata; and fifth, the balance, if any, to the defendant, Catherine Obersmith.

"Defendant, after rendition of the judgment, moved the trial court to vacate the same and to enter a new and different judgment, which motion was denied; and thereafter, the defendant made her motion for new trial, which was denied.

"It appears from defendant and appellant's opening brief that defendant's contentions are as follows:

"1. That plaintiff's amended complaint failed to state a cause of action in that the same did not allege the proportionate interests of plaintiff and defendant.

"2. That there was a variance between the allegations of the complaint and the evidence offered to support said allegations.

"3. That there was no evidence as to the amount due and unpaid on the street improvement bond.

"4. That the trial court was without jurisdiction to render a decree of partition of the real property.

"5. That plaintiff was not the owner and holder of the street improvement bond lien.

"We will answer defendant's points using the above as headings."

The complaint alleged that plaintiff and defendant were tenants in common but the court's determination that the certificate of sale and city treasurer's deed were void terminated the tenancy in common. A lienholder, in the circumstances, and the owner of the fee are not tenants in common and therefore there is nothing to "partition". Respondent's remedy is a renewal of the foreclosure proceedings on the bond for in the within action defendant's right to redeem is foreclosed.

The two cases relied upon by respondent namely, Elbert, Ltd., v. Nolan, 32 Cal.2d 610, 197 P.2d 537, and Burns v. Hiatt, 149 Cal. 617, 87 P. 196, are not decisive of the above question. The former case was not only an action in partition but also for declaratory relief. Partition was denied but the rights of the parties were declared. The Burns v. Hiatt case is an action to quiet title and the decisive question in the within action is not involved.

By reason of the foregoing the other points referred to by appellant require no discussion.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

111 Cal.App.2d 920

BERNARD v. SHURE et al.

MIDWAY ENTERPRISES, Inc. v. SHURE et al.

Civ. 4270.

District Court of Appeal, Fourth District, California.

June 23, 1952.

Suit by Floyd C. Bernard against Joseph Shure and Midway Enterprises, Inc., for cancellation of certain shares of stock, wherein Midway Enterprises, Inc., filed a cross-complaint against Joseph Shure and others. The Superior Court, San Diego County, Cyrus M. Monroe, J., rendered judgment that defendants were entitled to retain 68,387.85 shares of stock and the corporation appealed. The District Court of Appeal, Barnard, P. J., held that the evidence did not sustain court's findings.

Judgment reversed.

1. Licenses ⚿39.24

In suit for cancellation of certain shares of stock in corporation organized under laws of Nevada for purpose of operating drive-in motion picture theaters, evidence was insufficient to support finding that the issuance of the shares was not in violation of any law of California. Corporations Code, §§ 25003, 25009, 25500, 26100.

2. Licenses ⚿39.5

The law of California making void the issuance of shares of stock without the required permit is applicable to the shares of the corporation organized under the laws of another state. Corporations Code, §§ 25003, 25009, 25500, 26100.

3. Corporations ⚿320(11)

In suit for cancellation of certain shares of stock in corporation organized under laws of Nevada for purpose of operating drive-in motion picture theaters, evidence did not sustain court's findings that the issuance of promotional stock to the president of the corporation was authorized by the board of directors. Corporations Code, §§ 25003, 25009, 25500, 26100.

4. Corporations ⚿307

A director of a corporation while acting in a fiduciary capacity could not unite his personal and representative character in the same transaction and could not use his official position to further his own interests and to benefit himself individually.

5. Corporations ⚿320(11)

In suit for cancellation of certain shares of stock in corporation organized under laws of Nevada for purpose of operating drive-in motion picture theaters, director of corporation who acted in a fiduciary capacity in issuance of promotional stock to himself did not meet the burden of proof that he had acted in good faith and that he was justly entitled to the stock he received. Corporations Code, §§ 25003, 25009, 25500, 26100.

◆

McLeod & McLeod, San Francisco, Gray, Cary, Ames & Frye, San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, for respondents.

Edmund G. Brown, Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., for Commissioner of Corporations as Amicus Curiae in favor of appellant.

BARNARD, Presiding Justice.

This appeal involves the cancellation of certain shares of stock in Midway Enterprises, Inc., which was organized for the purpose of operating drive-in motion picture theaters.

Four persons, including the plaintiff Bernard and the defendant Joseph Shure, had operated certain theaters as a partnership. In June, 1948, they caused this corporation to be organized under the laws of Nevada, with a capitalization of 800,000 shares of the par value of $1.00 each. At the organization meeting in Carson City the resignation of the Nevada directors was accepted and Shure, Bernard and one Frank were elected as directors, and Shure was elected president. Frank was not one of the promoters, and he paid cash for his 50,000 shares. The next entry in the minutes consists of an unsigned waiver of notice of a special meeting of the board of directors "to be held at the offices of the corporation, at 3901 Midway Drive, San Diego, California, on the 30th day of June, 1948." The minutes of this meeting, held in San Diego, show that Shure and Bernard were present but Frank was absent; that it was agreed that certain shares of stock should be issued in exchange for the assets of the former partnership; and that it was further agreed that after those shares were issued, there should be issued an equal number of "promotional shares of stock". The only other minutes are those of a meeting held in San Diego on July 17, 1948, at which Shure and Bernard were present and Frank was absent. There was attached a waiver of notice, but this was not signed. At this meeting a resolution was adopted authorizing the purchase of the assets of the partnership at a valuation of $231,800, and directing the president and secretary to issue 231,800 shares of stock to the former partners, proportionately. Those shares were promptly issued. A large amount of stock was also sold to other people. In August, 1948, Joseph Shure then issued 73,684 shares as "promotional stock" to himself and certain of his nominees, the certificates being signed by him as president and by his son as secretary.

In November, 1948, Shure was ousted as president and manager of the corporation and this action was brought by Bernard, as a stockholder and on behalf of the corporation, for an accounting and for cancellation of the 73,684 shares thus issued as "promotional stock." The corporation filed a cross-complaint, and the action was tried as one between the corporation and the cross-defendants.

So far as material here, the court found: that Shure caused 73,684 shares to be issued to himself and his nominees, of which 8,500 shares were issued to persons who had paid Shure for that stock; that no permit for the issuance and sale of this stock had been issued by the corporation commissioner of this state; that no consideration was paid to the corporation for any of said stock except by way of services rendered in the organization of the corporation; that this stock was issued by Shure "as his purported share of the promotional stock of said corporation"; that no other promotional stock has been issued; and that the issuance of the promotional stock was authorized by the board of directors. It was further found that at the time of the formation of the corporation the "organizers and promoters" agreed that promotional stock, when issued, would be issued to them in certain proportions; that by the terms of this agreement between the promoters Shure was entitled to only 29½% of any promotional stock to be issued; that this 29½% amounts to 68,387.85 shares; that Shure is entitled to retain 68,387.85 shares so issued, but is not entitled to retain the other 5,294.15 shares; and that the 68,387.85 shares were legally issued and were not issued in violation of any law of this state.

Judgment was entered accordingly and the corporation has appealed from that part of the judgment which adjudges that the cross-defendants are the owners of and are entitled to retain the 68,387.85 shares thus issued.

The appellant concedes that the rights of those who paid cash to Shure for 8,500 shares of the promotional stock should be protected, and states that if this stock is cancelled it will ask for a permit to issue new and valid stock to them without further consideration. It also concedes that Shure and the other promoters may eventually be entitled to some stock in return for their services, but insists that any such promotional stock should be validly issued in an amount that will be fair to the corporation and the cash-paying stockholders, and subject to restrictions deemed necessary by the corporation commissioner in order to protect all parties concerned.

The appellant contends that the findings are inconsistent and insufficient to support the judgment; that some findings are not supported by the evidence; that the issuance of this promotional stock was not properly authorized by the corporation; and that this stock was issued in violation of the Corporate Securities Act. The respondents contend that the two issues, as to whether this stock was issued in violation of the Corporate Securities Act and whether its issuance was authorized by the board of directors, may not be considered on this appeal because the court's findings were contrary to appellant's contentions in this regard, and because the appellant did not question the "sufficiency of the findings." It is further contended that the evidence supports the findings that the stock was legally issued and that the issuance of the stock was authorized by the corporation. It is argued that the first of these findings is supported by the presumption that the law has been obeyed and by the testimony of Shure that he did not know where the promotional stock certificates were signed, and that he thought he was in San Diego at the time they were issued. It is argued that the finding that the issuance of the stock was authorized by the corporation is supported by the minutes of the directors' meeting held on June 30, 1948, in San Diego, in which it is stated that the directors agreed that, after shares were issued to pay for the partnership assets, a like amount of promotional stock should be issued.

The findings are somewhat unsatisfactory. It was found that no permit for the issuance of this stock was issued by the corporation commissioner of this state, but there was no finding as to where the stock was issued, or of any facts which would obviate the necessity for such a permit. The purported finding that these shares were legally issued is a conclusion, without any finding as to the basic facts. While it was found that the agreement between the "promoters" provided for the issuance of promotional stock to all of them, it was specifically found that no such stock was issued to anyone other than Shure. While it was found that the issuance of the promotional stock was authorized by the directors, there is no finding of facts showing their authority to so act, and no finding of any of the facts which would be essential to justify two of the three directors in adopting such a resolution for their own benefit.

[1, 2] In our opinion, the evidence is not sufficient to support the finding that the issuance of these shares was not in violation of any law of this state. The provisions of the Corporate Securities Act as then in force are now found in the Corporations Code, to which reference will be made. Section 25003 provides that the word "company" as used in that division shall apply to foreign corporations. Section 25500 provides that no company shall sell any security of its own issue without a permit from the commissioner. Section 25009 defines the word "sell" in a manner which includes the transaction here in question. Section 26100 provides that every security of its own issue issued by any company without a permit of the commissioner is void. Under varying sets of circumstances, similar to those which here appear, it has been frequently held that the law of this state making void the issuance of shares of stock without the required permit is applicable to the shares of a corporation organized under the laws of another state. Hardy v. Musicraft Records, Inc., 93 Cal.App.2d 698, 209 P.2d 839; B. C. Turf & Country Club v. Daugherty, 94 Cal.App.2d 320, 210 P.2d 760; Gillis v. Pan American Western Pet. Co., 3 Cal.2d 249, 44 P.2d 311; Auslen v. Thompson, 38 Cal.App.2d 204, 101 P.2d 136. The case of Kress v. Tooker-Jordan Corp., 103 Cal.App. 275, 284 P. 685, relied on by the respondents, is distinguishable on the facts and is in no way controlling.

While this corporation was organized in Nevada the promoters lived in California and were doing business here. At the organization meeting the original directors resigned and new directors were elected, all of whom lived in California, two of them being promoters of the corporation. The waiver of notice of the second meeting, which was entered in the minutes but never signed, referred to a special meeting to be held at the offices of the corporation in San Diego. That meeting was held in San Diego just two weeks after the organization meeting in Nevada. The only other meeting shown by the minutes was held in San Diego about two weeks later. The stock book and the books and other records of the corporation were kept in San Diego. It appears that the office of the corporation in this state was being used as the head office of the corporation, and the corporate affairs were being conducted in this state. If any other directors' meetings were held, they were held in California. Shure testified that the meetings of the directors were informal, that he would merely talk things over with Bernard, and that he would then have the minutes written up to show what they had done. Frank was never notified of any meeting of the board of directors, and he testified that he never attended a meeting; that he received no notice of any meeting; that he had no opportunity to vote or make any decision on any business pertaining to the corporation; and that he did not even know that he was a director until after this action was filed. The respondents contend that the appellant failed to prove by a preponderance of the evidence that this promotional stock was issued in California, and rely on Shure's testimony that he could not remember where the shares were issued. While he testified to this effect, he also testified that he would have to refresh his memory before he could say where he was on the day the stock was issued. He was then asked whether he meant to tell the court that he did not know where he was on the day the stock was issued and he replied, "I think I was in San Diego." He also testified that the shares of stock were issued the day they were made out. The shares of stock in question are all dated in August, 1948, and it amply appears from other evidence that Shure was not in Nevada during that month. We can find no evidence in the record which would have supported a finding that these shares of stock were actually issued in Nevada, and it may be added that such a fact, standing alone, would not have been sufficient to make inapplicable the requirement for a permit for the issuance of this stock. B. C. Turf & Country Club v. Daugherty, 94 Cal.App.2d 320, 210 P.2d 760.

[3–5] While the court found that at the time of the formation of the corporation the promoters agreed that promotional stock would later be issued, of which 29½% should be issued to Shure or his nominees, it was not found that the corporation was a party to that agreement. The court's findings that the issuance of the promotional stock to Shure was authorized by the board of directors, and that these shares were legally issued, are not sustained by the evidence. The evidence shows that the agreement between the promoters, if a definite agreement can be said to have been made, was made several months before the corporation was formed; that there was no agreement for the issuance of such stock to one of the promoters alone; that Bernard, who is both a promoter and one of the directors, did not know until long afterwards that the stock had been issued; and that no director, other than Shure, knew of any intention to issue it at that time. The evidence conclusively shows that the meeting of the directors on June 30, 1948, at which the issuance of promotional stock was purportedly authorized, was not a regular meeting as provided for in the by-laws. The evidence shows without conflict that Frank had no notice of that meeting, and the other directors had no authority to hold such a meeting. Moreover, the other directors, Shure and Bernard, were acting in a fiduciary capacity. As such a fiduciary, Shure could not unite his personal and representative character in the same transaction, and could not use his official position to further his own interests and to benefit himself individually. Lawrence v. I. N. Parlier Estate Co., 15 Cal.2d 220, 100 P.2d 765; Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156. There was neither evidence nor findings of any facts showing that the action there taken was based upon a sufficient consideration, or upon a reasonable contract which was fair to the corporation or to the stockholders who had paid cash for their stock. A burden rests upon such a fiduciary to show that he has acted in good faith and that he is justly entitled to whatever he received. Tretheway v. Tretheway, 16 Cal.2d 133, 104 P.2d 1033. This burden was not met.

The unfairness of this transaction to the corporation, to its cash-paying stockholders, and even to the other promoters, is fully apparent. We think the illegality of the transaction, and the insufficiency of the evidence and the findings to support the judgment, are equally apparent.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

111 Cal.App.2d 717

CALIFORNIA TRUST CO. v. HUGHES et al.

Civ. 18951.

District Court of Appeal, Second District,
Division 3, California.

June 17, 1952.

Rehearing Denied July 3, 1952.

Hearing Denied Aug. 14, 1952.

Quiet title action by the California Trust Company, as administrator of the estate of Aloysius Peter Hughes, also known as A. P. Hughes, deceased, to whom deed to certain property had been delivered, against James L. Hughes, grantor, and others. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered judgment for plaintiff, and named defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence supported the finding that the deed had been duly acknowledged by grantor and delivered by him to grantee with intent to pass title.

Affirmed.

1. Deeds 🔑208(1)

In quiet title action by grantee's representative against grantor, evidence that grantor had acknowledged and delivered deed to grantee made prima facie case that delivery was made with intent to transfer title.

2. Deeds 🔑194(1)

Grantor had burden of proof to rebut presumption that title passed by his acknowledgment and delivery of deed to grantee.

3. Deeds 🔑208(1)

In quiet title action by representative of grantee against grantor, evidence supported finding that deed had been delivered with intent on part of grantor that it pass title.

4. Deeds 🔑64, 208(3)

Acceptance is an essential part of delivery, and possession of deed by grantee, or those holding under him, is prima facie evidence of both delivery and acceptance.

5. Deeds 🔑66

Failure of grantee to record deed did not establish as matter of law that deed had not been delivered with intent to pass title, but was merely a circumstance for consideration of trial court.

6. Appeal and Error 🔑989, 1010(1)

Reviewing courts inquire whether evidence was substantial, not whether it was clear or convincing.

7. Deeds 🔑60

Delivery of deed to grantee with no condition expressed therein was absolute and free from any alleged qualification that it was to be used only for a particular purpose. Civ.Code, § 1056.

8. Estoppel 🔑69

Fact that grantee in his divorce case had testified that certain property was owned by his brother did not estop administrator of grantee's estate from claiming title to such property under the deed thereto, in view of fact that no facts were misrepresented to grantor, and grantor was not shown to have been in ignorance of any facts which would have had a bearing upon his actions and intentions in executing the deed.

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Burke Mathes, Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Francis M. Wheat, Los Angeles, of counsel, for respondent.

SHINN, Presiding Justice.

California Trust Company, as administrator of the estate of Aloysius P. Hughes (A. P. Hughes), deceased, instituted this action to quiet title to real property in the City of Los Angeles, and for an accounting of income therefrom. Findings and judgment were in favor of plaintiff quieting its title as administrator and awarding it a money judgment against James L. Hughes in the sum of $24,680.34. By his answer, James L. Hughes, referred to as defendant, claimed title to the property and he has appealed from the judgment. The question of title is the only one involved on the appeal; the money judgment is merely incidental.

Plaintiff claims title by virtue of a deed executed October 2, 1944, by James L. Hughes to his brother, Aloysius P. Hughes. The court found that the deed was duly acknowledged by the grantor and was delivered by him to the grantee with intent on the part of the grantor to pass title to the property. The question on appeal is whether there was sufficient evidence to support this finding. It is the contention of defendant that he placed the deed in the possession of his brother conditionally, and without any intention on the part of himself or his brother that it was to be effective as a conveyance. He gave testimony to that effect. The deed came into possession of plaintiff administrator in 1949 under circumstances to be related.

[1, 2] The evidence was conflicting upon the issue of legal delivery. We shall have occasion to speak of "delivery" in the sense of "manual," as distinguished from "legal" delivery. The evidence which was favorable to plaintiff's claim of title consisted of a presumption of law that the deed was delivered with intent to pass title, and the testimony of James that he delivered the deed to the grantee personally. In support of the presumption plaintiff quotes from Dinneen v. Younger, 57 Cal. App.2d 200, 204, 134 P.2d 323, 325, as follows: "There can be no doubt that upon proof that Rose Dinneen signed and acknowledged the deed and handed the same to the grantee, the plaintiff established a prima facie case of complete execution—that is, of delivery with intent to make the grant operative immediately as a transfer of title." It is a well settled rule. The burden of proof therefore was cast upon the defendant grantor to rebut this presumption. It has been said that this may be done only by the production of clear and convincing evidence. Ward v. Dougherty, 75 Cal. 240, 243, 17 P. 193; Towne v. Towne, 6 Cal.App. 697, 701, 92 P. 1050; Severn v. Ruhde, 58 Cal.App.2d 704, 707, 137 P.2d 466. Defendant does not dispute this rule, but he contends that it does not apply because the deed was delivered to A. P. Hughes more than a year prior to his death but was not recorded by him. He says that when the grantee does not record a deed it requires clear and convincing proof that it was intended to operate as a transfer of title.

The property here involved may be referred to as the Western Avenue property. There was evidence that defendant also executed a deed in favor of A. P. Hughes to property which may be called the Long Beach property. The two deeds were acknowledged October 2, 1944, and were handed by the grantor to the grantee. There was evidence that some six months or more before his death the grantee handed to his fiancee, Ethel Toney, an envelope containing the two deeds, with instructions to "put it away." She did not know what was in the envelope until she discovered the deeds after the death of Mr. Hughes. The envelope had been in her safe deposit box. She later, through her attorney, delivered the deeds to plaintiff. Title to the Long Beach property was involved in a companion case in which James L. Hughes prevailed. That decision, however, was not upon the ground of nondelivery of the deed to the Long Beach property to A. P. Hughes. The present case involves only the Western Avenue property.

In his testimony defendant related what he claimed to be the circumstances under which the deeds were executed and delivered. Euldene Hughes, wife of A. P. Hughes, was suing him for divorce and claiming title to both parcels of property. He testified that A. P. Hughes asked him to give him the deeds because he was negotiating with his wife for settlement of the pending divorce action and he wished to be able to transfer the property to his wife if that should become necessary in order to effect a settlement. He also testified, upon further questioning, that it was not his intention, in executing the deeds, to enable his brother to pass title to the property to his wife, and that if such transfer should become necessary new deeds would be required. He also testified that if A. P. Hughes used the deeds he was to receive a 16-unit court at 104th Street and Normandie Avenue, and another 16-unit court at 103rd Street and Normandie Avenue. He testified that he received nothing for the deeds and later asked his brother for the deeds, and that the latter told him they had been destroyed.

[3-6] A. P. Hughes made his will the 25th of September, 1945, after judgment

had been entered in the divorce case. Ethel Toney testified that in the four days that intervened between the making of the will and Mr. Hughes' death, he asked her to tear up the deeds but she did not do so, nor did she look at them. By his will, Mr. Hughes made specific bequests of four pieces of property, but made no mention of the Western Avenue or the Long Beach parcels. Ethel Toney was named residuary legatee under the will. She made no claim to these properties. A. P. Hughes had conveyed the Western Avenue property to defendant by deed dated March 20, 1943, and had conveyed the Long Beach property to defendant by deed dated March 8, 1941. After conveying the Western Avenue property to defendant, A. P. Hughes collected the rents from it for a year or a year and a half; otherwise defendant managed and collected rents from both properties. It would serve no useful purpose to give a more extended statement of the evidence. The unconflicting evidence with respect to possession of the deed by the grantee and by plaintiff and also as to the circumstances of the delivery was sufficient to furnish substantial support for the finding that the deed was delivered with the intent on the part of the grantor that it pass title. While acceptance is an essential part of delivery, possession of a deed by a grantee, or those holding under him, is *prima facie* evidence of both delivery and acceptance. Hodoian v. Garabedian, 79 Cal.App. 762, 769, 251 P. 227. Failure of A. P. Hughes to record the deed did not establish as a matter of law that the deed was not delivered with intent to pass title. Merritt v. Rey, 104 Cal.App. 700, 707, 286 P. 510. It was merely a circumstance for the consideration of the trial court. The failure of recordation of a deed during the lifetime of the grantee has never been deemed a reason for not giving effect to the presumption that arises from possession of the deed by the grantee or those claiming under him. See Stewart v. Silva, 192 Cal. 405, 221 P. 191; Hodoian v. Garabedian, supra; Dinneen v. Younger, supra, 57 Cal.App.2d 200, 134 P.2d 323. The statement in Morgan v. Matthieson, 103 Cal.App. 510, 517, 285 P. 325, that where a deed is not recorded during the lifetime of the grantee the intent to pass title must be proved by clear, unequivocal and convincing evidence, should be understood as applying to the facts of that case. It is not a rule of general application. And, in any event, it is the trial court that must be satisfied with the evidence. Reviewing courts inquire whether the evidence was substantial, not whether it was clear or convincing. Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583; Baines v. Zuieback, 84 Cal.App.2d 483, 488, 191 P.2d 67; cf. J. & H. Goodwin, Ltd. v. Franich, 37 Cal.App. 493, 174 P. 83.

Defendant's entire argument is addressed to the weight of the evidence. Numerous circumstances are mentioned which tend more or less to show that A. P. Hughes did not consider himself to be the owner of the Western Avenue property; he allowed defendant to manage it and collect the rents and mention neither the Western Avenue nor the Long Beach property in his will. There was testimony that he told Ethel Toney to tear up the deeds. Defendant claims the court ignored this testimony, which, of course, the court could have disbelieved. But these were only circumstances which were addressed to the trial judge. That they were given thoughtful consideration clearly appears from the court's memorandum decision contained in the clerk's transcript. It states that the court found no evidence which was in conflict with the presumption of complete delivery, but that, upon the contrary, the testimony of the defendant served to confirm the presumption of delivery; that if, as defendant testified, he gave the deeds to his brother to enable the latter to convey title, if necessary, to effect a property settlement, it was clear that he intended the deeds to be effective, and if there was a condition attached to the use of the deeds it was one that could not detract from the effectiveness of the delivery.

[7] The court properly applied the rule of section 1056 of the Civil Code, which reads: "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." Under

this rule, the delivery of the deed to A. P. Hughes, with no condition expressed therein, was absolute and free from any expressed qualification that it was to be used only for a particular purpose. Stewart v. Silva, supra, 192 Cal. 405, 410, 221 P. 191; Bias v. Reed, 169 Cal. 33, 44, 145 P. 516; Blackledge v. McIntosh, 85 Cal.App. 475, 482; Hodoian v. Garabedian, supra, 79 Cal.App. 762, 769, 251 P. 227; Weldon v. Lawrence, 76 Cal.App. 530, 535, 245 P. 451.

Defendant asserts that A. P. Hughes in the trial of his divorce case testified that he, defendant, owned the Western Avenue property and that although the deed in question was executed before the divorce case was decided, A. P. Hughes did not inform the court of that fact. It is claimed that plaintiff administrator is estopped by this testimony to claim title under the deed. No estoppel was pleaded nor was there any evidence that defendant relied or acted upon the testimony allegedly given by A. P. Hughes. No facts were misrepresented to defendant, nor was he shown to have been in ignorance of any facts which would have had a bearing upon his actions and intentions in executing the deed. There is no basis for the claim of estoppel.

The judgment is affirmed.

WOOD and VALLEE, JJ., concur.

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111 Cal.App.2d Supp. 969

HETZLER v. HAHLING.

C. A. No. 54166.

Superior Court of California,
San Diego County,
Appellate Department.
May 22, 1952.

Robert C. Hetzler, broker, brought action against Lena Hahling, vendor, for broker's commission. The Municipal Court, City of San Diego, State of California, Phil Smith, J., entered a summary judgment for plaintiff, and defendant appealed. The Superior Court, Appellate Department, Burch, J., held that where broker had fully performed contract, his right to commission would exist independently of any outcome of vendor's suit against purchasers for specific performance of contract procured by the broker.

Judgment affirmed.

1. Judgment 🔑185

On plaintiff's motion for summary judgment, where defendant's affidavits, liberally construed, disclose issue of fact, motion should be denied. Code Civ.Proc. § 437c.

2. Appeal and Error 🔑843(2)

Where broker was granted summary judgment for commission against vendor, vendor's contention on appeal that broker's action should abate until decision of vendor's action for specific performance against purchasers was moot where vendor's action had been dismissed in superior court.

3. Brokers 🔑64(1)

Broker's right to commission would exist independently of any outcome of vendor's suit against purchasers procured by broker for specific performance of contract which was fruit of broker's labor, since action of specific performance may be defended on equitable considerations not pertinent to broker's action for commission.

4. Compromise and Settlement 🔑6(1)

Claimed agreement to compromise and settle for $50 broker's claim for commission for procuring purchaser was unsupported by consideration where contract which resulted from vendor's acceptance of offer by purchasers procured by broker unequivocally acknowledged debt for commission to broker in sum of $575.

5. Brokers 🔑64(1)

Alleged fact that broker showed purchasers other property and suggested that they might recover for use on such new purchase a sum deposited by them in escrow on purchase of vendor's property would not defeat broker's claim for commission against vendor where it was not averred that purchasers were in any way influenced by broker's action to repudiate contract with vendor.

6. Judgment ⚷185

Where broker had fully performed according to employment contract and duty as a broker, and vendor disputed claim to commission and sought to compromise same but in affidavit gave no material fact upon which he based contention that whole commission was not due, summary judgment for broker was proper. Code Civ. Proc. § 437c.

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Alfred Einstein and V. Lustig, National City, for appellant.

Howard Turrentine, San Diego, for respondent.

BURCH, Judge.

This is an action for a real estate broker's commission. Upon a showing that plaintiff was a licensed broker, that defendant listed for sale with plaintiff exclusively for thirty days her certain real property, and that plaintiff obtained thereunder from Mr. and Mrs. Baker a written firm offer in accordance with the terms of the listing which was accepted by defendant, the trial court granted plaintiff a summary judgment against defendant. The holding in Twogood v. Monnette, 191 Cal. 103, 215 P. 542, is to the effect that a broker employed to sell real or personal property has earned his commission when he has produced a person who is ready, willing and able to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for a sale on the terms proposed by the seller. See also Clements v. Rankin, 83 Cal.App.2d 779, 786, 189 P.2d 725; Walter v. Libby, 72 Cal.App.2d 138, 142, 164 P.2d 21.

[1] The plaintiff, on making his motion for summary judgment, set out the above facts in his affidavit, and this would seem to support the summary judgment under section 437c of the Code of Civil Procedure unless defendant's affidavits, liberally construed, disclose an issue of fact to be tried, Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62; Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 122 P.2d 264; Arnold v. Hibernia Savings & Loan Society, 23 Cal.2d 741, 146 P.2d 684, in which latter event the motion should be denied. An examination of defendant's affidavits in resisting the motion discloses no fact which would defeat plaintiff's right, and in some respects strengthens plaintiff's showing.

[2–4] Defendant averred that she had brought in Superior Court an action for specific performance against the purchasers, Mr. and Mrs. Baker, on the contract which resulted from defendant's acceptance of the Bakers' offer. Defendant also set out *in haec verba* the contract sued on by her, and the same contains a specific acknowledgment of a commission of $575.00 due plaintiff from defendant. The Superior Court action was dismissed with prejudice by defendant, April 23, 1952. Defendant contended on appeal that plaintiff's action should abate until decision in the Superior Court action. The point is mooted by defendant's dismissal, but we think plaintiff's right would exist independently of any outcome there. The contract upon which defendant sued the Bakers is admittedly the fruit of plaintiff's labors, but the action of specific performance may be defended on equitable considerations not pertinent to plaintiff's action. Kauffman, Inc., v. Smith, 82 Cal.App.2d 302, 186 P.2d 11. Defendant further undertook in her affidavit to show an agreement of compromise and settlement of plaintiff's claim for $50.00, which sum when offered was refused by plaintiff. The claimed agreement is unsupported by consideration, since the contract which resulted from defendant's acceptance of the Baker offer, unequivocally acknowledged the debt for commission to plaintiff in the sum of $575.00.

[5] It was alleged in the affidavits of Mr. and Mrs. Baker that they conferred with plaintiff on November 28, 1951, that he showed them another property on that date, and suggested to them that they might recover for use on the new purchase a sum of $1500.00 which on August 18, 1951, had been deposited by them in escrow on the purchase of defendant's property. The

Bakers were prepared so to testify. Neither of them aver that they were in any way influenced by the action to repudiate their contract with defendant.

[6] We find no fact averred in this connection to diminish or defeat plaintiff's claim. On November 28, 1951, plaintiff had fully performed according to the stipulations of his employment contract and his duty as a broker under the law, and defendant, according to his affidavit, was disputing the claim and seeking to compromise it, but his affidavit gives us no material fact upon which he based his contention that the whole commission was not due. No other points are raised on appeal. We think the summary judgment should be affirmed.

GLEN, J., concurs.

TURRENTINE, J., deeming himself disqualified, does not participate in the foregoing opinion.

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112 Cal.App.2d 14

CAGWIN v. CAGWIN.

Civ. 15010.

District Court of Appeal, First District, Division 2, California.

June 25, 1952.

Motion by divorced husband for modification of awards for support of wife and children on ground of depleted income, wherein the divorced wife resisted the motion and cited the husband for contempt. The Superior Court of Marin County, Thomas F. Keating, J., modified the decree and the plaintiff wife appealed. The Court of Appeal, Nourse, P. J., held that the reduction was proper under a showing that the wife had profited by the marriage and husband's remarriage had added considerable extra expenses.

Affirmed.

1. Contempt 🔑39

Contempt of court is addressed to trial court's discretion.

2. Divorce 🔑311

If husband's excuses for failure to pay all support money awarded by divorce decree were sufficient, trial court was justified in denying commitment for contempt.

3. Divorce 🔑312.6(3)

In absence of finding or judgment on issue of contempt in husband's failure to pay support money, reviewing court could not assume from argument alone that husband was in contempt as basis for holding that trial court was without power to hear his petition for modification of divorce decree.

4. Divorce 🔑309

Award of $125 a month for support of each of two children was properly reduced to $75.00 per month on showing that wife had profited by remarriage while husband's remarriage had added considerable extra expenses, in absence of evidence that children were not well provided for.

Myers & Carter, San Anselmo, for appellant.

Buckley & Ehlers, Oakland, for respondent.

NOURSE, Presiding Justice.

In January 1948 the parties hereto were divorced. The plaintiff was awarded the custody of the two minor children and the husband was ordered to pay $125 a month for the support of each. The parties thereafter each took a new spouse—the wife apparently getting the better bargain from the financial point of view.

In January 1951 the defendant moved for a modification of the support awards on the ground of a depleted income. The plaintiff resisted the motion and at the same time cited the defendant for contempt. He was then $500 in arrears on his support payments. Both matters were heard together. The court modified the decree by reducing the amount payable for one of the minors from $125 to $75 a month. It did not hold that the defendant was in contempt, nor that he was not, but gave him ninety days to pay the arrears.

[1, 2] Appellant raises three questions which will be taken in order (1) contempt of court is a matter addressed to the discretion of the trial court. If the excuses made by defendant for his failure to pay all the support money were deemed sufficient the trial court was justified in denying a commitment.

[3] (2) It is argued that, since the defendant was in contempt at the time of the hearing, the court was without power to hear his petition for a modification of the decree. The argument is based on a wrong postulate. There is no evidence in the record of a finding or of a judgment on the contempt issue. We cannot assume from argument alone that defendant was in contempt.

[4] (3) Concededly the support and maintenance portions of a divorce decree are subject to modification when changed circumstances warrant it. The evidence is that the plaintiff by her second marriage has profited financially while the defendant's remarriage has added considerable extra expenses. There is no evidence that the children are not well provided for. Becker v. Becker, 64 Cal.App.2d 239, 148 P.2d 381.

The order is affirmed.

GOODELL and DOOLING, JJ., concur.

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111 Cal.App.2d 831

PEOPLE v. CROSSLAND.

Cr. 2814.

District Court of Appeal, First District, Division 2, California.

June 20, 1952.

Defendant was convicted in the Superior Court of the County of Alameda, Charles Wade Snook, J., of assault by force likely to produce bodily injury and of assault with a deadly weapon, and he appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained convictions.

Judgment affirmed, and appeal from verdict dismissed.

1. Criminal Law 🔑1023(10)

Defendant had no right to appeal from guilty verdict, and appeal therefrom would be dismissed.

2. Assault and Battery 🔑92

Evidence that motorcyclist drove in prohibited zone of highway, drove at illegal rate of speed, and drove without operator's license, and that when police officer approached motorcyclist and informed him that he had been speeding and that he would have to go "for a ride" with officer, and took motorcyclist by wrist, motorcyclist pulled loose, doubled his fists, and in ensuing melee severely beat officer with officer's club and pistol which officer had drawn in self-defense, sustained convictions for assault by force likely to produce bodily injury and for assault with a deadly weapon. Pen.Code, §§ 245, 3024.

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Raymond A. Ferrario, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wallace Colthurst, Deputy Atty. Gen., San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Defendant was tried to a jury on an information framed in two counts—assault by force likely to produce bodily injury, § 245, Penal Code, and assault with a deadly weapon, § 3024 Penal Code. He was convicted on both counts and appeals from the verdict and also from the ensuing judgment. Since there is no right of appeal from a verdict that appeal is dismissed. People v. Ormes, 88 Cal.App.2d 353, 198 P.2d 690.

[2] On the appeal from the judgment the sole issue is the sufficiency of the evidence. The people offered several witnesses who saw the affray. The defendant

did not take the stand. He offered one witness whose testimony was of no material value. Hence the uncontradicted evidence is that a member of the state highway patrol, while on duty, and in full uniform, saw the defendant riding a motorcycle in the prohibited dividing strip between the two traffic lanes of a through highway and signaled him to get over in the proper lane. The defendant at first complied and then when the officer directed him to pull off the highway and stop, he again entered the dividing strip and sped down the highway at a speed in excess of 80 miles an hour. The officer followed him with his red light burning and his siren sounding. When defendant stopped in the driveway to his home the officer approached him and informed him that he had been speeding and that he would have to go "for a ride" with him. (Appellant's counsel argues that this meant nothing to the defendant but an invitation for a ride. The ordinary individual would understand it as a notice of arrest.) Following this statement the officer asked defendant for his driving license. Defendant told him he had none. The officer then took defendant by the wrist and told him to come with him. The defendant pulled loose, doubled his fists, and in the ensuing melee, severely beat the officer with the officer's club and pistol which the latter had drawn in self-defense. All the evidence shows without conflict that defendant's assaults upon the officer were wholly unjustified and that they were made in resistance of an attempt to make a lawful arrest.

At the time the arrest was attempted defendant had committed three violations of the law—driving in a prohibited zone of the highway, driving at an illegal rate of speed, and driving without an operator's license. The appeal is wholly without merit.

Judgment affirmed. Appeal from the verdict dismissed.

GOODELL and DOOLING, JJ., concur.

39 Cal.2d 121

ROSICRUCIAN FELLOWSHIP et al. v. ROSICRUCIAN FELLOWSHIP NON-SECTARIAN CHURCH et al.

L. A. 19435.

Supreme Court of California, in Bank.
June 20, 1952.

Rehearing Denied July 17, 1952.

The Rosicrucian Fellowship, a corporation, and others brought action against The Rosicrucian Fellowship Nonsectarian Church, a corporation, and others for injunctive relief, involving controversy as to dominant use of certain religious property. The named defendant filed a cross-complaint for declaratory relief. The Superior Court, San Diego County, Robert B. Burch, J., entered judgment adverse to the plaintiff, and the plaintiff appealed. The Supreme Court, Carter, J., held that defendant religious corporation was entitled to dominant use of religious property, but that portion of injunction in favor of defendant was too broad as infringing upon freedom of speech and would be stricken from judgment.

Judgment modified and affirmed.

Prior opinion, Cal.App., 220 P.2d 66.

1. Religious Societies 🔑14

Generally, courts will not interfere in religious societies with reference to their ecclesiastical practices, except that civil and property rights may be adjudicated.

2. Religious Societies 🔑7

Person who joins church covenants expressly or impliedly that in consideration of benefits which result from such union, he will submit to control and be governed by laws, usages and customs whether they are of an ecclesiastical or temporal character, to which laws, usages and customs he assents as to so many stipulations of contract.

3. Religious Societies 🔑5

Formal evidence of contract of person who joins church is contained in canons of church, constitution, articles, bylaws of society, and customs and usages which have grown up in connection with instruments.

4. Religious Societies 🔑25

Judgment declaring that plaintiff religious corporation owns college and sanitarium but for use of church association, corporation formed by it, and religious followers, and that plaintiff has license to use religious writings, though in part couched in terms dealing with ecclesiastical functions, was proper as dealing with civil and property rights and did not interfere with exercise of ecclesiastical functions, where court did not adopt any different system than had been exercised for ownership and exercise of rights involved, but merely determined same as shown by custom, usage and past practice.

5. Action 🔑65

In action in nature of equitable proceeding, court may consider facts as they existed at time of trial so that interest of justice may be subserved.

6. Religious Societies 🔑31(7)

Where judgment was that plaintiff religious corporation holds real property and personal property for use and benefit of disciples of philosophy, unincorporated church association and corporation formed by followers, it was immaterial whether defendant corporation was formed for valid purpose, because members and followers of philosophy were true beneficiaries.

7. Religious Societies 🔑7

Where plaintiff religious corporation was organized and real property transferred to it, and members of church association did not consent to incorporation or amendments to articles of incorporation, there was no surrender of all rights to the corporation.

8. Appeal and Error 🔑989, 996

It is for trial court to weigh evidence and draw reasonable inferences deducible therefrom.

9. Religious Societies 🔑4

In action for injunctive relief involving controversy between a religious corporation and another religious corporation, an unincorporated church association, and followers of the philosophy, as to certain property rights, record established that the church was the unincorporated association of followers.

10. Religious Societies 🔑31(3)

In action for injunctive relief involving controversy between religious corporation and another religious corporation, unincorporated church association, and followers of philosophy, as to use of certain church property, defendant corporation, association and followers could properly bring representative suit on a cross-complaint asserting that action was prosecuted for benefit of all persons in United States who are believers in philosophy and stating that there were approximately 706 persons and that it would be impractical to name them all as parties.

11. Parties ⇨12, 23

Where parties interested are numerous, and suit is for object common to all, some of body may maintain bill on behalf of themselves and others, and bill may also be maintained against portion of numerous body of defendants representing a common interest.

12. Religious Societies ⇨31(3)

Where, in action for injunctive relief involving dispute as to dominant use of property, defendant religious corporation and others properly filed cross complaint in representative capacity, all persons represented were not indispensable parties.

13. Religious Societies ⇨31(3)

Woman who was named defendant by plaintiff religious corporation and who was named as representative in defendant religious corporation's cross complaint in representative capacity was party to action and could have her contract with plaintiff litigated.

14. Religious Societies ⇨29

Contract between woman who organized corporation disseminating certain religious teachings, and older corporation similarly engaged, for dissolution of new corporation, and granting of license to old corporation to use religious writings, in return for making woman trustee and upon retirement, president emeritus, contemplated that woman could hold position as long as she desired, and upon removal from office there was breach authorizing cancellation of contract by woman.

15. Pleading ⇨8(4)

Where, in action involving breach of contract, party claimed she gave up certain rights without consideration, such answer could be considered as showing that party did not receive consideration, in absence of objection that such answer was conclusion and not evidence.

16. Religious Societies ⇨31(1)

Where woman who organized religious corporation entered contract with older religious corporation disseminating similar teachings, for dissolution of new corporation and granting of license to old corporation to use religious writings, and woman was to receive office of trustee for life, sustenance and living quarters at religious college, and an annuity, upon breach by corporation, there was nothing of consequence required to be restored by woman to give her right of action.

17. Contracts ⇨345

Where cross-complaint alleging breach of contract was sufficient to advise plaintiff of issues to be met, same was not insufficient for failure to allege that restoration of consideration received under contract was not necessary. Code Civ.Proc. § 2055.

18. Appeal and Error ⇨1048(1)

In action involving breach of contract, sustaining of objection as to whether party alleging breach had offered to restore or had restored anything she received under contract was not reversible error where there was nothing worthy of restoration.

19. Injunction ⇨11

Injunction against future acts was proper where record sufficiently indicated that past acts would probably recur.

20. Religious Societies ⇨31(7)

Injunction which restrained interference with dominant use of property for ecclesiastical purposes was not uncertain, in view of fact that "dominant use" clearly means superior right and that judgment in other parts defined such rights.

21. Injunction ⇨94

Injunction will not be granted where restraint interferes with freedom of speech.

22. Constitutional Law ⇨90
Injunction ⇨189

Portion of injunction restraining slanderous or libelous statements was too broad and infringed upon freedom of speech and would be stricken.

23. Appeal and Error ⚿954(2)

Where religious corporation brought action against another religious corporation, church association, and followers of philosophy, for injunction against use of name "The Rosicrucian Fellowship" or anything like it, from soliciting followers for contributions and using religious writings, and defendants cross-complained for declaration of rights and for injunctive relief, and trial court found that plaintiff owned college and sanitarium but for use of defendants, and declared that plaintiff had license to use religious writings, refusal to grant plaintiff injunctive relief which is to some extent discretionary with trial court would not justify reversal.

24. Appeal and Error ⚿1048(6)

Where witness gave certain testimony on direct examination, refusal of court to allow defendant to prove the contrary by witness on cross-examination was not prejudicial error, since court may have felt that it was unlikely witness would change testimony given on direct examination.

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Rollin L. McNitt, Homer C. Compton, and Edythe Jacobs, Los Angeles, for appellant.

Stewart, Shaw & Murphey, Los Angeles, Luce, Forward, Kunzel & Scripps, Fred Kunzel, San Diego, and William L. Murphey, Los Angeles, for respondents.

CARTER, Justice.

This is an appeal from a judgment that plaintiff take nothing by its action to obtain, among other things, an injunction against the use of the name "The Rosicrucian Fellowship" and declaring the rights of the parties in response to defendants' cross-complaint for declaratory relief.

Plaintiff, The Rosicrucian Fellowship, is a corporation formed in 1913. Cross-defendants are plaintiff and the trustees of that corporation. Defendants and cross-complainants are a church corporation, formed in 1944, The Rosicrucian Fellowship Non-Sectarian Church, Mrs. Heindel, and followers of the rosicrucian philosophy. The controversy mainly concerns whether plaintiff corporation or defendant corporation and the unorganized followers have rights in connection with certain property acquired in the course of the development of the religious group known as "The Rosicrucian Fellowship."

The preliminary background of the religious movement is not disputed. According to the findings of the trial court, Max Heindel, after study in Europe in 1908, wrote a book called "The Cosmo-Conception of Mystic Christianity" which he used as a basis for teaching what he described as the rosicrucian philosophy to organized groups of followers, called centers, in various cities in the United States. He classified his followers, with respect to their proficiency in the philosophy, as disciples, probationers and students. In 1910, Heindel married defendant Mrs. Heindel who thereafter assisted him in writing, teaching and obtaining followers. The Heindels and their followers constituted, until July 6, 1944, an unincorporated church association known as "The Rosicrucian Fellowship." This association, as distinguished from plaintiff corporation, was without an ecclesiastical system of church government until July 6, 1944, when the defendant corporation was formed.

In 1911, Heindel purchased, with his wife's assistance, taking title in his name, real property in San Diego County called by them "Mt. Ecclesia." Improvements were made on the property by them prior to Heindel's death and by Mrs. Heindel thereafter with funds received by them and later by plaintiff corporation from contributions from followers and the sale of writings. Heindel indicated by letters to his followers that he held the property in trust for the use and benefit of the followers of the philosophy. In 1913, the Heindels formed plaintiff corporation, named "The Rosicrucian Fellowship," for the purpose of transferring to it the property known as Mt. Ecclesia and some temporal functions of the unincorporated church association. The articles of incorporation expressed the purpose "to establish a college or seminary for the study" of the rosicrucian philosophy. Under the articles and by-laws the followers were not members of the corporation. It was formed and the amendments to its articles, later mentioned, were adopted without their approval or consent, or the approval or consent of the unincorporated association previously mentioned.

The court found that from 1913 until his death in 1919, Heindel held title to Mt. Ecclesia, and he and his wife, with the assistance of their followers, members of the unincorporated church association, conducted all the so-called ecclesiastical functions for the church association, and at all times, until July 6, 1944, Mrs. Heindel and members of the church association conducted all such ecclesiastical functions of the philosophy, which included teaching, preparing and disseminating writings and soliciting members.

Mrs. Heindel, between 1916 and 1919, became the owner of all the writings of her husband by assignment and will. (She is still the owner subject to the 1931 contract later mentioned herein.) In 1919, after Heindel's death, Mrs. Heindel conveyed Mt. Ecclesia to plaintiff corporation in trust for the use and benefit of the followers of the philosophy as members of the church association, (later plaintiff corporation acquired an additional 10 acres) and later as members of defendant corporation.

In 1925, the articles of plaintiff corporation were amended to include among the purposes the establishment of a nonsectarian church (to teach and disseminate the rosicrucian philosophy) and a sanitarium. In 1931, the articles were again amended, declaring the establishment of a college of learning to teach and disseminate the philosophy, to be one of the purposes. A 1935 amendment changed the name to "The Rosicrucian College." In 1940, the articles were amended to recite that the corporation was formed under the non-profit college incorporation law; the name was changed back to "The Rosicrucian Fellowship" and the purpose was again declared to be for the establishment of a church or religious organization to disseminate the rosicrucian philosophy.

In January, 1943, the members of the church association organized (287 of them) an association for a church institution, which on July 6, 1944, was incorporated—defendant corporation—with the declared purpose of organizing and conducting a church. By-laws and rules were adopted for a complete system of representative church government.

Dissention developed in the organization in 1931 when Mrs. Heindel withdrew from The Rosicrucian Fellowship and moved to Oceanside where she established an organization known as the Max Heindel Rose Cross Fellowship, which undertook to carry on activities relating to the advancement of the rosicrucian philosophy. In settlement of the controversy with respect to the use of the writings, a contract was made between plaintiff corporation and Mrs. Heindel in October, 1931, in which it was recited that there existed a controversy between them concerning the legal ownership of the writings, and that Mrs. Heindel had established an organization for disseminating the teachings theretofore distributed by plaintiff. It was agreed that plaintiff should have an "undisputed, irrevocable license, right and permit" to publish, sell, etc. all writings; that, subject to plaintiff's right, Mrs. Heindel was the owner for life of the writings, which would vest on her death in plaintiff. Neither party should authorize others to distribute the writings without the consent of the other, except that Mrs. Heindel could give a license to an organization formed or sponsored by her; plaintiff was to provide a life annuity for Mrs. Heindel, paying $125 per month; if she ceased her activities competitive with plaintiff before January 15, 1934, the annuity would be increased to $208.33 per month; provision was made for arbitration; a statement was to be sent to all followers that the controversy was settled. The court found that defendant corporation is sponsored and led by Mrs. Heindel. In October, 1934, another contract was made by the same parties in which was recited some of the main provisions of the 1931 contract and that Mrs. Heindel had formed a corporation sole, Max Heindel Rose Cross Philosophies, which was distributing the writings and had a following of 2,050; that plaintiff corporation has continued its activities since the "schism," having 4,500 followers; that each has certain assets; that Mrs. Heindel and her corporation and followers have been asked to unite with plaintiff and they have accepted and the parties have agreed to a consolidation. In consideration of $1.00 paid by each to the other and other valuable consideration it was agreed that Mrs. Heindel's corporation shall be dissolved and its books and equipment shall be transferred to plaintiff and paid for at a specified price. The 1931 contract was continued in force except that Mrs. Heindel did not have the right to grant to any organization the right to use the writings. Mrs. Heindel's annuity was fixed at $125 per month. As a part of the consideration, Mrs. Heindel was to have living quarters and sustenance at Mt. Ecclesia for life; to be elected a trustee of plaintiff and "elected" chairman of the "executive or governing committee"; to become the "manager" in charge of activities of plaintiff under the committee of five, naming three of them; the lessons and letters to be signed by her on behalf of plaintiff; and she was to be editor of the magazine. It was finally recited that: "All the parties hereto are of one mind upon the proposition that the schism referred to above has caused great misunderstanding upon the part of many people and has injured and delayed the progress of the work. It is believed by all concerned that a repetition of conditions which resulted from this schism is to be avoided in view of the fact that Max Heindel, as a representative of the Elder Brothers of the order brought these teachings to the people, and that Mrs. Heindel spent years of her active life helping to build up the institution, that a part of the consideration of this contract should be assurance to her that if at any time she ceases to be active in connection with the work and retires from authority, that she shall then become President Emeritus of the organization for life, and that her annuities, her living quarters and her sustenance shall continue during her lifetime, and that she will cooperate with the Fellowship to the end that the teachings of the Rosicrucian Philosophies may be given to the world to the best possible advantage." The court interpreted the contract to mean that the consideration running to Mrs. Heindel was that she was entitled to be a trustee, chairman of the governing committee and manager of plaintiff corporation at all times thereafter until she voluntarily retired. The corporation performed its promise until February, 1942, when she was removed from the positions against her wishes. On October 7, 1944, Mrs. Heindel gave notice of cancellation of the 1934 contract.

The troubles evidently came to a head after Mrs. Heindel was removed from her positions, for on April 16, 1942, Weaver, Munson and Grow, as members of the unincorporated church, commenced an action in the Superior Court of San Diego County. The action was against plaintiff corporation and the trustees thereof, and it was there found that they sued on behalf of 500 members of the church. Plaintiffs there sought a declaration that they and the other members had a right to participate in the election of trustees of plaintiff corporation and to recover $41,939.56, alleged to have been misapplied by the trustees in the operation of the sanitarium at Mt. Ecclesia during the period from 1939 to 1942. The judgment in that action declared that plaintiff corporation was existing and that its articles were legally amended in 1925, 1930, 1931, 1935 and 1940, and all its by-laws were legally adopted; the followers of the rosicrucian philosophy constitute a church known as "The Rosicrucian Fellowship" as distinguished from plaintiff corporation; that the church has no ecclesiastical organization or system of church government; that plaintiff corporation owns and holds Mt. Ecclesia as trustee for the members of the church; that the church members are entitled to an accounting from the corporation for misapplication of funds; that the followers of the philosophy and members of the church are not corporate members of the corporation and are not entitled to vote for the election of trustees; that the church has no spiritual head; and that the removal of Mrs. Heindel in February, 1942, as president of plaintiff corporation was legal.[1]

Based upon the findings the court in the case at bar rendered judgment declaring that all of Mt. Ecclesia and all personal property thereon was owned by plaintiff corporation but that the church association and defendant corporation and followers were entitled to the dominant use of the property for so-called religious purposes without interference inasmuch as plaintiff corporation held it only as a trustee and they were beneficiaries. It was also declared that such beneficiaries had the dominant right to enjoy and use such property for such functions which include "lecturing, teaching of the Rosicrucian Philosophy to people interested therein; the establishment of centers for the study and teaching of Mystic Christianity as interpreted and expounded by Mr. and Mrs. Max Heindel in all books, pamphlets and letters written by them, or either of them; issuing and revoking charters of any and all centers; the preparation of correspondence courses for the study, teaching and dissemination of the Rosicrucian Philosophy; the preparation of all ecclesiastical and esoteric lessons and letters to Students, Probationers and Disciples; the preparation of horoscopes and astrodiagnosis thereof for the assistance and guidance of Students, Probationers and Disciples in alleviating mental and physical suffering, difficulties and problems; the recommendation of diets for the physical welfare of Students, Probationers and Disciples requesting the same; corresponding with Students, Probationers and Disciples in the United States and elsewhere regarding the said religious belief, and the teaching and dissemination thereof; to suspend and expel Students, Probationers and Disciples according to its by-laws, rules and regulations"; that plaintiff corporation has not acquired the right and may not use the property to perform any of those functions, and the church association and said beneficiaries have not lost any of such rights by waiver or estoppel; that plaintiff corporation may use the property in the conduct of the temporal functions including "the printing, publishing, selling of said books, pamphlets and letters written by Mr. and Mrs. Max Heindel from and after October 23, 1931; the printing or multigraphing and mailing of ecclesiastical and esoteric letters and lessons written by Mrs. Max Heindel or other Probationers or Disciples designated by the Rosicrucian Fellowship Non-Sectarian Church; the possession and use of a mailing list of Students, Probationers and Disciples and addressograph plates and machinery for the transposition thereof, for mailing purposes only; the operation of a lodge and a cafeteria; the receipt and recording of Students' monthly report cards and Probationers' monthly reports; the employment and discharge of employees for said purposes; the receipt of gifts and contributions specifically designated for said corporation; the collection of monies from its sale of said books, pamphlets and letters and from the operation of said lodge and cafeteria; the payment of salaries and taxes; the management and maintenance of said real property fixtures, improvements and personal property thereon; all for the account and benefit of the Probationers and Disciples, as members of the said unincorporated church association and as members of The Rosicrucian Fellowship Non-Sectarian Church, beneficiaries thereof"; that Mrs. Heindel is the owner of all the copy-rights on all the writings; that the church association and defendant corporation and members may use the name "The Rosicrucian Fellowship"; that the members of the defendant corporation and followers of the philosophy own the list of names and addresses of all followers; that the 1934 contract above referred to was breached by plaintiff corporation and is "null and void" but the corporation has the non-exclusive right under the 1931 contract to publish and sell the writings; that defendant corporation has a non-exclusive right under a license agreement of 1944 from Mrs. Heindel to publish and sell such writings. Injunctive relief was granted against plaintiff corporation wherein it was restrained from doing various things later mentioned herein. From the judgment it is clear that the main object was to preserve the use of the property to the followers of the philosophy, and as later seen, not to interfere with them in the exercise of their ecclesiastical functions.

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[1] That action was entitled Weaver v. Meyncke and the judgment became final in the Superior Court.

The main contention of plaintiff corporation on this appeal is that the court had no jurisdiction to decide who was entitled to exercise the ecclesiastical functions pertaining to the rosicrucian philosophy; that first the unincorporated church association and later the defendant corporation and members had such power.

The provisions of the judgment and discussions during the trial, taking them as a whole, though in part couched in language dealing with ecclesiastical functions, purport to deal with civil and property rights, such as, who may use the property at Mt. Ecclesia, lists of members, rights to property, rights in the writings and disposal thereof, solicitation of members and contributions. It should be observed that various rights affected by the judgment have civil and property right connotations. Illustrations are: The right to use a name "The Rosicrucian Fellowship" see Law v. Crist, 41 Cal.App.2d 862, 107 P.2d 953; the publication and sale of copyrighted books and documents and emblems, see Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 187 P.2d 474; mailing lists, see Cal. Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197, 188 P.2d 303. Hence the judgment may well be proper as reaching and affecting such rights, as it does, although by its language it might seem to go further and declare who may carry out so-called ecclesiastical functions, which may include the right to use the property to teach the philosophy and the solicitation of members and contributions.

[1–3] The general rule that courts will not interfere in religous societies with reference to their ecclesiastical practices stems from the separation of the church and state, but has always been qualified by the rule that civil and property rights would be adjudicated. See Watson v. Jones, 13 Wall. 679, 20 L.Ed. 666; Church of Christ of Long Beach v. Harper, 83 Cal.App. 41, 256 P. 476; Dyer v. Superior Court, 94 Cal.App. 260, 271 P. 113. There are two ways in which the problem may arise. The question may arise as to the extent to which the court is bound by the decisions of the church tribunals in either ecclesiastical or temporal matters, or the scope of the jurisdiction the court will exercise when there are no such tribunals but there are disputes between factions concerning ecclesiastical and temporal matters. In the instant case the court found that there was no established church system or government therefor and hence no church tribunals. Whether an activity is ecclesiastical or involves property rights, especially when a decision on one necessarily involves consideration of the other, are difficult questions. Ecclesiastical matters include in the main, creeds and proper modes of exercising one's belief. While the principle that courts will not purport to exercise ecclesiastical jurisdiction is settled as an abstract proposition, they will determine civil and property rights which depend essentially on the contracts of the parties as evinced by rules, regulations, practices and customs accepted and followed. The matter has been generally summarized: "It is obvious that no case can reach the civil courts unless it involves some property or other civil right. The courts of the land are not concerned with mere polemic discussions, and cannot coerce the performance of obligations of a spiritual character, or adopt a judicial standard for theological orthodoxy, or determine the abstract truth of religious doctrines, or adjudicate whether a certain person is a Catholic in good standing, or settle mere questions of faith or doctrine, or make changes in the liturgy, or dictate the policy of a church in the seating of the sexes, or the playing of instrumental music, or decide who the rightful leader of a church ought to be, or enjoin a clergyman from striking the complainant's name from his register of communicants, or enforce the religious right of a member to partake of the Lord's Supper." American Church Law, Zollman, § 313. It is also settled principle that: "It is perfectly clear that, whatever church relationship is maintained in the United States, is not a matter of status. It is based, not on residence, or birth, or compulsion, but on voluntary consent. It rests on faith, 'primarily, faith in God and his teachings; secondarily, faith in and reliance upon each other.' It is 'one of contract,' and is therefore exactly what the parties to it make it and nothing more. A person who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union he will submit to its control and be governed by its laws, usages and customs whether they are of an ecclesiastical or temporal character to which laws, usages, and customs he assents as to so many stipulations of a contract. The formal evidence of such contract is contained in the canons of the church, the constitution, articles, and by-laws of the society, and the customs and usages which have grown up in connection with these instruments." American Church Law, Zollman, § 328.

There appears to be no question between the parties here as to the proper way or method of teaching the philosophy or its principles. Rather, the dispute concerns who shall have the right to use the property, to teach the philosophy, and exercise the other rights herein enumerated. Closely related to the right to use the property are also involved the rights of solicitation of, and contributions from members, and of selling the writings. In fact, plaintiff corporation by its complaint demands a settlement of these matters for it prays that it should be accorded the right to solicit membership and contributions, to use the writings, have the mailing lists and be free from interference in conducting its meetings, services and lectures. Moreover, the dispute between the parties has been going on for many years and should be settled.

In connection with the jurisdictional question, plaintiff corporation argues further, that religious organizations are dual in nature, one part consisting of the members as a spiritual body, and the other as an unincorporated entity constituting the secular body; and that the plaintiff corporation here is the secular body. It is argued that this was determined by the decree in Weaver v. Meyncke, and reference is made to statements that a church society does not lose its identity by incorporating; that the corporation and the church, although one, may exist within the pole of the other, are not correlative, but each is independent of the other, one dealing with spiritual things and the other temporal. See 45 Am.Jur., Religious Societies, § 8; Wheelock v. First Presb. Church, 119 Cal. 477, 51 P. 841. The essential problem, nevertheless, is to ascertain from the acts, dealings and usages of the parties where the various rights rest in order to determine the ownership of civil and property rights, even though some so-called ecclesiastical rights are involved. Plaintiff corporation was found to own the property at Mt. Ecclesia but as a trustee for the unincorporated church, its members, and defendant corporation and its members. Organized, or unorganized, or lacking in an established church government, the followers of Mr. and Mrs. Heindel, and later of Mrs. Heindel, were as a group, the beneficiaries, and as such have always possessed the other rights accorded them in the judgment. As shown by the discussion earlier in this opinion some of the so-called ecclesiastical functions are so interwoven with civil and property rights that any decision involving the latter must necessarily affect the former. Moreover, it was recognized in the recitations in the 1931 contract with Mrs. Heindel, that both plaintiff corporation and the followers as a group had some rights somewhat in the nature of both ecclesiastical and property.

Plaintiff urges that generally courts have classified religious organizations into three categories: (1) Where one or a few persons, usually claiming divine right, control the whole hierarchy, including the local churches or societies; (2) Where there is a similar hierarchy but an assembly is in control; and (3) Where each local group is in charge of all its affairs through majority vote of its members and there is no control from above. See Watson v. Jones, supra; 45 Am.Jur., Religious Societies, § 4. It is also urged that where there is a schism or split between the followers or members of a society in the third class, or in an anomalous class which fits in none of the three, like the rosicrucians, those adhering to the original structure, whether or not they constitute a majority of all the members, are declared to have all of the property rights. It is argued that plaintiff corporation is the original structure and, therefore, it must have the property rights rather than the unorganized church or followers who later formed defendant corporation.

[4] The basic question in a controversy such as this should be the ownership of civil and property rights as shown by the conduct and acts of the parties. A classification based on a formula is not of much assistance, especially when we have, as we do here, an anomalous arrangement. See American Church Law, Zollman, § 328, supra. Nor is it important whether a schism in the technical sense has occurred so far as the creed or philosophy is concerned, and the findings and judgment on a whole show that there has been none. It appears that from the first, the unorganized church and it members through its leaders, the Heindels, have exercised property and civil rights incident to ecclesiastical functions which were not surrendered to plaintiff corporation. As heretofore stated the court found that centers, or groups of followers, were formed by Mr. Heindel in 1909, before plaintiff corporation was formed. It was also found that after the marriage of Mr. and Mrs. Heindel, they taught, wrote, sold writings, and solicited members; that from 1910 to 1913 their followers constituted an unincorporated church association known as "The Rosicrucian Fellowship"; that the Mt. Ecclesia property was purchased and improved in part by contributions from those followers and the property was declared by Heindel to be held in trust for the followers; that plaintiff corporation was formed in 1913 to hold Mt. Ecclesia for the benefit of the followers, but without their consent; that from 1913 to 1919, the Heindels, with the assistance of the followers as members of the church, "conducted all ecclesiastical functions for the church" and continued to do so until 1944. Those functions included obtaining contributions, using Mt. Ecclesia, lecturing, teaching the preparation, dissemination and sale of writings which had, as above seen, property and civil right aspects; that Mt. Ecclesia was deeded to plaintiff corporation in trust for the benefit of the followers but title to the writings was retained by Mrs. Heindel; that plaintiff corporation conducted certain business affairs all for the benefit of the unincorporated church, and that it also performed some so-called ecclesiastical functions without the consent of the followers who did not waive their right to organize themselves into a permanent church organization but did organize defendant corporation with a complete church government. In short, the true organization was the unincorporated church association, its members and the members of defendant corporation which was incorporated in 1944. It was, and is, the true and original structure, in ecclesiastical and secular activities, and any functions exercised by plaintiff corporation, except the management of the Mt. Ecclesia property and the license from Mrs. Heindel to use the writings, were usurped by plaintiff corporation. The court found that a majority of the followers formed defendant corporation and while that was a factor considered by the court in reaching its conclusion as to the ownership of the rights, it was also predicated on the premise that the unincorporated church was the basic group and owned most of the rights. The judgment preserved to plaintiff corporation the limited rights as trustee of Mt. Ecclesia and the license to use the writings. From the foregoing it is clear that the court did not adopt any different system than had existed for the ownership and exercise of the rights involved as claimed by plaintiff corporation. It determined the basic rights of the parties as shown by custom, usage, and past practices of the parties themselves.

[5] Plaintiff asserts that no notice was given to the followers of the formation of defendant corporation; that a majority did not agree thereto; and that the court erred in considering the number who had joined at the time of trial rather than the number at the time the action was commenced.

The court found that by April, 1945, 541 probationers and disciples out of 706 in the United States had become members of defendant corporation, which is, of course, a majority. Inasmuch as this action is in the nature of an equitable proceeding, the court may consider the facts as they existed at the time of trial so that the interests of justice may be subserved. Mercer Casualty Co. v. Lewis, 41 Cal.App.2d 918, 108 P.2d 65. Defendant corporation has offered to prove here that most of the foreign followers have also applied for membership. We think that is unnecessary as we feel the court was justified in assuming that a sufficiently substantial number of those who could reasonably be reached had joined. Moreover, we understand the judgment to accord the rights to all members of the unincorporated church association, as well as defendant corporation, and hence the foreign followers have not been prejudiced.

[6] Plaintiff asserts there cannot be two corporations, plaintiff and defendant, with one controlling temporal affairs and the other, a religious corporation, controlling ecclesiastical matters. It is contended that a corporation cannot be formed for ecclesiastical purpose, that it may exercise only temporal powers. Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 P. 841. In that case, the court speaks of the formation of non-profit corporations for religious purposes, which could be formed for any lawful purpose under former section 593 of the Civil Code, which authorized the formation of corporations for secular purposes only. Defendants urge that corporations may be formed to carry on religious, as well as temporal functions, under the law existing when defendant corporation was formed. That law, now Corporations Code, section 9200, provides that non-profit corporations may be formed for any lawful purpose for which persons may associate themselves, such as religious purposes. However, it is not material here, because, as we have seen, the rights which we interpret the judgment to affect, are essentially property in nature and we see no reason why some of them may not be in plaintiff and others in defendant corporations in accordance with the conduct and usage of the parties. The judgment states that all of Mt. Ecclesia, and the personal property thereon, is held by plaintiff corporation for the use and benefit of cross-complainants as probationers and disciples of the philosophy, "as members of the unincorporated church association organized in 1908 and 1909" and as members of "defendant corporation, as beneficiaries." Thus, all followers, whether members of the unincorporated church, or the defendant corporation, are beneficiaries and may use the property. We do not construe it to mean that only the members of defendant corporation are beneficiaries entitled to use the property. Hence it is of no particular consequence whether defendant corporation was formed for a valid purpose, or that members of defendant corporation are also mentioned as beneficiaries because members and followers of the philosophy are the true beneficiaries.

Plaintiff corporation claims that the church association and its members turned over the functions of conducting the church to it and that they are now estopped to claim those functions or that the association is unincorporated. It refers to the finding that at all times after 1913 (the date of its formation) the church association and its members were unincorporated but it was also found that it, plaintiff corporation, conducted temporal and secular functions for the members of the church association and has the right, subject to the dominant right of the association, to use the property for temporal purposes; that the church association was formed and regulations adopted by it without the consent of plaintiff corporation. Plaintiff corporation appears to assert that it has the right to exercise ecclesiastical functions, a matter which in other places it claims a corporation cannot have. The findings show that from 1913 to 1924 plaintiff corporation conducted "certain" secular functions and the judgment accorded it that power. It was also found that the followers did not consent to the formation of plaintiff corporation or its regulations. In this connection plaintiff asserts that the judgment in Weaver v. Meyncke is contrary to the present holding. We find nothing inconsistent in the holding of these cases. In the Weaver case the main question was whether the trustees of plaintiff had misappropriated trust funds. It was there found that plaintiff corporation was a corporation and its articles were legally amended; that none of the members of the unincorporated church were members of the corporation or entitled to vote for the trustees thereof; that such members had not been deprived of any right in the corporation. It was also found, however, that the members of the church were cestuis of the corporation trustee and were entitled to apply to the court for relief from any corporate mismanagement; that the property was held by the corporation as trustee for the members, all in harmony with the judgment here. So far as the legality of the formation of the corporation and amendments of its articles is concerned, the law may have been complied with without constituting a surrender by the church association and its members of all their rights to the property. Reasonably interpreted, the Weaver findings and judgment do no more than generally recognize plaintiff corporation as owner of Mt. Ecclesia as trustee for the unincorporated church association. It does not purport to deal with the right to use the property or the details of the ecclesiastical rights which have property right aspects (as heretofore mentioned) which have been exercised by the unincorporated association.

[7] The essence of plaintiff's contention in this respect seems to be that since the unincorporated church association had surrendered all its rights and powers to it, and that as it, plaintiff, had exercised those rights over a period of time with the acquiescence of the association, the latter is now estopped to assert them. As heretofore seen, the court found that there was no waiver by, or estoppel on the part of, the church association or its members, and that they owned the rights subject to certain rights in plaintiff; that there was an organized system or church government, and that the members did not consent to the incorporation of plaintiff or amendments to its articles of incorporation. We cannot say there has been a surrender of all rights to plaintiff, or a recognition that plaintiff had all of those rights, as was the case in Baker v. Ducker, 79 Cal. 365, 21 P. 357; Bear v. Heasley, 98 Mich. 279, 57 N.W. 270, 24 L.R.A. 615 and other cases cited by plaintiff.

[8, 9] Plaintiff asserts that the evidence shows it was to have all of the rights above mentioned. Specifically, it is asserted that Heindel told the followers in 1912 that he intended to form the corporation, that articles were filed in 1913 in which the Heindels were two of the five incorporators, and the followers were told of the incorporation; that Seattle center followers turned their assets over to the corporation and took their instructions in the philosphy from plaintiff; that plaintiff corporation adopted and enforced rules dealing with the operation of the philosophy; that it has enrolled a substantial number of followers; and that Mrs. Heindel organized a church, Max Heindel Rose-Cross Philosophies, which was dissolved by the 1934 agreement. On the other hand, there is evidence that instructions in the dissemination of the philosophy were not taken from plaintiff; that plaintiff was first organized as a college or seminary corporation and it was to be only the trustee of the property; that Heindel did not transfer the property to plaintiff; that the property was not transferred until after his death; that the Heindels and followers were carrying on so-called ecclesiastical functions and using the property to disseminate their writings; that Mr. and Mrs. Heindel were the leaders in the church association (later, Mrs. Heindel was the leader); that the unorganized church association used the name "The Rosicrucian Fellowship" and was the church rather than plaintiff; that title to the writings has always remained with Mrs. Heindel; that only physical, or purely business, functions were carried on by plaintiff; that plaintiff has no members except the trustees who were self perpetuating. It was for the trial court to weigh the evidence and draw any reasonable inferences deducible therefrom. Hence the authorities Linke v. Church of Jesus Christ, 71 Cal.App.2d 667, 163 P.2d 44, and others, cited by plaintiff to the effect that one who joins a church submits to its constitution and by-laws, are not

in point. We think it is clear from the record that the church was the unincorporated association of followers as found by the court.

Near the end of the trial, without objection and by leave of court, defendants amended their cross-complaint by adding an allegation to the effect that the action was prosecuted for the benefit of all those persons in the United States who are believers in the philosophy as taught by the Heindels, and stated that there were approximately 706 such persons; that it would be impracticable to name them all as parties. In other words, the cross-complaint was amended to show that the action was a representative one. Plaintiff claims that it was not a proper case for a representative action in that it did not purport to include followers outside the United States; that it was not brought in good faith, because counsel for cross-complainants stated in court that the representation was only of defendant corporation members; that the defendant corporation cannot be a representative inasmuch as its interests are adverse to those purported to be represented. It further claims that because the action was not a representative one, all the believers were indispensable parties.

[10–12] We believe the cross-complaint pleads sufficient facts to make this a proper representative suit. There was no bad faith shown on the part of the cross-complainants. The discussion with reference to the amendment of the cross-complaint was general and, at the trial before the amendment, the action was treated as a representative one to which plaintiff made no objection. The cross-complainants, other than defendant and cross-complainant corporation, are followers of the philosophy. The basic issue involved was as to the dominant use of the property and, as we have seen, the judgment, if properly interpreted, preserved that use to all the followers, whether members of the unincorporated church association or defendant corporation. Followers, other than members of defendant corporation, are not excluded nor are members in foreign lands deprived of any rights. Whether the foreign members are bound by the judgment need not be determined. It follows that there is no adverse interest because the judgment protects all followers, and we see no reason why the followers who are cross-complainants could not, in part at least, choose a corporation they had formed, the defendant corporation, to lead in the representative suit. Generally speaking, in controversies such as this it is considered that: "* * * [P]laintiffs [members of a church suing in behalf of all] bring the action for the benefit of all the members of the * * * Church. In effect, each member is a party plaintiff, and that all the members could jointly bring the action we feel well assured. It is said in Smith v. Swormstedt, 16 How. 288 [14 L.Ed. 942]: 'The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and the others; and a bill may also be maintained against a portion of a numerous body of defendants representing a common interest.' Baker v. Ducker, 79 Cal. 365, 21 P. 764, is to the same effect." Wheelock v. First Presb. Church, 119 Cal. 477, 481, 51 P. 841, 843. It is apparent that if this is a proper representative action all the persons represented are not indispensable parties. If plaintiff's argument is to prevail, it is doubtful that the controversies here could ever be settled unless every follower here, and abroad, was made a party. Obviously, this would not be feasible.

Plaintiff makes several contentions with reference to the court's determination that the 1934 agreement was breached and cancelled and that the 1931 contract was in force and effect. The court found, as above noted, that the sole consideration for Mrs. Heindel's agreement in the 1934 contract to give plaintiff an exclusive license to use the writings, was plaintiff corporation's promise that she would hold the positions with the corporation heretofore mentioned for as long as she desired; the court found plaintiff breached the contract in 1942–1944 by removing her from the positions in failing to re-elect her.

Plaintiff argues that the contract does not require that she hold positions so long as she desires as found by the court. We feel that the trial court's construction of the contract is reasonable when all the circumstances are taken into consideration. It will be recalled that the agreement recited that the 1931 contract had dealt with the right to the writings, that Mrs. Heindel could grant to an organization sponsored by her, a license to use the writings; that she had formed a thriving organization; that plaintiff corporation, which advocated the philosophy, had prospered and had funds; that the two organizations should unite for more effective operation under the name Rosicrucian Philosophy; that the organization formed by Mrs. Heindel should be dissolved and the writings held by it turned over to plaintiff. It was agreed that a repetition of a two-organization situation was injurious and was to be avoided; Mrs. Heindel's years of work were recognized. All of those factors indicated an intent to compromise. These factors showed that although plaintiff was to have the right to use the writings and Mrs. Heindel could not give that right to another organization, Mrs. Heindel was not to lose complete control of the writings or the situation. It was then provided that Mrs. Heindel should be elected trustee and to fill vacancies to be created in other positions, including chairman of the executive committee, composed of five, and to be "manager in charge" of the fellowship activities; she was to write, supervise the preparation of writings and was to be editor of the magazine; and finally, because Mrs. Heindel spent years working in the philosophy, she was to have assurance that "if at any time she ceases to be in connection with the work and retires from authority," she was to become "President Emeritus." It is inferable therefrom that she was not to become president emeritus until she voluntarily retired from authority. This indicated that until she did so retire she was to hold the positions named and retain the authority. If it were otherwise the other trustees could, at their will, make the agreement meaningless by removing her from the positions, thus leaving her a mere empty right. That she was to hold them as long as she desired is further evidenced by the fact that the trustees acquiesced in the occupancy of the positions by Mrs. Heindel from 1934 until 1942.

Reference is made to the judgment in Weaver v. Meyncke, where it was said that Mrs. Heindel's removal from the positions held by her was "legal." That issue was not involved in that case, and although the procedure may have been "legal" there was nothing to indicate what the consequence of the breach of the 1934 contract would be.

[13] It should also be observed that plaintiff claims the contract cannot be properly litigated here because Mrs. Heindel, not defendant corporation, was a party to the contract but that she is not a party here except as a representative of the followers, by amendment to the cross-complaint. We have concluded that she is a party to this action. She was named individually as defendant by plaintiff, and as cross-complainant in the cross-complaint, and we do not believe the amendment excluded her as an individual. She has taken an active part in the litigation and will, unquestionably, be bound by the judgment.

[14] For the reasons above discussed the court was justified in finding a breach and cancellation of the 1934 contract. Implicit in the finding is the conclusion that the breach and failure of consideration was of a substantial character although the part of the contract which was breached was not the sole consideration therefor as Mrs. Heindel was to receive, in addition, sustenance at Mt. Ecclesia.

Plaintiff urges that there was no allegation of an offer, or any offer, to restore the consideration received by Mrs. Heindel under the 1934 agreement and that such an offer was necessary. Most of the matters in the other counts were reiterated in the fourth count of the cross-complaint, and the 1931 and 1934 contracts are pleaded in haec verba. It was also pleaded that the 1934 contract modified the 1931 contract with respect to Mrs. Heindel's right to grant a license to use the writings and that the sole consideration therefor was that Mrs. Heindel was to have living quarters at Mt. Ecclesia and hold the positions as long as she desired; that in 1942–1944 plaintiff caused Mrs. Heindel to be removed from the positions in violation of the contract; that on October 7, 1944, Mrs. Heindel gave notice to plaintiff of the termination of the contract; that a controversy exists between the parties as to whether the contract is still in effect.

[15, 16] We must look at both contracts to see what Mrs. Heindel was entitled to receive and what she did receive under the 1934 contract. Provision was made in the 1931 contract, which was continued in force except as modified by the 1934 contract, for an annuity. The annuity provisions were the same in both contracts so she would not be required to restore any money received thereunder. The plaintiff and Mrs. Heindel have the right to use, and Mrs. Heindel is the owner of, the writings under both contracts. Plaintiff could not, but Mrs. Heindel could, grant to an organization sponsored by her, a license to use the writings. In the 1934 contract she gave up that right. Under the latter contract she sold certain assets at their market value; that part of the contract was performed. The additional things which Mrs. Heindel was to receive under the 1934 contract, and which would be the only ones considered so far as restoration is concerned were that she was to have living quarters at Mt. Ecclesia and to be allowed "sustenance" at the cafeteria there. She testified that she used the $3,200 she received from the transferred assets for furniture, supplies, and the houses in which she lived, and that she received "no compensation" and no "consideration" for giving up her right to license the use of the writings to another. Plaintiff claims that was a conclusion drawn by Mrs. Heindel and that it was not evidence, citing Huntsman v. State Harbor Com'rs, 17 Cal.App.2d 749, 62 P.2d 771, but no objection was made to the answer and it may be considered as showing that she did not receive consideration. In the Huntsman case the question was whether there was a valid contract insofar as consideration therefor was concerned. The contract there provided for consideration on its face. The question here is whether the promised consideration was received as it relates to the necessity for restoration. In addition, Mrs. Heindel prepared writings and lessons for the corporation, performed services for it and refrained from licensing the writings to others, all of which may be considered to have been of some value. Under all the circumstances we believe there was nothing of consequence required to be restored.

[17] In this connection plaintiff argues that the pleading was insufficient because it did not allege that restoration was not necessary. Liberally construed, the cross-complaint was sufficient to advise plaintiff of the issues to be met. Moreover, it should be observed that plaintiff elicited from Mrs. Heindel the answer that she had received no consideration during its examination of her under section 2055 of the Code of Civil Procedure. While it was not bound by that testimony it was brought out as a material issue.

[18] In the same connection, plaintiff claims the court committed reversible error in sustaining an objection to a question asked Dodson, plaintiff's treasurer, as to whether Mrs. Heindel had offered to restore, or had restored, anything she received under the contract. Our conclusion that Mrs. Heindel had received nothing worthy of restoration answers this argument of plaintiff.

Plaintiff claims that the injunctive provisions of the judgment are inproper. It asserts that there is no pleading or proof to justify them, that they are uncertain, that some of them consist of restraining libelous and slanderous statements which are not cognizable in equity since such restraint would constitute an unwarranted interference with freedom of speech.

The cross-complaint appears to plead primarily a cause of action for declaratory relief but plaintiff does not assert that a declaratory judgment may not also give injunctive relief in an equity case. The cross-complaint prays for a declaration of rights and such other relief as may be proper. The injunctive part of the judgment restrained plaintiff from (1) asserting ownership of the property except as trustee for the beneficiaries; (2) interfering with their use of the property in the conduct of ecclesiastical functions; (3) conducting or interfering with the conduct of ecclesiastical functions; (4) claiming the exclusive right to use the name "Rosicrucian Fellowship"; or interfering with its use by cross-complainants; (5) interfering with the use by the followers of the lists and stencils, etc., of names and addresses of followers; (6) claiming defendant has no right under the license from Mrs. Heindel to print and distribute the writings; (7) interfering with the use by Mrs. Heindel, or defendant corporation of the plates for printing the writings; (8) making either oral or written statements that Mrs. Heindel was untruthful, had selfish purposes in organizing defendant corporation, or that defendant corporation was an outlaw organization, or otherwise doing acts to deter followers from becoming members of defendant corporation; (9) interfering with the exclusive use by Mrs. Heindel, or followers designated by defendant church, of confidential discipleship instructions prepared by her. The court found that since 1943 plaintiff corporation had taken various steps to prevent the followers from organizing themselves into a church organization. Those steps consisted of claiming power to expel, and expelling followers, making statements in derogation of Mrs. Heindel, and casting aspersions on defendant corporation so as to deter followers from becoming members, and assure continued adherence to plaintiff. It was also found that plaintiff corporation has excluded members who participated in the organization of defendant corporation from the use of the property; that plaintiff corporation took possession of philosophy instructions written by Mrs. Heindel; that plaintiff threatens to, and will unless enjoined, continue to do those things; that plaintiff claims the right to expel followers, and exclude them from the use of the property for ecclesiastical and other purposes; that plaintiff has prevented the use of the list of names, addresses, and stencils.

That plaintiff is continuing these claims appears from the prayer of its complaint where it asks that defendants be restrained from using the name "The Rosicrucian Fellowship" or anything like it; from soliciting followers for contributions; and from using any of the writings.

[19] It is true that an injunction "is ordered against past acts only if there is evidence that they will probably recur." Hannah v. Pogue, 23 Cal.2d 849, 858, 147 P.2d 572, 577. We believe, however, the record sufficiently indicates that the acts will probably recur. It is not unreasonable to suppose that assertions of claims to the property will be injurious to cross-complainants.

[20] There is no merit to the claim of uncertainty in that part of the injunction which restrains interference with the dominant use of the property for ecclesiastical purposes by the followers. "Dominant use" clearly means the superior right and the judgment in other parts heretofore quoted defines such rights.

[21, 22] Complaint is made that the eighth provision of the injunction, heretofore mentioned (paragraph C[9] of the judgment), violates the right of freedom of speech and is like an injunction restraining slanderous or libelous statements. It is established that an injunction will not be granted where the restraint interferes with freedom of speech. See Near v. State of Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; Dailey v. Superior Court, 112 Cal. 94, 44 P. 458, 32 L.R.A. 273; Magill Bros. v. Building Service etc. Union, 20 Cal.2d 506, 127 P.2d 542; In re Wood, 194 Cal. 49, 227 P. 908; Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 117, 180 P.2d 321, 171 A.L.R. 913. While it has been said that an injunction may be granted to restrain the making of false or libelous statements where there is a breach of trust or contract, to injure business relations (see Pomeroy's Equity Jurisprudence, 5th ed., § 1358; 28 Am.Jur., Injunctions, §§ 118, 119) and although there are property and contract aspects in this case, the provision here is too broad and does impinge upon freedom of speech especially when we consider that religious controversies are also concerned. Hence paragraph C(9) of the judgment must be, and is, stricken.

[23] Plaintiff urges that it should have been granted injunctive relief. The judgment declares plaintiff's rights and, as such relief is to some extent discretionary with the court, (14 Cal.Jur. 185–6) we do not think a reversal is justified.

[24] Plaintiff claims error in the refusal of its offer of proof by a witness, Mrs. Murray. She had testified on direct examination that a list of members exhibited to her showed the number of followers who were members of defendant corporation. On cross-examination plaintiff offered to prove by her that the list was not a true one in that it contained names of persons who were not members of the fellowship or of defendant corporation. We do not think prejudicial error was committed when we consider that the trial court may have felt that it was unlikely the witness would change her testimony on direct examination and, as we construe the judgment, the rights are accorded to all followers of the philosophy whether or not they are members of defendant corporation.

The judgment is modified by striking out paragraph C(9) thereof, and as so modified, is affirmed. Respondents to recover costs on appeal.

SHENK, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

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39 Cal.2d 153

SEXTON v. BROOKS.

L. A. 21983.

Supreme Court of California, in Bank.

June 26, 1952.

Rehearing Denied July 24, 1952.

Action by Mollie Sexton against Evelyn Simon Brooks for injuries received when plaintiff fell on cement sidewalk in front of defendant's business building. The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court, Gibson, C. J., held that instruction to effect that invitor owes duty to business invitee to use reasonable care to make all portions of premises over which he has control safe was prejudicially erroneous in that it failed to define the word "control."

Reversed.

Carter, J., dissented.

Prior opinion, Cal.App., 229 P.2d 24.

1. Negligence 🔑32(1), 37

An invitor is under duty to keep in safe condition all portions of premises over which he has control whether they are within building or on outside and used by general public as well as invitees as an approach to the building.

2. Municipal Corporations 🔑808(1)

Generally, in absence of statute, a landowner is under no duty to maintain in safe condition a public street abutting his property, but such a landowner is liable for condition of portion of public sidewalk which he has altered or constructed for benefit of his property and which serves a use independent of and apart from ordinary and accustomed use for which sidewalks are designed.

3. Municipal Corporations 🔑808(1)

Duty of landowner to maintain portion of public sidewalk which he has altered or constructed for benefit of his property and which serves a use independent of and apart from ordinary and accustomed use for which sidewalks are designed runs with the land, and therefore a property owner cannot avoid liability on ground that condition was created by his predecessors in title.

4. Municipal Corporations 🔑808(1)

A landowner may be liable under some circumstances for injuries resulting from defective condition of public sidewalk where such sidewalk has been constructed or altered by the city in a particular manner for special benefit of landowner's property.

5. Appeal and Error 🔑1064(1)
Municipal Corporations 🔑822(2)

In action by pedestrian against owner of business building for injuries sustained when pedestrian fell on cement sidewalk in front of such building, instruction to effect that invitor owes duty to business invitee to use reasonable care to make all portions of premises over which he has control safe was prejudicially erroneous in that it failed to define the word "control."

6. Appeal and Error 🔑216(3)

Failure of landowner to request instruction which correctly defined her duty to pedestrian, who was injured because of defective condition of public sidewalk in front of landowner's building, did not waive error in instruction which stated that an invitor owed duty to business invitee to use reasonable care to make all portions of premises over which he has control safe, but which failed to define the word "control."

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Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for appellant.

Joseph A. Ball and Thomas F. McCarry, Long Beach, for respondent.

GIBSON, Justice.

Plaintiff recovered a verdict for damages for injuries she received as the result of a fall in front of a building owned by defendant. The principal question raised on this appeal is whether the jury was properly instructed on the applicable rules of law.

Since 1946 defendant has owned a two-story building which is located on the northeast corner of Garnet Street and Benita Avenue in Redondo Beach. In 1902 the area on the Benita Avenue side of the property, extending westerly from the present building line, was dedicated to public use for street purposes. In that same year the city constructed a paved sidewalk along Benita Avenue in front of defendant's property, but left unpaved an 18 inch "strip" or "shoulder" between the building line and the sidewalk. Subsequently, at some time prior to 1918, the 18 inch strip was also paved, but there is no direct evidence indicating whether the work was done by the city or by the property owner. For purposes of clarity we shall use the term "sidewalk" to designate the paved walk which was built by the city in 1902.

Defendant's building contains several stores which are leased to tenants and face Benita Avenue. Near the north end of the building there is a large vestibule which furnishes access to the doorways of two of the stores. The sidewalk in front of the building slopes downhill gradually from north to south without any abrupt change in grade. The strip or shoulder conforms to the grade of the sidewalk until it reaches a point directly west of the north corner of the vestibule. At that point the strip is crossed at right angles by a narrow ridge approximately one inch high, and there is a sharp step or drop-off in the strip below the ridge which reaches a depth of 5½ inches at the junction of the strip and the north corner of the vestibule. The floor of the vestibule is nearly level so that its northern part is approximately 5½ inches lower than the sidewalk, and the portion of the strip which lies directly in front of the vestibule is paved so as to slope gently from the sidewalk to the vestibule floor. On the day of the accident plaintiff was walking southward along the shoulder intending to enter one of the stores served by the vestibule entrance, when she caught her heel on the ridge and fell.

The jury was told that "an invitor owes a duty to a business invitee to use reasonable care to make all portions of premises over which he has control safe whether they be within the precincts of the building or on the outside and used by the general public in common with invitees as an approach to the building. In this case, you are instructed that if you believe from the evidence that there was a danger inherent upon a particular approach to the building owned by defendant, then you are instructed that it is your duty to determine whether or not said owner was negligent in failing to, by some means, warn or protect business invitees against the danger inherent in this particular approach."

The foregoing instruction is based on principles stated in Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 170 P.2d 5, which plaintiff contends are applicable here. In that case defendant De La Guerra was the owner of property which adjoined a parking lot operated by an oil company. Mrs. Johnston, a patron of one of De La Guerra's tenants, was injured when she stepped down from the top of a retaining wall located on the parking lot onto a private walk on the De

La Guerra property. There was evidence from which a jury could have found that De La Guerra should have anticipated that invitees might approach the private walk in that manner, and that, under the circumstances there existing, the difference in level between the De La Guerra walk and the adjoining property created the hazardous condition which was the proximate cause of the accident. We concluded that since De La Guerra had control over the private walk it was under a duty to protect or warn business invitees against the danger inherent in that approach to the building. The present case presents a different factual situation. As we have seen, the assertedly dangerous condition, which consisted of the ridge over which plaintiff tripped and the step or drop-off below it, was located on the 18 inch strip paralleling defendant's property line, and of itself constituted a hazard which was completely independent of any condition existing on defendant's property.

[1] In the first sentence of the quoted instruction the jurors were told that an invitor is under a duty to keep in a safe condition all portions of "premises over which he has control," whether they are within the building or on the outside and used by the general public as well as invitees as "an approach to the buliding." This is a correct statement of the law. The jurors were not instructed, however, what constituted "control" or under what circumstances, if any, an owner of property has "control" of an area which has been dedicated to public use. Instead, the jurors were told in the second sentence of the instruction that if "there was danger inherent upon a particular approach to the building," it was their duty to determine whether defendant was negligent in failing to warn or protect business invitees against the danger. As we have seen, the approach to defendant's building upon which the assertedly dangerous condition existed was located on land which had been dedicated to the public. We, of course, do not know what interpretation the jurors placed upon the instruction given them, but they may have understood it to mean that under the evidence they were bound to find that defendant had control of the approach to her building and was under a duty to use reasonable care to make it safe.

[2, 3] It is the general rule that in the absence of statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property. Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; Schaefer v. Lenahan, 63 Cal.App.2d 324, 146 P.2d 929; see note 93 A.L.R. 800–803. There is, however, an exception to this rule, and plaintiff claims that the evidence brings this case within that exception. It has been held that an abutting owner is liable for the condition of portions of the public sidewalk which he has altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed. Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435 [plank driveway across sidewalk area]; see, generally, notes in 62 A.L.R. 1067–1073; 59 A.L.R. 441–443. The duty to maintain such portions of the street runs with the land, Monsch v. Pellissier, 187 Cal. 790, 793, 204 P. 224, and a property owner cannot avoid liability on the ground that the condition was created by his predecessors in title. Nickelsburg v. City of N. Y., 263 App.Div. 625, 34 N.Y.S.2d 1, 2–3; Kniffley v. Reid 287 Ky. 212, 152 S.W.2d 615; Herron v. City of Youngstown, 136 Ohio St. 190, 24 N.E.2d 708, 710; Joel v. Electrical Research Products, Inc., 2 Cir., 94 F.2d 588. Any suggestion to the contrary in Daly v. Mathews, 49 Cal.App.2d 545, 548, 122 P.2d 81, is disapproved.

[4] A landowner may also be liable under some circumstances where the public sidewalk has been constructed or altered by the city in a particular manner for the special benefit of his property. For example, if an inherently dangerous condition is created on a public sidewalk abutting an entrance to a building, and this is done at the request of the owner and for his special benefit in order to serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed, the landowner may be under

a duty to warn invitees of the hazard. If, however, the work is done by the city without regard to whether it benefits the adjoining property, and if the incidental benefit which results could not have been refused by the person who owned the property at that time, neither he nor his successor should be held liable for a dangerous condition caused by the construction. See Werner v. Trout, Tex.Civ.App., 2 S.W.2d 525, 526, 527.

The jury in the present case was not instructed on the rules discussed above, and it was given no directions which would enable it to pass upon material questions of fact. The evidence was not without conflict, and we cannot say as a matter of law that defendant was under a duty to maintain the 18 inch strip in a safe condition or to warn business invitees of the danger inherent in this approach to the building. Although there was evidence, which need not be detailed here, that would support a finding that the strip was constructed in a manner benefiting defendant's property and served a purpose apart from the ordinary use for which sidewalks are designed, the facts proved were subject to conflicting inferences. Moreover, the record is not clear as to who surfaced the strip, and there is no evidence as to the circumstances under which the work was done. The paving was completed prior to the time defendant purchased the property, and, under the evidence presented, the jury was not compelled to find that the work was done by, or at the request of, any of defendant's predecessors in title.

[5, 6] The instruction which was given was erroneous and misleading, and defendant did not waive the error by failure to request an instruction which correctly defined her duty to plaintiff. See Tabata v. Murane, 24 Cal.2d 221, 227–228, 148 P.2d 605. We are of the opinion that under the circumstances of this case the error was prejudicial.

The judgment is reversed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree that the instruction quoted in the majority opinion is ground for reversal for two reasons: (1) The instruction was not erroneous; at the most it was incomplete and not sufficiently specific and hence defendant cannot complain because she did not offer a more explicit one. (2) The error, if any, in the instruction was cured by other instructions.

Let us examine the instruction quoted in the majority opinion. The opinion concedes that the first sentence correctly states the law. The only apparent criticism is that the word "control" is not sufficiently defined. That is nothing more than a statement that it is incomplete—not sufficiently explicit. As defendant offered no more precise instruction he cannot now complain. The rule is stated in Tabata v. Murane, 24 Cal.2d 221, 228, 148 P.2d 605, 609, cited by the majority: "'If the law applicable to the facts of a case is stated correctly in a *general* charge to the jury, a party may not, in the absence of a request for a *more specific or elaborate* instruction, complain that a more specific or elaborate instruction should have been given.'" (Emphasis added.) And generally, "it is unquestionably the law that where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain upon appeal only in case he requests that the charge be made more specific, or asks for other qualifying instructions, and his request is denied." 24 Cal.Jur. 796. Particularly it has been held that a party cannot complain of the failure of an instruction to define terms used unless he requests a definition. Mecham v. Crump, 137 Cal.App. 200, 30 P.2d 568; Neudeck v. Vestal, 117 Cal.App. 266, 3 P.2d 595; Hamm v. San Joaquin etc. Canal Co., 44 Cal.App.2d 47, 111 P.2d 940; Los Angeles City H. S. Dist. v. Schumann, 78 Cal.App. 353, 248 P. 737; Ramos v. Service Bros., 118 Cal.App.432, 5 P.2d 623; Bezera v. Associated Oil Co., 117 Cal.App. 139, 3 P.2d 622; Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660; 24

Cal.Jur. 797. No complaint may be made, therefore, of the first sentence.

It is clear that the second sentence of the instruction is modified by the first sentence thus requiring "control" by the defendant in the circumstances there mentioned. Moreover, the majority opinion overlooks that part of the second sentence reading *"if you believe* from the evidence that there was a danger inherent upon a particular *approach* to the building *owned* by defendant" certain results follow. Clearly the word "owned" refers to and modifies *approach* rather than "building." Hence the jury were told that *if* they found that the approach was *owned* by defendant and it was dangerous, there was liability. That is no doubt the law because if it is *owned* by the defendant it is controlled by him, and the ownership harmonizes with the first sentence which speaks of control of the property involved

Even assuming there is some uncertainty in the instruction it was adequately clarified by other instructions which specifically required that defendant be the owner and have control of the defective place where plaintiff fell before there could be liability The jury was instructed: "It is the duty of a landlord, such as the defendant in this case, to exercise reasonable care in making safe, and in the maintenance and repair of, any part of a building or other property *over which he retains control* and which is reserved from the exclusive use of any one tenant so that it may be used in common by all tenants and all others who may lawfully enter the premises." (Emphasis added.) "Whenever a person is a guest or an invitee of a tenant and as such enters upon a part of the premises so reserved for common use, *and which is under the landlord's control,* he is deemed by law to be an invitee of the landlord, and the duty of the landlord, as I have stated it, applies in such invitee's favor *as to those parts of the premises under the landlord's control* and upon or into which said invitee would reasonably be likely to go under the circumstances of the invitation, or would be induced or allured to go by the express or implied invitation arising from those circumstances. * * * It is the duty of a landlord to maintain and keep in a reasonably safe condition for use by guests or invitees of tenants any part of a building *over which he retains control* and which is reserved from the exclusive use of one tenant so that it may be used in common by the tenants and all others who may lawfully enter the premises." (Emphasis added.) "* * * [D]efendants were under no duty to keep the *public sidewalk* in front of their premises safe or in repair, or to reconstruct or alter it in any way, and they cannot be held liable for a structural defect, if any, causing plaintiff's accident." (Emphasis added.) The last instruction specifically told the jury that there could be no liability if the accident occurred on the *public* sidewalk thus eliminating any possibility that liability could be imposed for conditions on property not owned by or under defendant's control.

In view of the foregoing it cannot fairly be said that the error, if any, in giving the instruction complained of, was prejudicial, and the judgment should, therefore, be affirmed.

Rehearing denied; CARTER, J., dissenting.

GRAYHILL DRILLING CO. v. SUPERIOR OIL CO. *

Civ. 18775.

District Court of Appeal, Second District,
Division 3, California.

June 19, 1952.

Rehearing Denied July 8, 1952.
Hearing Granted Aug. 14, 1952.

Action by the Grayhill Drilling Company, a corporation, against the Superior Oil Company, a corporation, for sum allegedly due for drilling oil well. The Superior Court of Los Angeles County, Allen W. Ashburn, J., entered a judgment dismissing the action after granting motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence would support finding that oral contract was termination of written agreement and that same was ratified by oil company's officer.

Judgment reversed, purported appeal from order directing judgment of nonsuit dismissed.

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* Subsequent opinion 249 P.2d 21.

1. Mines and Minerals 🔑109

If oral agreement whereunder oil company was to take over work of completing well and drilling company was to proceed with its own equipment and crews and would be paid on cost plus basis for future work, be considered as modification of written agreement to drill well at certain price per foot, and oral agreement was not fully executed, it was invalid. Civ.Code, § 1698.

2. Mines and Minerals 🔑109

If written agreement for drilling oil well at certain price per foot was terminated by oral agreement whereunder oil company was to take over drilling and drilling company was to use its own equipment and crews and would be paid for future work on cost plus basis, it would be immaterial that drilling company thereafter completed well under new arrangement.

3. Mines and Minerals 🔑109

In action for sum allegedly due for drilling oil well, based on written contract at certain price per foot allegedly modified by oral agreement entered during progress of work whereunder oil company was to take over work and pay drilling company for future work on cost plus basis, evidence authorized inference that oral agreement was intended to terminate written contract.

4. Mines and Minerals 🔑109

Oral agreement whereunder oil company was to take over work of completing oil well, and drilling company was to use its own crews and equipment and be paid for future work on cost plus basis, would be valid as termination of written agreement to drill well at certain price per foot.

5. Mines and Minerals 🔑109

Whether oral agreement whereunder oil company was to take over drilling of oil well and drilling company was to use its own equipment and crews and be paid on cost plus basis for future work, contemplated termination of prior written contract to drill well at certain price per foot, was question of intention for trier of fact.

6. Trial 🔑136(1)

Question of intention is usually one of fact.

7. Contracts 🔑254

Written contract may be abandoned or terminated by parol agreement.

8. Contracts 🔑254

Parol agreement abandoning or terminating written contract ends contract, and statute making unexecuted oral contract modifying written contract invalid is inapplicable. Civ.Code, § 1698.

9. Contracts 🔑255

Mutual agreement to terminate or abandon written contract is usually sufficient consideration passing from each party to the other.

10. Mines and Minerals 🔑109

Where drilling company contemplated stopping oil well drilling under written contract because of financial difficulties, mutual surrender of rights under written agreement would be sufficient consideration for oral agreement to terminate written contract.

11. Mines and Minerals 🔑109

In action for sum allegedly due for drilling oil well, based on written contract at certain price per foot allegedly modified by oral agreement entered into during progress of work whereunder oil company was to take over work and drilling company was to use its own crews and equipment and be paid on cost plus basis, evidence would authorize finding that officer of oil company ratified abrogation of written agreement while not approving re-employment of drilling company on cost plus basis. Civ.Code, § 2311.

12. Mines and Minerals 🔑109

Oral agreement whereunder oil company was to take over drilling of oil well and drilling company was to use its equipment and crews and be paid on cost plus basis for future work, was not necessarily indivisible and could be ratified in part. Civ.Code, § 2311.

13. Work and Labor 🔑10

Where work is performed or work and labor are furnished under invalid, but not illegal, agreement, recovery may be had for their reasonable value.

14. Mines and Minerals ⚷109

If oil company officer ratified oral agreement whereunder oil company was to take over work of drilling oil well and drilling company was to use its own equipment and crews and be paid on cost plus basis, as to abrogation of written contract, but not as to re-employment on cost plus basis, drilling company would have cause of action for reasonable value of work.

15. Compromise and Settlement ⚷5(2)

If there is bona fide dispute as to amount due under contract, acceptance of tender as full settlement would be complete defense.

16. Compromise and Settlement ⚷23(3)

In action for sum allegedly due for drilling oil well, evidence on issue of whether there was no bona fide dispute as to amount due drilling company would be sufficient to warrant finding that acceptance by drilling company of amount tendered as full settlement was not bar to the action.

17. Trial ⚷165

On motion for nonsuit, trial court was bound to draw inferences most favorable to party against whom motion was made.

18. Appeal and Error ⚷927(3), 997(2)

On appeal from judgment of nonsuit, District Court of Appeal must, in considering evidence relating to defense of accord and satisfaction, give preference to inferences to be drawn from evidence most favorable to plaintiff, and will not weigh them against opposing inferences.

19. Appeal and Error ⚷997(2)

On appeal from judgment of nonsuit, where it appears that findings in favor of plaintiff on controlling facts would have had support in evidence, it is immaterial that evidence would support findings in favor of defendant.

20. Mines and Minerals ⚷105(2)

In action for sum allegedly due for drilling oil well, wherein issue was whether oral agreement abrogating written contract and calling for continuance of work on cost plus basis, was ratified by oil company's officer, statements of oil company's agents that they had performed their duty and reported to oil company's officer for advice and had received certain instructions as to action to be taken, were admissible and material.

◆

Lee Combs, John Barry, Los Angeles, for appellant.

Hanna & Morton, Harold C. Morton, Edward A. Penprase, B. W. Burkhead, Los Angeles, Max K. Jamison, Porterville, for respondent.

SHINN, Presiding Justice.

Plaintiff Grayhill Drilling Company sued defendant Superior Oil Company for the sum of $32,367.02 alleged to be due for the drilling of an oil well for defendant in Oklahoma. One cause of action of the complaint was based upon an oral agreement for the drilling of the well. It was alleged that the parties entered into a written agreement for the drilling of the well and during the progress of the work entered into a new oral agreement for completion of the well, and it was also alleged that the oral agreement was a modification of the written agreement. There was also a cause of action for the reasonable value of work and labor performed for defendant at its special instance and request, and an additional cause of action upon an account stated. The principal amount sought to be recovered was the same in each cause of action. It was alleged that plaintiff had earned $103,064.42, and had been paid only the sum of $70,697.40. Defendant, by its answer, admitted the making of the written contract, denied there was any agreement modifying the same or any new oral agreement, and pleaded special defenses, among them the payment of $23,000 as an accord and satisfaction of plaintiff's claim. At the close of plaintiff's evidence the court granted defendant's motion for nonsuit and entered judgment dismissing the action. Plaintiff appeals.

The question is the usual one: Was the evidence sufficient to make out a prima facie case for recovery upon a cause of action that was pleaded. We believe it was sufficient.

The written agreement was dated February 15, 1949. The well was to be drilled in Garvin County, Oklahoma. The agreement was prepared by defendant's agents in Oklahoma, was sent to California where it was signed by J. C. Cody, vice-president of defendant, and was returned to Oklahoma where it was executed by plaintiff. The well was to be drilled to the Gibson sand, which was expected to be encountered at or below 6500 feet, and the hole was to vary not more than three degrees from vertical. Upon final completion of plaintiff's work defendant was to pay $5.25 per foot for hole drilled to 6500 feet, or lesser depth which would allow testing of the Gibson sand, and $6.00 per foot below 6500 feet, and in addition defendant was to pay for footage made in coring and reaming, and also for "standby time" at certain stipulated rates. Other provisions related to compensation but are not pertinent to the questions which require consideration. It was provided that plaintiff would be considered at all times an independent contractor and responsible for any mishap, costs and damages due to breakage, breakdown, or other failure of its tools or equipment, or to its lack of skill or diligence. All work was to be performed at the risk of the contractor. Neither party was given the right to stop the work before the well reached the agreed depth. Paragraph 13 read as set out below.[1] Plaintiff, upon the trial, first contended that it had a right to discontinue work at its election under this provision of the agreement. This was an untenable position and was later abandoned. Paragraph 13 gave Superior the right to take over the job and finish the well at its own expense, but in the view we take of the case it is unimportant that the contract gave it that right.

Plaintiff's work progressed favorably to a depth somewhat below 4000 feet. At some point, which was not definitely fixed by the evidence, but which was somewhere between 4000 and 5000 feet, an abrupt dip of the formation was encountered which greatly retarded progress. Plaintiff proceeded with its work for some time, although in order to keep within the three degrees tolerance little footage could be made. Under an arrangement with defendant's local agents the tolerance was increased to four degrees, but it soon became evident to plaintiff that it would be financially unable to complete the well under the terms of the written agreement. Harry Frederickson, vice-president and general manager of plaintiff, who had negotiated the contract and was in charge of the work, contacted defendant's local agents, Edwin L. Smith and B. R. Kunau. Mr. Smith was an attorney and defendant's manager for Kansas, Oklahoma and West Texas, with headquarters in Oklahoma City. He handled only land, legal and geological work. Defendant's drilling department was in charge of its local superintendent, Kunau, who was superintendent of drilling and production in Oklahoma and Kansas, with offices at Chickasha, Oklahoma. It was a part of the duties of Mr. Kunau to obtain bids for contract work and submit them to Mr. Cody, a vice-president of defendant who executed its drilling contracts, with offices at Bakersfield, California. Cody made the decisions and Kunau did not enter into drilling contracts for the company. Frederickson first explained his situation to Smith. Plaintiff was not receiving any money from defendant on the contract, creditors were pressing and plaintiff's bankers were unwilling to render further support. Frederickson insisted that plaintiff would have to abandon the work unless it was given relief from the terms of the contract. Smith was sympathetic, but referred Frederickson to Kunau, explaining that the matter was one in which he was without authority to agree to any modification of the contract. Kunau, he said, was the proper one with whom Frederickson should negotiate. Frederickson took the matter up with Kunau and explained his situation. Kunau also was sympathetic. The trial court properly accepted Frederickson's testimony respecting his conversations with Kunau and the oral agreement which the two negotiated. In brief, the agreement was that defendant would take over the work of completing the well, but plaintiff would proceed with its own equipment and crews; plaintiff would be paid $5.25 per foot for the hole drilled up to that time (about 4000 feet), and for future work would be paid on a cost plus basis. No agreement was made with respect to the amount of plaintiff's compensation above cost. Following this arrangement plaintiff proceeded with the work and defendant maintained tool pushers on the job who exercised supervision over the drilling. So far as disclosed by the evidence, Cody was not advised of this oral arrangement. The well was drilled to a depth of 7254 feet, and was abandoned as a dry hole. Thereafter, Frederickson conferred with Smith, and under agreement with Smith, and partly at his suggestion, plaintiff rendered three statements: One was for the sum of $96,872.63, "actual cost" of the well; another for the sum of $100,121.42, based upon "footage contract to 4000′, actual cost from 4000′ to 7254′"; the third for $47,697.46, which was the amount that would have been earned by drilling the well under the original contract. These statements were furnished to Kunau July 1st, with a letter from plaintiff stating that Kunau had expressed a desire to have an invoice prepared in accordance with the written contract, another reflecting actual cost, and adding that plaintiff was going a step further and had prepared an invoice on a footage basis to 4000 feet and actual cost for the additional footage. The amount of $103,064.42, alleged in the complaint, reflected additional invoices that plaintiff received and furnished to defendant after the preparation of its statements above mentioned.

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[1] "In the event Contractor fails or refuses to comply with all the terms and conditions of this agreement, Company may at its election utilize Contractor's equipment and complete the drilling of said well as contemplated herein, using any or all of such equipment as it may desire, and shall compensate Contractor therefor by the payment to Contractor of the reasonable rental value of such equipment during the time that Company utilizes the same. Work done by Contractor prior to Company taking over such equipment shall be compensated for on the basis as is hereinabove provided."

On September 1st defendant issued its check for $47,697.46 which plaintiff cashed. In the meantime efforts, oral and written, had been put forth by Frederickson in an effort to collect the balance, and these continued after the receipt of the above mentioned check. Neither Smith nor Kunau denied to plaintiff that an oral agreement had been entered into as claimed by Frederickson. However, both disclaimed responsibility for a settlement, insisting that it could only be made by their superiors. Frederickson then wrote two letters to Bill Keck, Jr., President of Superior Oil, in Los Angeles, endeavoring to get a settlement, but received no reply. He came to Los Angeles, discussed the matter with Keck and was referred to Cody who, Keck said, was authorized to make settlement. Frederickson went to Bakersfield and interviewed Cody. He explained his operations under his agreement with Kunau and offered to exhibit all his vouchers which supported his statement of cost. No item of the account was questioned by Cody, nor did he deny that a settlement was due plaintiff. He offered $23,000 in settlement, but when questioned as to how he arrived at the figure gave no reason other than that he considered the amount to be fair. He referred Frederickson to Mr. Hansen and Mr. Winther of Superior's accounting department in Los Angeles. Frederickson went to see these gentlemen, taking with him all his vouchers and statements which he exhibited to and left with them. After going over the matter at length, Winther said they had checked plaintiff's "recaps" and found them to be in order. Hansen said: "In a matter of this sort, it depends upon trust and confidence displayed by both parties," and that he believed Superior was willing to pay Grayhill the actual cost of the well but not any profit, to which Frederickson agreed. Plaintiff's accounts were discussed, but no item was disputed.

then or at any subsequent time. Hansen told Frederickson on more than one occasion that he had tried to get a check for him but that Cody would not allow him to release a check yet, although he had told Cody that they found no errors in the account and had no complaints. At Hansen's suggestion that Frederickson might be irritating Cody by his presence in California, he returned to Oklahoma City. He eventually received the invoices and statements which Hansen had had in his possession for about a month.

Sometime in October Frederickson met with Kunau and Cody in Oklahoma City and discussed the matter. Cody again offered him $23,000, which Frederickson refused to accept. Kunau then said to Cody that he had not discussed the matter of the completion of the well with Frederickson, a statement which Frederickson then denied. After discussing the possibility of plaintiff's being given more drilling work, which Cody refused to do, Cody finally said: "Are you going to take this $23,000 or are you going to take nothing?" Frederickson asked time to confer with his creditors and following contact with them again met with Kunau and Cody later in the day, at which time he said he would accept the check although he did not consider it a final payment of the account. Cody said "all right," he would call for the check. Under date of November 4th defendant's comptroller mailed plaintiff a voucher check for $23,000, with a letter stating: "We are enclosing check No. 5305 in the amount of $23,000.00 in full and final settlement of balance of all claims and costs for drilling Craig No. 1 well in Garvin County, Oklahoma. This check is being sent in accordance with request of Mr. J. C. Cody." The voucher contained the notation that it was "in full and final settlement of balance of all claims and costs for drilling Craig No. 1" etc. Plaintiff cashed the check and later instituted the present action.

The court stated as grounds for the nonsuit that the alleged oral agreement, insofar as it obligated Superior to pay for completion on a cost plus basis, was invalid for the reasons that it was an attempted oral modification of the written contract, and was not fully executed; Kunau and Smith had no authority to enter into the modification agreement, and it was not ratified by authorized officers or representatives of the company. With these conclusions we agree.

[1] If the oral agreement be considered as a modification of the written agreement, it was not fully executed and was invalid under the provision of section 1698, Civil Code, that a written agreement can be modified only by written agreement or executed oral agreement. Klein Norton Co. v. Cohen, 107 Cal.App. 325, 330, 290 P. 613.

Neither Kunau nor Smith ever executed drilling contracts for the company, nor had they ever been authorized so to do. No one in authority ratified the oral modification for completion of the well on a cost plus basis. Frederickson understood that drilling contracts were subject to the approval of Cody, and were executed by him on behalf of the company. He did not inquire whether Cody had given approval to the oral agreement nor whether he had been advised concerning it. It is unnecessary to decide whether the attempted change from a footage to a cost plus basis would have been supported by a consideration as to each party.

[2] Our agreement with the reasoning of the trial court does not enable us to agree that a nonsuit was properly granted. It is clear that there was the further question whether the written agreement was terminated by mutual consent. This could have been accomplished by an agreement of the parties that they would not be bound in the future by the terms of that agreement. The fact that the drilling of the well was not abandoned does not necessarily mean that the agreement was not terminated. If it was terminated by mutual consent it is immaterial that plaintiff thereafter completed the well under a new arrangement.

The facts in evidence presented the following questions: (1) Would the oral agreement, as testified to by Frederickson, if valid, have accomplished a termination of the obligations of the parties under the written agreement; (2) could the oral agreement be valid as a termination of the original agreement, even though invalid as to the terms on which the well was to be completed; (3) was there evidence which would have justified a finding that the parties agreed to a termination of the written agreement; (4) was there a consideration for such an agreement?

[3, 4] In our discussion we shall use "terminate" and its derivatives as descriptive of an agreement of the parties to the original agreement that they would no longer be bound by its terms. We have reached the following conclusions: It could have been inferred from the evidence that the parties intended to terminate the original contract; oral termination of the agreement would have been supported by a sufficient consideration; the oral agreement could be valid as a termination of the written agreement, even though invalid as to the remainder; there was evidence to support a finding that the oral agreement, although entered into by Kunau without authority, was ratified by defendant insofar as it released the parties from the obligations of the written agreement.

Our reasons for these conclusions are based upon the evidence that Mr. Cody did consent to and approve the oral arrangement by which plaintiff was released from its obligation to drill the well for a footage price, and upon the evidence that defendant did take over supervision of the drilling. Other circumstances are that none of defendant's representatives, Keck, Cody, Kunau or Smith, sought to hold plaintiff to its agreement to complete the well for a footage price. All recognized the fact that plaintiff was to be compensated upon some other basis, although Frederickson was sent from pillar to post in an unsuccessful effort to find out what the basis of payment would be.

The two main features of the original agreement were that plaintiff, as an independent contractor, was to drill a well to a certain depth, to certain specifications, and for a stated price. It had the obligations and responsibilities of a contractor, and control of the operation. Defendant was to pay the agreed charges. If defendant took over control, or right of control, of the operation and plaintiff became subject to its orders rather than to the rigid provisions of the agreement, and if the parties discarded the price per foot as a basis of payment, it may be asked: What remained of the original agreement, and was plaintiff in a position different from that of any other drilling company that might have been employed to complete the work under defendant's direction? These are the principal features of the case which lead us to believe that the jury could reasonably have found that the parties terminated their contract by mutual consent.

[5, 6] Whether the oral agreement contemplated termination of the prior written contract was a question of intention, to be answered by the trier of fact from a consideration of the acts of the parties as well as from their words. The question of intention is usually one of fact. Treadwell v. Nickel, 194 Cal. 243, 259, 228 P. 25; Smyth v. Tennison, 24 Cal.App. 519, 521, 141 P. 1059.

[7, 8] A written contract may be abandoned or terminated by parol agreement. Such an agreement ends the contract and there is no occasion to apply the rule of section 1698, Civil Code. Green v. Wells & Co., 2 Cal. 584; Pearsall v. Henry, 153 Cal. 314, 317, 95 P. 154, 159; Treadwell v. Nickel, supra; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 331, 290 P. 613.

[9] The mutual agreement to terminate or abandon is usually a sufficient consideration passing from each party to the other. Haberman v. Sawall, 72 Cal.App. 576, 582, 237 P. 776; Hooke v. Great Western Lumber Co., 54 Cal.App. 681, 683, 202 P. 492; Grant v. Aerodraulics Co., 91 Cal.App. 2d 68, 76, 204 P.2d 683.

[10] We cannot say as a matter of law that an oral agreement of plaintiff and defendant to terminate their agreement would not have been within these rules. It was apparent that plaintiff was in financial difficulties and would eventually have to stop the work. Defendant's representatives deemed it wiser to end plaintiff's contract and keep the work going than to wait until plaintiff threw up the job, especially since, by so doing, plaintiff's equip-

ment and crews would be available for completion of the well. The mutual surrender of rights under the written agreement would be sufficient, in law, as a consideration for an oral agreement to terminate it.

Our conclusion on this branch of the case is that it could properly have been determined upon the evidence that the written contract was terminated by mutual consent and that there was no valid agreement as to what plaintiff's compensation would be for finishing the well. Defendant's representatives at all times acknowledged an obligation to pay something more than plaintiff would have earned on a footage basis. An additional $23,000 was paid as the amount Mr. Cody considered to be "fair." If plaintiff had been excused from complying with the written agreement and defendant was not bound by Mr. Kunau's cost plus agreement, it would follow that there was no express agreement for completion of the work.

[11, 12] Defendant was bound by the oral agreement only to the extent that it was ratified by Mr. Keck and Mr. Cody. Mr. Keck's statement that Cody was authorized to settle with plaintiff assumed that some new agreement had been made. The payment of the $23,000 confirmed the fact that the written agreement was not binding, unless defendant intended it as a mere gift. It does not appear as a matter of law that it was so intended. A jury could properly decide that it was the intention of Mr. Keck and Mr. Cody to ratify abrogation of the original agreement, but not to approve the re-employment of plaintiff on a cost plus basis. The oral agreement was not necessarily indivisible and therefore could be ratified in part. See Civ.Code, sec. 2311; Colpe v. Jubilee Mining Co., 2 Cal.App. 393, 84 P. 324.

If the facts should be found in plaintiff's favor as outlined, the legal consequence would be that plaintiff drilled an oil well with no valid agreement as to what its compensation would be.

[13, 14] Where work is performed or work and labor are furnished under an invalid, but not illegal, agreement a recovery may be had for their reasonable value. Armstrong v. Kline, 64 Cal.App.2d 704, 717, 149 P.2d 445; Long v. Rumsey, 12 Cal.2d 334, 342, 84 P.2d 146; Hagan v. McNary, 170 Cal. 141, 144, 148 P. 937, L.R.A. 1915 E, 562. As previously stated, plaintiff had a cause of action for the reasonable value of the work.

[15–17] The final question is whether the defense of accord and satisfaction was established. The doctrine was given extended exposition in the recent case of Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 234 P.2d 16. It is clear, under the rules there stated, that if it was established as a matter of law that there was a bona fide dispute as to the amount due plaintiff a nonsuit should have been granted upon the ground that the tender of $23,000 as full settlement, and its acceptance by plaintiff was a complete defense to the action. That there was a dispute is not to be questioned, but we cannot say that the evidence established the bona fides of the dispute to the exclusion of a contrary conclusion. In discussing this matter we could well repeat much that has already been said, but we find this to be unnecessary. The salient features are the following: It was understood and conceded by defendant's representatives that plaintiff was to be fairly compensated for its work; the work had been done in a manner that was satisfactory to defendant; complete data as to the cost was furnished defendant, was checked and approved; no item was challenged, no complaint was made of any overcharge; no contention was advanced that plaintiff should be paid less than the fair and reasonable value of the work, or that the cost had been unreasonably high; no claim was made that there was any agreement for completion of the well on other than a cost plus basis. Defendant simply offered $23,000, saying, "take it or leave it." To be sure, Mr. Cody said he thought the amount was fair, but he declined to give any reason for arriving at that figure. We think it cannot be said as a matter of law, upon these facts, that there was a *bona fide* dispute as to the amount that was due plaintiff, or that the figure of $23,000 was not arrived at arbitrarily. If a debtor should say to his creditor, "I do not deny that you have earned the amount you claim, I do not claim you ever agreed to accept less, but I will pay you only 40 per cent of the bill in full settlement, because I think that is a fair amount," would it be unreasonable for a trier of fact to find there was not a bona fide dispute? This does not appear to us to be a debatable question. Upon such facts a court or jury would be warranted in determining that the debtor's refusal to pay the debt was arbitrary, unreasonable and not founded upon a *bona fide* belief that the creditor was demanding more than was justly due. In the present case it would not have been unreasonable for a jury to conclude that Mr. Cody, although satisfied that defendant's statements truly reflected the actual and reasonable cost of completing the well, offered the less amount for the sole purpose of reducing defendant's cost, and consequent loss, in the drilling of a dry hole. The trial court was bound to draw the inferences most favorable to plaintiff. The bona fides of Mr. Cody's purpose and actions was clearly a question for submission to the jury. Berger v. Lane, 190 Cal. 443, 213 P. 45; B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 171, 137 P. 624; Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27, 134 P. 989; 1 C.J.S., Accord and Satisfaction, § 32, page 516. In Potter v. Pacific Coast Lumber Co., supra, 37 Cal.2d 592, 234 P.2d 16, and Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175, relied upon by defendant, the bona fides of the dispute was not questioned and for that reason the cases are not apposite to the point we are discussing.

[18, 19] On this appeal from a judgment of nonsuit we must, of course, in considering the evidence relating to the defense of accord and satisfaction, give preference to the inferences to be drawn from the evidence that are most favorable to plaintiff. We are not required to and should not weigh them against opposing inferences. That is the function of the trial court. Our duty begins and ends with inquiry and decision as to whether findings by a trier of fact that the written agreement was terminated, that defendant did not agree upon any terms for completion of the well, and that there was no accord and satisfaction, would have had support in the evidence of the plaintiff and the reasonable inferences therefrom. It is scarcely necessary to add that on an appeal from a judgment of nonsuit where it appears that findings in favor of plaintiff on the controlling facts would have had support in the evidence, it is immaterial that the evidence would support findings in favor of the defendant.

In the absence of any evidence to the contrary we think it could have been inferred from plaintiff's evidence that its cost as shown by its statements was the reasonable value of its labor and material.

[20] Certain portions of the testimony were stricken on defendant's motion. These related to statements of Smith and Kunau that they had been in communication with California, had been asked for advice and had received certain instructions. Although these statements were not sufficient to prove the authority of Smith or Kunau to make a new contract with plaintiff, since authority to bind defendant could not be established by declarations of the agents, alone, they were nevertheless admissible as evidence that the situation had been reported to California. According to defendant's contention, Smith and Kunau had no authority in the matter except to report to their superiors. Their statements that they had performed that duty were admissible and material.

In view of our holding that the evidence would have supported findings in favor of plaintiff upon the issues we have discussed, and would have established a prima facie case for plaintiff, it was error to grant a nonsuit.

The judgment is reversed; the purported appeal from the order directing a judgment of nonsuit is dismissed.

WOOD and VALLÉE, JJ., concur.

112 Cal.App.2d 140

PEOPLE v. WHITEHURST.

Cr. 4766.

District Court of Appeal, Second District,
Division 3, California.
June 30, 1952.

Rehearing Denied July 8, 1952.
Hearing Denied July 24, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Joseph M. Maltby, J., of lewd and lascivious act on body of a child ten years of age, and he appealed from order denying motion for new trial. The District Court of Appeal, Vallée, J., held that inconsistent testimony, credibility of prosecuting witness, and weight to be given her testimony, were for trial judge.

Order affirmed.

1. Criminal Law ⚷561(1)

Requirement that state must prove guilt beyond reasonable doubt is applicable in, and primarily concern of, trial court.

2. Criminal Law ⚷260(11)

Reviewing court will not hold unsupported trial court's finding of guilt merely because it might reasonably draw different inferences from those trial court reasonably drew, or might not be convinced beyond reasonable doubt of guilt of defendant.

3. Criminal Law ⚷260(11)

Reviewing court cannot reject testimony of witness that has been believed by trier of fact unless it is physical impossibility that it be true, or falsity is apparent without resorting to inferences or deductions.

4. Criminal Law ⚷1159(4)

In order to say that testimony is inherently improbable so that reviewing court can reject same, it must appear that what was related or described could not have occurred, and testimony which merely discloses unusual circumstances is not inherently improbable, and that which is subject to justifiable suspicion does not justify reversal.

5. Criminal Law ⚷260(11)

In prosecution for lewd and lascivious act on body of child ten years of age, effect of claimed inconsistencies and statements said to be inherently improbable and incredible, resolution of same, credibility of child, and weight to be given her testimony, were for trial judge. Pen.Code, § 288.

6. Criminal Law ⚷553

Trier of fact may believe and accept portion of testimony of witness and disbelieve the remainder or have reasonable doubt as to its effect.

7. Criminal Law ⚷1144(13)

On appeal that portion of testimony of witness which supports judgment must be accepted, not that portion which would defeat, or tend to defeat, judgment.

8. Criminal Law ⚷260(11)

Unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support finding of trier of fact, it cannot be set aside on appeal.

9. Criminal Law ⚷1134(1)

Function of District Court of Appeal is to determine whether evidence, if believed, is of sufficient character to justify conviction.

10. Criminal Law ⚷878(3)

Fact that defendant was acquitted of sexual and kidnapping offenses charged in counts was not conclusive on sufficiency of evidence to sustain conviction of offense charged in count for lewd and lascivious act on body of child, and would not prevent consideration of evidence in respect to those counts in connection with offense charged in count convicted on, nor did it establish that prosecuting witness's testimony as to count convicted on was inherently improbable or incredible. Pen.Code, §§ 207, 286, 288, 288a.

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Albert C. S. Ramsey and Milton Emlein, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Dep. Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged in four counts with 1) a violation of section 288 of the Penal Code, lewd and lascivious act on the body of a child ten years of age (Count I); 2) a violation of section 288a, copulation of the sexual organ of the same child (Count II); 3) a violation of section 286, sodomy on the same child (Count III); a violation of section 207, kidnaping the child (Count IV). He was convicted by the court, sitting without a jury, of the offense charged in count I, and acquitted of the offenses charged in counts II, III and IV. He was found not to be a sexual psychopath. Imposition of sentence was suspended and probation granted. He appeals from the order denying his motion for a new trial.

Nancy, the complaining witness, testified to facts constituting the act charged in count I. No purpose would be served in relating her testimony in detail. She testified that defendant committed lascivious acts on her body which could not have been done for any purpose other than gratifying the lust and passions of defendant.

Shortly after seven o'clock in the evening of April 13, 1951, defendant induced Nancy, who was returning home from an errand, to enter his automobile by telling her he was a juvenile officer, it was late for her to be out, he would have to talk to her folks and would drive her home. It was dark. Defendant drove past Nancy's street and continued on. As he drove he committed lascivious acts. He raised the windows, removed her undergarments, stopped the car on three occasions, and each time committed other acts. He then drove to a point near Nancy's home, gave her a dime and two nickels, told her not to tell her mother, let her out, and she went home. When Nancy entered the house tears were streaming down her face, her eyes were red, her face flushed, she was upset and nervous, and appeared to be frightened. She told her mother she had something awful to tell her; that a man had picked her up and "took" her away and "did bad things" to her. Her mother telephoned the police immediately. The police arrived in four or five minutes, and Nancy told them what had happened. Defendant was apprehended by the police within about a half hour.

A physician examined Nancy about nine-thirty that evening at the request of the investigating officers. Called by defendant, he testified that Nancy was calm and rather relaxed for one of her age undergoing an examination; she was still in childhood; there were no signs of trauma; there was no evidence of dampness, wetness, irritating discharge, mucous, spermatozoa, or semen; there were no stains on her clothing. There was an irritated and reddened appearance caused by inflammation. There was no evidence of rape.

The only ground urged for reversal is that the testimony of the child, Nancy, was "so inherently improbable and incredible that it amounted to no evidence at all."

[1, 2] The requirement that the state must prove the defendant guilty beyond a reasonable doubt is applicable in, and primarily the concern of, the trial court. A reviewing court will not hold unsupported the trial court's finding of guilt merely because it might reasonably draw different inferences from those the trial court reasonably drew, or might not be convinced beyond a reasonable doubt of the guilt of the defendant. People v. Kerr, 37 Cal.2d 11, 15, 229 P.2d 777; People v. Tollack, 105 Cal.App.2d 169, 172, 233 P.2d 121. It is the trier of the fact which must be pursuaded beyond a reasonable doubt of the guilt of the defendant. People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633.

[3–9] A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. In order to say that testimony is inherently improbable it must appear that what was related or described could not have occurred. People v. Klinkenberg, 90 Cal.App.2d 608, 627, 204 P.2d 47, 613; People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836. Testimony which merely discloses unusual circumstances is not inherently improbable. Kidroski v. Anderson, 39 Cal.App.2d 602, 605, 103 P.2d 1000. Testimony which is subject to justifiable suspicion does not justify reversal of a judgment. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. The effect of claimed inconsistencies and statements said to be inherently improbable and incredible, the resolution of them, the credibility of the child, and the weight to be given her testimony, were for the trial judge, not for this court. People v. Amy, 100 Cal.App.2d 126–127, 223 P.2d 69. The trier of fact may believe and accept a portion of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836. Unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Our function is to determine whether the evidence, if believed, is of sufficient character to justify conviction.

Defendant argues that because the trial judge acquitted him on counts II, III and IV he necessarily disbelieved the testimony of Nancy with respect to those charges and that, having disbelieved her with respect thereto, he could not reasonably believe her testimony with respect to the lewd and lascivious conduct; that "the time element, the route taken, the medical testimony, the lack of complaint by the girl as to alleged occurrences, her conduct and demonstrated inconsistencies in her statement all conclusively establish the inherent improbability and falseness of her story." In view of the principles of law we have stated, the contention of defendant is not tenable.

[10] The fact that defendant was acquitted of the offenses charged in counts II, III and IV is not conclusive on the sufficiency of the evidence to sustain the conviction of the offense charged in count I. It does not prevent consideration of the evidence with respect to those counts in connection with the offenses charged in count I, nor does it establish that Nancy's testimony as to count I is inherently improbable or incredible. People v. Codina, 30 Cal.2d 356, 360–361, 181 P.2d 881; People v. Amick, 20 Cal.2d 247, 252, 125 P.2d 25; People v. Hernandez, 100 Cal.App.2d 128, 132–134, 223 P.2d 71; People v. Jollet, 60 Cal.App.2d 245, 250, 140 P.2d 479.

The time element is unimportant. At most, defendant's computation merely shows that Nancy was not watching the clock. She did not know how long they stopped each time. Her testimony as to the route taken differed from that testified to by a witness who followed defendant's car part of the distance and from that of defendant. The court could well have believed that Nancy's story was true with respect to defendant's conduct but that she was mistaken as to time and the exact route he drove in the dark. The physician testified that there was no evidence of any secretion which would have caused the redness or irritation. The inference is that it was caused by some external force. While the evidence indicates that no rape was committed as Nancy testified, it does not demonstrate that defendant did not commit the acts of which he was found guilty. She testified there was no penetration. Nancy complained to her mother immediately upon arriving at home.

Nancy's testimony was corroborated in important particulars. Her mother and another witness testified that when she arrived home she was crying, her face was flushed, her eyes were red, she was nervous and upset, and appeared frightened. She pounded on the door to be let in instead of using a knocker on the door. She complained to her mother immediately, and her mother telephoned the police. Later that evening her mother examined her and found a red and irritated condition. Nancy had the dime and two nickels defendant had given her. She did not have them when she left on the errand. A witness, Morgan, saw defendant's car with Nancy standing beside it. After Nancy got in Morgan became suspicious, circled the block, saw the lights on defendant's car switched off, and saw it pull over to the curb. Morgan drove around and then saw defendant's car moving with the lights on. He saw Nancy in the car and took down the license number. He lost defendant's car at a traffic signal and then phoned the police. Nancy's fingerprints were found on the right front vent-window of defendant's car. Defendant testified that when he first saw Nancy he was having trouble with his car and had her hold a flashlight for him. A specialist in fingerprints testified that fingerprints on the flashlight were not made by Nancy.

Immediately after defendant was arrested he was taken to the police station. The police told him he was arrested for rape and molesting a ten-year old girl. Defendant asked what the charge of rape consisted of, and Penal Code section 286 was read to him. He then asked, "What is the crime of *fondling* children." (Italics added.) An officer then read Penal Code section 288 to him. In questioning defendant the police had not used the word "fondling." After defendant had been taken to the station the police had a showup with him and five other men. Nancy was brought in and asked if she could point out the man who had molested her. She pointed to defendant.

Defendant told the police he had never seen Nancy; that he had been drinking at various bars that evening; that he was with a woman whom he took to work at about 6:00 p. m.; that she worked in a night club and that he stayed there until about 8:00 p. m. He told the police that Nancy had never been in his car; that he had not seen before in his life. At the trial he admitted that Nancy was in the car; testified that he gave her twenty cents for holding the flashlight while he worked on his car, and offered to drive her home; that he drove around with her in the car because she could not show him where she lived; and that he let her out near her home. He denied the acts charged.

Counsel for defendant make an able, forceful, and persuasive argument on the cold record. But the cold record cannot give the look or manner of the complaining witness.

> "It is the dead body of the evidence without its spirit."

A witness may convince all who hear him that he is truthful and yet his testimony, when read, may convey a most unfavorable impression. We cannot say, as a matter of law, that Nancy's testimony is inherently improbable or incredible in its vital particulars with respect to the charge of which defendant was convicted.

Order affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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111 Cal.App.2d 747

GILMAN v. CITY OF LONG BEACH et al.

Civ. 18838.

District Court of Appeal, Second District, Division 1, California.

June 18, 1952.

Rehearing Denied July 14, 1952.

Hearing Denied Aug. 14, 1952.

Proceeding by Lillian E. Gilman against City of Long Beach, and others, for a peremptory writ of mandate to compel the defendants to grant a widow's pension. The Superior Court, Los Angeles County, Raymond McIntosh, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Doran, J., held that the evidence supported the jury's findings.

Judgment affirmed.

1. Mandamus 🔑168(4)

In proceeding for a peremptory writ of mandate to compel the municipality to grant and pay a widow's pension under the provisions of the charter of the City of Long Beach, substantial evidence supported jury's findings to the effect that husband died as the result of injury received during the performance of duty as a member of the fire department, and that such services so aggravated a pre-existing injury or sickness as to render him physically unable to perform the duties of his position.

2. Mandamus 🔑187(9)

In proceeding for peremptory writ of mandate to compel municipality to grant a fireman's widow's pension under provisions of the charter of the City of Long Beach, where substantial evidence supported jury's findings of fact, the determination of such questions of fact could not be disturbed on appeal.

3. Municipal Corporations 🔑200(6)

The word "injury" in charter provision for payment of pension to dependents of fireman whose death results from service-connected "injury", includes acceleration or aggravation of a pre-existing disease to extent that it becomes disabling or brings about death sooner than it otherwise would have occurred.

See publication Words and Phrases, for other judicial constructions and definitions of "Injury".

Irving M. Smith, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondent.

DORAN, Justice.

The petition herein prays for a peremptory writ of mandate to compel the defendants to grant and pay a widow's pension under the provisions of Section 187(4) of the Charter of the City of Long Beach. Petitioner is the widow of Vertle P. Gilman who died on April 13, 1949. Mr. Gilman became a member of the Long Beach Fire Department on October 1, 1932, and continued in active service until April 2, 1949 at which time he became unable to continue his duties by reason of a heart affliction. Appellants' answer denies that decedent was eligible for retirement pension as a result of injuries received in or sickness caused by the discharge of decedent's duties, and denies that respondent was entitled to a pension.

A jury answered special interrogatories in favor of respondent, to the effect that Mr. Gilman died as a result of injury received during the performance of duties as a member of the fire department, and that such services "so aggravated a pre-existing injury or sickness * * * as to render him physically unable to perform the duties of his position from and after April 2, 1949". Judgment was entered ordering appellants to grant respondent a widow's pension and to pay the amount prescribed by the charter. It is contended by appellants that there is no substantial evidence in the record to support the jury's findings, and that the judgment granting respondent a widow's pension is contrary to law.

The record discloses evidence that the decedent Gilman was in good health when appointed to the Fire Department in 1932; that during the period from 1934 to 1939 Gilman, assigned to the harbor area, was called upon to fight fires in the holds of ships, which service involved strenuous exertion and exposure to smoke. In fighting a factory fire decedent was exposed to ammonia fumes. From March, 1942, to July, 1943, decedent was required to fight numerous grass fires and fires at the City Dump; the men were obliged to work short-handed and Gilman was observed to become exhausted and short of breath, one of the first signs of heart trouble. At about this time Gilman was examined for promotion and turned down because of high blood pressure and "essential hypertension".

In December, 1945 decedent was called upon to fight a Long Beach fire for two or three days involving strenuous exertion and creosote smoke and fumes. In January 1947, decedent was promoted to the position of captain, and appeared to worry over the added responsibilities of the office. About this time Mr. Gilman commenced to complain of an upset stomach, said to be a symptom of advanced coronary sclerosis. There was some difficulty in sleeping; decedent appeared to lose weight and became increasingly nervous. There was medical testimony that decedent's life was materially shortened by the stresses and strains of employment, and that decedent's heart disease was caused by such activity and its progress accelerated thereby.

[1] It is apparent from the above and other evidence contained in the record that there is substantial evidence in support of the jury's findings and the judgment entered thereon. The appellant criticizes this evidence as merely showing that "the employee might have lived longer had he not been working and had lived under the idealistic conditions prescribed by the doctor and had he been free from the stresses and strains of modern living".

[2] As pointed out in respondent's brief, the parties "agreed to the factual issues to be submitted to the jury". Question No. 4 asked the jury to determine whether "*any* services performed by Vertle P. Gilman, while working as a member of the Fire Department * * * so aggravated a pre-existing injury or sickness, if any, as to render him physically unable to perform the duties of his position from and after April 2, 1949". (Italics added.) As hereinbefore indicated, this inquiry was answered in the affirmative, and is sup-

ported by substantial evidence. In the present state of the record, and under the usual rule governing appellate review, the determination of such questions of fact, cannot be now disturbed.

In dealing with the same pension provisions involved herein, Section 187(4) of the Long Beach City Charter, the reviewing court in Wood v. Board of Police and Fire Pension Com'rs, of City of Long Beach, 49 Cal.App.2d 52, 120 P.2d 898, 900, said: "Subdivision 4 provides in plain language for the payment of a pension to the dependents of a policeman whose death occurred (a) as a result of a service-connected injury; or (b) as a result of a service-connected sickness; or (c) after retirement; or (d) while eligible to retirement. Each of these contingencies establishes a separate and distinct classification of dependents entitled to receive a pension".

A similar provision, found in Section 183 of the Los Angeles City Charter, has received broad interpretation in Cordell v. City of Los Angeles, 67 Cal.App.2d 257, 154 P.2d 31, 34, and in Bradley v. City of Los Angeles, 55 Cal.App.2d 592, 131 P.2d 391, 394. In the Cordell case the words "'shall die as a result of any injury received during the performance of his duty,'" are held to mean "that a causal relation, mediate or immediate, must be shown between the duty performed by the decedent and the immediate cause of his death", quoting from Lawrence v. City of Los Angeles, 53 Cal.App.2d 6, 127 P.2d 931.

In the Bradley case, just cited, it is said: "The word 'injury' as used * * * is not limited * * * to injuries caused by external violence, physical force or as a result of accident * * * but it is given a much broader and more liberal meaning. So construed it includes any injury or disease arising out of and in the course of the employment, which causes incapacity or death. * * * Such legislation should be applied fairly and broadly with a view to confer the benefits intended." Although it is true, as noted by appellant, that the facts in these cases differed materially from those here involved, the principles of interpretation there enunciated are well applicable to the present controversy.

[3] Appellants also complain of the giving of an instruction that the term "injury", includes "the acceleration or aggravation of a pre-existing disease to the extent that it becomes disabling or brings about death sooner than it otherwise would have occurred". As noted in respondent's brief, however, "This portion of the instruction is almost a direct quotation from the language * * * in the cases of Buckley v. Roche, 214 Cal. 241 [4 P.2d 929] * * * and Dillard v. City of Los Angeles, 20 Cal.2d 599 [127 P.2d 917, 919, 128 P.2d 537]". In both of these cases it was held that "The fact that a police officer had at the time of the injury a previous heart affliction does not of itself defeat his dependents' right to a pension if the injury precipitated his death by aggravating the heart condition."

No reversible error has been pointed out; there is no merit in any of the appellant's contentions, and the findings of the jury resulting in the judgment compelling appellants to grant Mrs. Gilman a widow's pension, are supported by the evidence.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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111 Cal.App.2d 833

SIBERT et al. v. SHAVER.

Civ. 18771.

District Court of Appeal, Second District,
Division 2, California.
June 20, 1952.

Rehearing Denied July 9, 1952.

Hearing Denied Aug. 14, 1952.

Rena C. Sibert, as administratrix of the estate of Clarence E. Sibert, deceased, and others brought action against defendant as surviving partner of partnership consisting of defendant and deceased, to rescind assignment of deceased partner's interest in partnership to defendant on ground that defendant had falsely represented that invention of partnership and business were of little value, and for accounting for profits of partnership. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that defendant had been guilty of false representations.

Judgment affirmed.

1. Partnership ⚷258(8), 336(3)

In action by administratrix of estate of deceased partner against surviving partner to rescind assignment by deceased partner's widow and daughter of deceased partner's interest in partnership to surviving partner, on ground that surviving partner had falsely represented that invention of partnership and business were of little value, and for accounting for profits of partnership, evidence sustained finding that surviving partner was guilty of misrepresentation, so as to warrant rescission of assignment.

2. Partnership ⚷67

Mere fact that brothers-in-law made application for patent in their joint names, did not compel determination that invention was not a partnership asset as distinguished from a tenancy in common.

3. Partnership ⚷249

A surviving partner is a trustee of trust inherited from his deceased partner, and of assets of partnership, and, as such, he owes maximum good faith and personal confidence to deceased and deceased's beneficiaries. Civ.Code, §§ 2219, 2228.

4. Partnership ⚷249

A surviving partner continues as a trustee subject to obligations of a voluntary trustee. Corporation Code, § 15030.

5. Limitation of Actions ⚷197(2)

In action by administratrix of estate of deceased partner against surviving partner to rescind assignment by deceased partner's widow and daughter of deceased partner's interest in partnership to surviving partner, on ground that surviving partner had falsely represented that invention of partnership and business were of little value, and for accounting for profits of partnership, evidence sustained finding that alleged fraud of surviving partner was discovered less than three years prior to institution of action, and that therefore rescission was not barred by three year statute of limitation. Code Civ.Proc. § 338, subd. 4.

6. Partnership ⚷258(8), 321

In action by administratrix of estate of deceased partner against surviving partner to rescind assignment by deceased partner's widow and daughter of deceased partner's interest in partnership to surviving partner, on ground that surviving partner had falsely represented that invention of partnership and business were of little value, and for accounting for profits of partnership, evidence was sufficient to sustain finding that surviving partner failed to establish his defense of laches.

7. Equity ⚷71(1)

Mere lapse of time does not mean laches.

8. Equity ⚷72(1)

To make doctrine of laches applicable, it must be made to appear that party who interposes it as a defense has suffered prejudice by virtue of delay in commencing his action.

9. Appeal and Error ⚷1008(1)

Where finding of trial court was supported by proof, it could not be disturbed on appeal.

10. Limitation of Actions ⚷13
Partnership ⚷258(5)

Where continued concealment by surviving partner of true facts relating to partnership as well as express statements of alleged untruths by surviving partner, caused widow and daughter of deceased partner to delay their demands on surviving partner for rescission of assignment by them of deceased partner's interest in partnership to surviving partner, surviving partner was estopped from pleading either laches or statute of limitations. Code Civ.Proc. § 338, subd. 4.

11. Limitation of Actions ⚷104(1)

Cause of action against the surviving partner by administratrix of estate of deceased partner to establish partnership, wind up its affairs, and for an accounting was not barred by four year statute of limitations, where surviving partner had failed to make full disclosure to beneficiaries of estate of deceased partner. Corporation Code, § 15031(4); Code Civ.Proc. § 343.

12. Partnership ⚿282

Partner may share in profits earned after dissolution of partnership, where partner seeking share in profits has interest in assets or capital of partnership after dissolution, and only in event that partner seeking share in profits has no interest in assets or his interest is negligible is he barred from asserting claim to a share of profits.

13. Partnership ⚿258(11), 344

In action by administratrix of estate of deceased partner against surviving partner to rescind assignment by deceased partner's widow and daughter of deceased partner's interest in partnership to surviving partner, on ground that surviving partner had falsely represented that invention of partnership and business were of little value, and for accounting for profits of partnership, administratrix was entitled to recover share in profits made by surviving partner, where invention involved patented device which was a valuable partnership asset.

◆

Demetriou & Viney, and Stanley M. Arndt, Los Angeles, for appellant.

Irving M. Walker and Richard L. North, Los Angeles, for respondent.

MOORE, Presiding Justice.

The judgment herein is (1) for the enforcement of a rescission of an assignment of respondents' interest in an invention for potato slicing and in the letters patent to be issued thereon; (2) for respondents and appellant as owners to vest title to the patent in the partnership formed by appellant and decedent for the manufacture and sale of the device based upon such invention; (3) for the partnership to be wound up and settled by appellant who must account to the probate court for the interest of decedent. Appellant demands a reversal on the grounds of the insufficiency of the proof, inconsistency of the findings and lack of support for the conclusions of law.

Clarence Sibert died intestate October 9, 1937, leaving his widow Rena and their daughter Mary Jane. Prior to his decease, he and appellant had long been intimate friends, Shaver having married decedent's sister. They were frequent visitors in each other's home. George Shaver was a salesman of market equipment merchandise while Clarence Sibert was a talented jewelry manufacturer. When in 1935 George became convinced of the need for a potato slicer, he told Clarence who promptly commenced work on the invention and thenceforth worked on the device continuously at nights. Shaver purchased the requisite materials and assisted Clarence. Finally they triumphed. They filed an application for letters patent on June 10, 1936, as joint inventors of the slicer and stated they were partners. Sales were immediate, 60 having been made prior to December 1, 1936, at $35 each.

The behavior of the men about the time of their beginning the project is important to the elucidation of the issues. On June 5, 1936, they stated they were partners in their application for a patent. On other previous occasions they had stated in their conversations that they were to do business as partners. February 8, 1937, they filed a certificate with the county clerk that they were doing business as a partnership under the fictitious firm name of S & S Specialty Co. and immediately filed a complaint against their debtor alleging they were doing business as partners under the fictitious firm name. Thus, the partners continued their operations until October 9, 1937, when Sibert deceased.

Prior to the passing of her husband Rena Sibert had been an invalid resulting from a nervous breakdown. She had lost weight from 175 to 85 pounds; suffered hallucinations and incoherency of speech. While she was confined in a sanitarium Clarence dined at the Shaver home. As Rena gradually improved appellant continued to carry on the business of the S & S Specialty Co. but said nothing to Rena and Mary Jane about his achievements.

Shortly after Clarence died Rena had herself appointed guardian of Mary Jane so the daughter might receive the proceeds of an insurance policy on her father's life. During the course of that proceeding the widow spoke to attorney Nevitt of the slicer and of her husband's interest. Pursuant to her suggestion, the lawyer had Shaver call to discuss the invention and the interest of decedent's family in it. Appellant told Rena and her lawyer that he was not manufacturing the device; that it was not going yet and was of little value; that Clarence had no interest in the business; that the patent had not been issued and it would probably never amount to anything.[1] Also, Shaver told Nevitt that he would pay Rena $200 and return a bar pin which Clarence had made for her and which she had pledged to George as security for a loan of $105.

Nevitt reported the offer to Rena and thereafter advised her that Shaver wished her and Mary Jane to visit his home and get the money and the pin. He declined to advise them as to the course they should pursue. They did call alone, executed the assignment—already prepared by Shaver's attorney and approved by Nevitt "as to form and substance." Shaver told them that while they had no interest in the invention they were signing the writing to clear the record. Rena received the promised consideration; but Mary Jane collected nothing. To this time the two women had confidence in Shaver, believed in him and relied upon his statements relative to the ill-success of the invention and executed the assignment solely by reason of their reliance upon his representations and by reason of their ignorance of the true status of the slicer, its adaptation to the needs of the trade, George's success in promoting sales and the profits realizable thereon.

After Sibert's decease his surviving partner continued the manufacture and sale of the machine under the partnership name but never divulged a word to respondents of the success of the enterprise, the number of sales, the cost of manufacture and the profit earned on each delivery. As the months rolled along and vigor and imagination returned to Rena she awoke to new courage and the mother and daughter began to dream again of the world that might have been if the plans of Clarence Sibert had materialized. Some two and a half years after they had given Shaver the assignment, to wit, in November, 1940, Mary Jane made a friendly call at the home of attorney Crum. While there she engaged him in discussion about the possible rights she and her mother might establish in the invention of her father, and related their conversation with Shaver at the time of making the assignment. Subsequently Crum advised Mary Jane of his doubt that the assignment could be annulled despite Shaver's misrepresentations as to the ownership of the patent. At the trial Crum testified that he had researched the question of the assignment of "rights that might lead to a patent" but he knew nothing of the facts of the case other than the execution of the assignment "and now wondered" whether it was possible that the women did have some rights. Although he had not seen the assignment he advised against litigation by reason of the expense of making the necessary investigations and because of the mental illness which Rena had suffered.

When in 1946 Mrs. Sibert heard that appellant "had made a million dollars" out of the slicer, she consulted attorney North. He promptly made an exhaustive investigation of all the facts and of the circumstances of the invention, partnership, application for letters. After having received a report from the patent office he called upon Shaver at the S & S Specialty Co. and requested an inspection of the document signed by respondents. Appellant told the attorney that Rena "had been confined in a mental institution and was still crazy" but he promised to get the writing from his lock box. On his call two days later Mr. North examined the assignment and promised to investigate further and report his findings.

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[1] Three weeks later the patent was issued to Clarence Sibert and George Shaver.

Not only did the attorney discover the certificate of fictitious firm name filed by the inventors but during a period of 18 months he visited numerous cafes, drive-ins, kitchen-supply houses and such other places as might use the slicer. He determined that the device had been on the market since a time antedating the assignment in May, 1938, and that Shaver had made numerous sales from August, 1936, to May, 1938, and that the slicer's value was well established. Thereupon, on September 24, 1947, Rena caused a notice of rescission of the assignment to be served upon appellant. The demand was based on the grounds of fraud, undue influence and mistake of fact.

Mrs. Sibert having qualified as administratrix of her husband's estate in December, 1947, in March 1948, her attorney examined Shaver in a probate proceeding. Appellant at that time denied (1) that he had ever entered into a partnership with Clarence, (2) that his brother-in-law was owner of a half interest in the invention, and (3) that S & S Specialty Co. existed prior to 1940. He testified that prior to the death of Clarence only four experimental models of the slicer had been built; that he had no records; that no slicers had been sold prior to the passing of decedent; that his records showed that 10,000 slicers were sold between 1940 and March 10, 1948; that he had always dealt with the invention as his own and that he had never known that Rena had been confined in a place for cases of mental illness. Despite such denials and testimony of Shaver, as well as his refusal to cooperate in developing the truth, in August, 1949, respondents filed this action to enforce the rescission of the assignment.

Findings Have Substantial Evidential Support.

[1, 2] That George and Clarence invented the device together as partners, applied for a patent and made the invention an asset of the partnership is clearly established by the proof and by reasonable inferences. The filing of the certificate of a fictitious name and the affidavit attached thereto, the allegations of their complaint filed against a salesman they had employed to make sales, are written evidence which, alone, would have supported the finding of a partnership. In addition there is persuasive parol proof. While the application for a patent was not on a partnership form, the notary who took their acknowledgements testified that "they said they were partners in the application." Moreover, when, on one occasion the families were gathered at the home of Mrs. Taggart, Shaver said, "Clarence, make us a potato cutter and we will do all right." Clarence agreed and commenced at once and continued work on the invention. The witness, Mrs. Weber testified that she had accompanied the inventors to San Diego where she was to introduce them to her friend, a patent attorney, and that in their conversation en route they declared their business in connection with the slicer was on a partnership basis. Such evidence takes on added emphasis in the light of the fact that the brothers-in-law at the beginning agreed upon equal capital contributions, shared expenses for materials and worked together in developing the plans and specifications for the new device. The mere fact that the men made the application in their joint names does not compel a determination that the invention was not a partnership asset as distinguished from a tenancy in common. While consulting the San Diego attorney it is not unlikely that he neglected to develop the plans already agreed upon.

Conceding the fact the utmost value as proof of appellant's claim, it goes not further than to create a conflict which was resolved against him. But appellant insists that the allegation of the complaint does not support the finding. The complaint alleges that "at the time of his death the decedent was the owner of an equal one-half interest in and to said invention, and letters patent and in and to said partnership." The finding is that each held a one-half interest in the slicer, but subject to an agreement that the invention should be an asset of the partnership. Such slight variance does not create an irreconcilable conflict. That appellant misrepresented material facts relative to the partnership is established by the factual situation already recited. Appellant's positive declarations to Rena that Clarence had no interest; nothing had been done toward marketing the slicer; it "wasn't going yet"; it is of little value; no sales had been made,—these were misrepresentations with reference to material facts which, alone, would have warranted rescission. But besides such misstatements the court could not but be impressed by the concealments of important facts from the women. Both of them were in complete ignorance of the status of the slicer's development and of its commercial value. But equally as potent ground for rescission was respondents' reliance upon and confidence in appellant. Neither of them had ever had experience in inventions, patents, promotions or sales. Mary Jane was not of age until the very day of the assignment and Rena's mind had suffered a serious impairment. In view of such evidence and its adoption by the court relief from the finding is unspeakable in view of the proof that at least one hundred slicers had been produced and sold by 1938—many of them prior to Clarence's death. In addition to the foregoing Rena proved that Shaver had told her that she must execute the assignment in order to regain her bar pin pledged to Shaver. While that fact was not recited in the notice of rescission, the truth of it indicates that the trial court believed that appellant would not hesitate to oppress the unfortunate related to himself by family ties.

[3, 4] A surviving partner is a trustee of the trust inherited from his decedent, and of the assets of the partnership. As such he owes the maximum of good faith and personal confidence to the decedent and to the latter's beneficiaries. Civ.Code, sec. 2219. In all matters connected with his trust, the trustee is bound to act in the highest good faith toward his beneficiaries. Civ.Code, sec. 2228. A surviving partner continues as trustee subject to the obligations of a voluntary trustee. Corp. Code, sec. 15030; Smith v. Walker, 38 Cal. 385.

Action Not Barred By Three-Year Statute.

[5] Appellant contends that even though fraud and oppression were established, rescission was barred by the three-year statute. Code Civ.Proc. sec. 338(4). He argues that the letter of attorney Crum establishes that as of 1940 respondents knew that certain statements made to them by appellant were false and necessarily the statute of limitations commenced to run when they acquired such knowledge. Such argument is predicated upon the assumption that Crum was actually aware of Shaver's misrepresentations or knew such facts as should have put him on notice that the assignment was not the result of fair dealing by Shaver, citing Nelson v. Nelson, 131 Cal.App. 126, 131, 20 P.2d 995.

But Crum was not so circumstanced as to be fairly chargeable with notice of the fraud. While his letter indicates that he had such knowledge his testimony discloses the true situation. All he knew was that an assignment of some sort had been executed. He testified that any references in his letter to misrepresentations of Shaver were based upon his own assumption since he had no actual knowledge of the facts and respondents were unable to supply him with specific details.

[6–8] Appellant assigns as prejudicial the court's conclusion that laches was not available to him as a defense. Such ruling was correct. The mere lapse of time does not mean laches. To make that doctrine applicable it must be made to appear that the party who interposes it as a defense has suffered prejudice by virtue of the delay in commencing his action. Appellant attempts to bring himself within the rule by his claim that attorney Nevitt had deceased and that since he was the only disinterested witness to Shaver's declarations upon which Rena relied his demise has prejudiced appellant's cause. But there is no indication that Nevitt's testimony would have supported appellant. Shaver denied a partnership with Sibert ever existed and that Clarence had any interest in the business or in the assets on hand.

By virtue of his denials that Clarence ever had an interest in the invention and of his concealment of all his information relative to the joint undertaking with his brother-in-law, appellant caused the delay. But appellant contends that the knowledge of Nevitt was to be imputed to his clients even though he might not have communicated his information to respondents they are deemed to have received it and therefore they are chargeable with the delay, again relying on Nelson v. Nelson, supra. That decision is not pertinent. Not only did the attorney therein have full knowledge of the fraudulent probate sale complained of but likewise did a number of the plaintiffs. In spite of such knowledge they released the defendant administratrix of liability for her act.

[9, 10] The court's finding that respondents rescinded promptly is not arbitrary but is supported by the proof above recited. It cannot, therefore, be disturbed. Philpott v. Superior Court, 1 Cal.2d 512, 524, 36 P.2d 635, 95 A.L.R. 990; Reiniger v. Hassell, 216 Cal. 209, 211, 13 P.2d 737. It follows that since appellant's continued concealment of the true facts as well as his express statements of untruths which they believed caused Rena and Mary Jane to delay their demands, he is estopped from pleading either laches or the statute of limitations. Hansen v. Bear Film Co., 28 Cal.2d 154, 178, 168 P.2d 946; Benner v. Industrial Accident Commission, 26 Cal.2d 346, 349, 159 P.2d 24; Pashley v. Pacific Electric R. Co., 25 Cal.2d 226, 229, 153 P.2d 325.

Action To Establish Partnership.

[11] Because the period of limitation commences with the dissolution of a partnership, Shearer v. Davis, 67 Cal.App.2d 878, 881, 155 P.2d 708, and since Clarence's death dissolved the S & S Specialty Co., Corp.Code, sec. 15031(4), appellant contends that the count to establish the partnership, wind up its affairs and make an accounting is barred by the four-year statute of limitations. Code Civ.Proc. sec. 343. Such a bar cannot be successfully raised in the situation here involved. Commencing with the first negotiations between the parties and continuing beyond the assignment of the patent to the time of trial, appellant never ceased to repeat his denial of the partnership. The statute of limitations may not be invoked where he fraudulently conceals the existence of a fact which he was in duty bound to disclose. Hansen v. Bear Film Co., supra, 28 Cal.2d 178, 168 P.2d 946; Sears v. Rule, 27 Cal.2d 131, 147, 163 P.2d 443; Pashley v. Pacific Electric Railway Co., supra, 25 Cal.2d 229, 153 P.2d 325. But appellant did not content himself with denying the partnership with Sibert. He steadfastly and continually repeated that (1) the invention was valueless, and (2) there was no manufacture and sale of the slicer. Also, he concealed through March, 1948, that (1) he and Sibert had instituted a business that continued till his death; (2) he had records of the business, commencing with 1936; (3) 100 slicers had been sold by the partnership in November, 1936; (4) the partnership had operated prior to 1940; (5) records of the business prior to 1940 were in the books; (6) he could not get a Canadian patent by reason of the fact that Sibert's estate had not been probated. Respondents were persuaded by appellant to believe that further inquiry as to their rights would be useless. Appellant's actions are all the more grievous when it is borne in mind that he occupied the position of a trustee as to the deceased partner's interest. Ruppe v. Utter, 76 Cal.App. 19, 25, 243 P. 715. Hence, he was in duty bound to make a full disclosure to the beneficiaries of Clarence's estate and will not now be permitted to capitalize on his unconscionable conduct by seeking refuge behind the statute of limitations.

[12] Appellant also contends that, assuming the judgment to be otherwise correct, it was error to compel him to account for profits earned after the death of his partner, citing Hall v. Watson, 73 Cal.App.2d 735, 167 P.2d 210. But the cited decision emphasizes that one may share in profits earned after dissolution of a part-

nership where the partner seeking a portion of such profits has an interest in the assets or capital of the firm after dissolution. Only in the event the complaining partner has no interest in the assets or where his interest is negligible is he barred from asserting claim to a share of the profits.

[13] In the case at bar the patented device was a valuable partnership asset. It caused S & S Specialty Co. to mushroom into a fruitful enterprise of rare promise. It is meaningless for appellant to assert that it had no value in view of its immediate acceptance by the trade and especially in view of its subsequently proven popularity.[2] Accordingly, since appellant was in the position of a trustee as to the deceased's interest in the firm, his use thereafter of the assets without regard to any winding up of the business places him in the discomfiting position of being held to account for profits earned subsequent to Sibert's decease. Fooshe v. Sunshine, 96 Cal.App.2d 336, 343, 215 P.2d 66, 16 A.L.R.2d 1142; Ruppe v. Utter, 76 Cal.App. 19, 25, 243 P. 715.

It is also asserted that the trial court erred in rendering judgment in favor of Mary Jane inasmuch as any interest which Clarence might have held at his death was presumably community property and would pass to the widow alone under our intestacy law. Probate Code, sec. 201. However, the judgment though providing that Rena and Mary Jane as heirs at law of Clarence are the owners of a half interest in the patent, provides further that such interest is subject to the administration of the Sibert estate. It is presumed that the probate court will make lawful and valid orders in its decree of distribution.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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112 Cal.App.2d 112

MACKAY et ux. v. WHITAKER et al.

Civ. 15255.

District Court of Appeal, First District, Division 1, California.

June 30, 1952.

Declaratory judgment and quiet title action by Larry D. Mackay and his wife against Ted H. Whitaker and his wife and others. From an adverse judgment of the Superior Court, in and for County of Contra Costa, Leo G. Marcollo, J., defendants appealed. On plaintiffs' motion to dismiss the appeal, the District Court of Appeals, Peters, P. J., held that defendants had not made such acceptance of benefits of judgment as would preclude them from prosecuting the appeal.

Motion denied.

1. Appeal and Error ⚷157

Compliance with whole or part of judgment under compulsion, or even voluntary compliance, unless pursuant to compromise agreement not to prosecute appeal, does not foreclose right of appeal, and therefore delivering up of possession of property pursuant to quiet title judgment under compulsion of restitution and contempt proceedings would not bar appeal from such judgment.

2. Appeal and Error ⚷161

The rule that voluntary acceptance of whole or part of benefits of judgment acts as bar to prosecution of appeal has no application where benefits accepted are such that appellant is admittedly entitled to them or where they would not be affected by the appeal.

3. Appeal and Error ⚷161

Even where respondent has tendered performance and appellant or his counsel has retained but not used the benefits tendered pursuant to judgment, appellant will not necessarily be barred from right of appeal from such judgment.

4. Action ⚷66

Public policy favors deciding cases on their merits.

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[2] Appellant testified at the 1948 Probate proceeding that at least 10,000 slicers had been sold to that date.

5. Appeal and Error ⚷161

Beneficial owners of realty were not precluded from appealing adverse declaratory and quiet title judgment by fact that their attorney, who also represented holder of title and mortgagee, had delivered deed from holder of title to successful litigants to title company with direction to hold until receipt of full release from successful litigants, in view of fact that direction was not a request for benefits on behalf of beneficial owners but was intended only to relieve holder of title and mortgagee of liability.

6. Appeal and Error ⚷161

Although escrow holder of deed sent successful litigants' cancellation of note of beneficial owners of property and release of rights under declaratory and quiet title action to attorney, who had represented beneficial owners and other parties, and such attorney had kept documents for about a year, there was not such acceptance of benefits of judgment as would preclude beneficial owners from appealing from judgment.

7. Appeal and Error ⚷161

Proof on motion to dismiss appeal was insufficient to establish that respondents had changed their position to their detriment in reliance on apparent acceptance of appellants of benefits under the judgment appealed from, and motion to dismiss appeal would be denied.

Robert H. Kroninger, Oakland, for appellants.

Royal E. Handlos, San Francisco, for respondents.

PETERS, Presiding Justice.

This is a motion to dismiss an appeal on the grounds that the judgment has been satisfied, and that the appellants have voluntarily accepted its benefits to the detriment of respondents.

The Mackays brought this action against the Whitakers, the Emslies, James C. Philips and the Philips corporation for declaratory relief and to quiet title to a parcel of property on which the Emslies had been conducting a kennel. The kennel property was subject to a first deed of trust given by the Emslies to a loan company to secure a $10,000 note. The claim of the Mackays to the property grows out of the following circumstances: In 1948 the Mackays and the Emslies entered into an informal joint adventure for the purchase of dogs for show purposes, the Mackays advancing most of the money. In November of 1949 the parties entered into a written agreement setting forth their respective rights and obligations. This agreement, executed on November 25, 1949, provided that the Emslies should deed the property to the Whitakers, disinterested third parties, who should hold it as security for a third deed of trust given as security for a $10,000 two-year note executed by the Emslies and payable to the Mackays. A second deed of trust to the Philips corporation was authorized to secure certain advances that might be made. The agreement authorized the Emslies and the Whitakers to increase the loan company indebtedness, if necessary, to $12,500, and also provided that upon maturity of the Mackays' note a new installment note should be executed. The agreement then provided that in the event the Emslies defaulted in payments on the first deed of trust loan, or on their payments to the Mackays, the Mackays had the option, on the 61st day after such default, to purchase the property for the balance then owed to them, upon their assumption of the obligations of the first deed of trust.

The Mackays' note required the Emslies to make monthly payments of interest. No interest was paid, the Mackays elected to exercise their option, the Whitakers refused to convey, and this action was commenced in November of 1950.

The trial court rendered its judgment in favor of the Mackays. The judgment declares that the Mackays are the owners of the property subject to the first deed of trust (and a second to the Philips corporation to secure an obligation of $1.00), and that the Mackays are entitled to possession upon certain conditions, namely, that the Mackays open an escrow, deposit therein a cancellation of the Emslies' note to them, a release of the Whitakers, an assumption of the prior obligations, and sufficient money to reimburse the Whitakers and the Philips corporation for advances made by them in connection with a default under the first deed of trust. The Whitakers were to execute a deed to the property naming the Mackays as grantees, and deposit it in escrow, to be delivered upon completion of the escrow, at which time the Emslies were to deliver possession to the Mackays, upon receiving a full release.

From this judgment all of the defendants appealed, although it is conceded that the Emslies are the only appellants beneficially interested. The notice of appeal was filed June 15, 1951, the transcripts on appeal were filed in January, 1952, and the appellants' opening brief was filed April 15, 1952. This motion to dismiss was filed by respondents on May 12, 1952. Affidavits have been filed by both parties, and supplemental affidavits have been filed by appellants.

It is the theory of respondents that they complied with all of the terms of the judgment, that appellants accepted the benefits of the judgment, and that for these reasons the appeal must be dismissed. The affidavits filed on behalf of the respondents aver that they opened the required escrow and deposited therein all of the required documents. Among other things, the respondents paid into escrow some $664.02 to reinstate the first deed of trust. It is then averred that the escrow was closed on June 18, 1951; that on the next day the escrow holder delivered to the appellants all of the deposited documents, including a release of all obligations under the $10,000 note, and a cancellation of the note; that nevertheless the Emslies refused to deliver possession of the premises; that respondents secured a writ of restitution and threatened the Emslies with comtempt; that the Emslies delivered up possession on July 18, 1951.

Attached as an exhibit to this affidavit is a copy of a letter dated June 4, 1951, from Raymond Ferrario, then attorney for appellants, addressed to the title company enclosing a deed from the Whitakers to the Mackays, and informing the title company that such deed should be held until the title company received a full release of the Whitakers and of Philips, evidence that taxes and payments on the first deed of trust had been made, and a full release by the Mackays of the Superior Court action here involved. The Emslies are not mentioned by name in that letter. It also appears that under date of June 19, 1951, the title company informed Ferrario that the escrow had been closed and that the Whitakers' deed to the Mackays had been recorded. Enclosed with this letter was a cancellation of the Emslies' note, a general release of all involved, including the Emslies, and a waiver of the deed of trust executed by the loan association.

The Emslies filed opposing affidavits. They aver that they did not authorize their then attorney Ferrario to write the letter of June 4, 1951, demanding the cancellation of the note and the release. They also aver that they have not accepted any benefits of the judgment nor voluntarily performed any of the burdens, and that they surrendered possession of the property by reason of the threat of the contempt proceeding. The Whitakers aver that they deposited the deed in order to relieve themselves of liability, inasmuch as they have no interest in the litigation.

Attorney Ferrario avers that at the time of the rendition of the judgment, and numerous times thereafter, he informed counsel for respondents that appellants intended to appeal; that in May and June of 1951 respondents made numerous demands upon appellants to perform, and finally instituted the restitution and contempt proceedings; that in June of 1951 he informed the Whitakers and Philips, who have no interest in the litigation, that if they desired to relieve themselves of liability under the judgment they should comply with its terms; that under such circumstances the Whitakers executed the deed and he sent the letter of June 4, 1951; that counsel for respondents, although he knew that appellants intended to perfect the appeal, at no time claimed that the transactions in June, 1951, constituted an acquiescence in the judgment until this motion to dismiss was filed.

In a supplementary affidavit the Emslies aver that they have not received the note, its cancellation, or the release, and that they did not know that they had been received by Ferrario until this motion to dismiss was filed. They further aver that, had they known of them, they would have rejected them. They offer, in the event that the judgment is reversed on appeal, whether for a new trial or otherwise, to "pay all such costs and execute any and all such instruments as the court shall deem necessary to the placing of the parties in the positions in which they found themselves at the commencement of this litigation, or which shall by the court be deemed necessary to the placing of the parties in any other position with respect to each other as may be considered by the court just and proper."

Attorney Ferrario also filed a supplementary affidavit in which he avers that he wrote the letter of June 4, 1951, solely on behalf of the Whitakers and Philips; that such letter did not have any reference to the Emslies; that the letter did not demand a cancellation of the Emslies' note to the Mackays, or a release of the Emslies; that the letter was intended to and did refer solely to the demands of the Whitakers and of Philips; that the letter of the title company dated June 19, 1951, enclosing the various documents, did not come to his knowledge until after this motion was filed when it was discovered in his files; that until such discovery he had no knowledge that the documents in any way affected the Emslies; that the Emslies were never informed that he had received such documents and never had an opportunity to reject their tender; that none of the documents have been recorded or used in any way to realize any benefits therefrom; that the Emslies now reject the tender. The documents are attached to his affidavit for such disposition as the court may deem proper.

In ascertaining whether this appeal should or should not be dismissed it is important to note that appellants at all times have diligently prosecuted the appeal, and, obviously, at no time had an intent to abandon it. Moreover, although the respondents have known since the entry of the judgment in May of 1951, that appellants intended to appeal, and the escrow has been closed since June 18, 1951, they took no steps to seek a dismissal until May of 1952.

[1] It is also important to note that appellants' compliance with the judgment by delivering up possession of the property and by the execution and delivery of the Whitakers' deed, in no way can operate to bar the appeal. The delivery of possession by the Emslies was made under the compulsion of the restitution and contempt proceedings. Compliance with the whole or part of a judgment under compulsion does not foreclose the right of appeal. It is equally clear that even a voluntary compliance by the appellants with the provisions of the judgment would not foreclose such right unless such compliance was pursuant to a compromise agreement not to prosecute the appeal. Reitano v. Yankwich, 38 Cal.2d 1, 237 P.2d 6. Therefore, even though the appellants may have complied with portions of the judgment, and even though such compliance was voluntary, such compliance cannot be used to preclude them from prosecuting this appeal.

[2] Respondents place their reliance on the rule that the voluntary acceptance by the appellants of the whole or part of the benefits of a judgment or order will act as a bar to the prosecution of an appeal. Schubert v. Reich, 36 Cal.2d 298, 223 P.2d 242; Giometti v. Etienne, 5 Cal.2d 411, 55 P.2d 216; Guho v. City of San Diego, 124 Cal.App. 680, 13 P.2d 387; Dickenson v. Kallusch, 91 Cal.App. 141, 266 P. 816; Preluzsky v. Pacific Co-operative Cafeteria Co., 195 Cal. 290, 232 P. 970. This rule has no application, however, where the benefits accepted are such that appellant is admittedly entitled to them, or where they woud not be affected by the appeal. Stein v. Simpson, 37 Cal.2d 79, 230 P.2d 816.

[3] Even where the respondent has tendered performance, and appellant or his counsel have retained but not used the benefits tendered, the appellant will not necessarily be barred from the right of appeal. Phillips v. Isham, 105 Cal.App.2d 608, 233 P.2d 637. In that case the court

stated 105 Cal.App.2d at page 611, 233 P.2d at page 638, that before an acceptance of benefits will preclude prosecution of the appeal " 'it must appear, upon clear and decisive grounds, that the acceptance or receipt therefor was understood or intended as constituting an acquiescence in the judgment or decree.' "

[4, 5] If these rules be kept in mind, and considering the strong public policy in favor of deciding cases on their merits, People v. Becker, 108 Cal.App.2d 764, 239 P.2d 898, we do not think that there was such a voluntary acceptance of benefits of this judgment by appellants as precludes them from prosecuting this appeal. Even though Ferrario was attorney for all of the appellants, including the Emslies, and even though his actions in reference to the escrow are probably binding on all appellants, even though not specifically authorized, it is quite clear that he did not intend, by his letter of June 4, 1951, to ask for any benefits on behalf of the Emslies. The letter, in fact, asks for no such benefits. It refers to the enclosed deed from the Whitakers to respondents, and authorizes the deed to be used upon securing a release of the Whitakers and Philips, and upon payment of taxes and overdue payments on the deed of trust. It is a conceded fact that the Whitakers and Philips have no interest in this litigation. The respondents had no desire to hold them liable for any derelictions of the Emslies. All of the steps set forth in the letter were reasonably calculated to accomplish the intent of everyone to relieve the Whitakers and Philips of liability. Respondents call attention to paragraph five of the letter asking for a full release by the Mackays from all liability arising out of the action now here on appeal. Although the language used in this paragraph is general, and certainly could be improved upon so far as clarity is concerned, it is reasonably capable of the interpretation, when it is read after the preceding four paragraphs all referring to the Whitakers and Philips, that it was intended to apply only to them. For this reason Ferrario's letter should not be construed as a request for the benefits of the judgment on behalf of the Emslies.

[6] But, say respondents, the escrow holder sent a cancellation of the Emslies' note and a release to Ferrario, and he kept the documents for about a year. This, they say, must be construed as an acceptance of the benefits of the judgment. But Ferrario avers that he did not know that he had received them, and that they were put in the files in the belief that they referred only to the Whitakers and Philips. This, it is averred, is what Ferrario intended to ask for by his letter, and that, apparently, is what he thought he had received. Neither Ferrario nor the Emslies had any actual knowledge that the documents had been tendered. As soon as they found out about them, the Emslies refused the tender. Under such circumstances it should not be held that such an ambiguous retention of the documents by Ferrario constituted an acceptance of benefits sufficient to preclude the prosecution of the appeal. See Phillips v. Isham, 105 Cal.App.2d 608, 233 P.2d 637.

[7] Respondents claim that they have changed their position to their detriment in reliance on the apparent acceptance by paying up the default on the first deed of trust, and in assuming liability thereunder. These steps were all necessary if the Whitakers were to be released from liability, as respondents intended. There is no satisfactory proof that such steps would not have been taken to protect them alone.

In view of the offer made by appellants in their affidavit if the judgment is ultimately reversed, the respondents will be protected from loss.

The tendered documents are ordered restored to respondents, and the motion to dismiss is denied.

BRAY and FRED B. WOOD, JJ., concur.

111 Cal.App.2d 794

PEOPLE v. GREEN.

Cr. 4774.

District Court of Appeal, Second District,
Division 2, California.
June 19, 1952.

Rehearing Denied July 1, 1952.

Hearing Denied July 17, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., of committing an abortion, and he appealed. The District Court of Appeal, McComb, J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law ⚷371(1)

Where a felonious intent is an essential ingredient of crime charged, and accused claims that his act was accidentally, mistakenly or innocently done, or where circumstances might support an inference that the act was lawful, it is proper to rebut such claim or inference by evidence of other criminal acts done by accused, in which he used similar means and which produced the same result, in order to prove the criminal purpose that actuated the deed.

2. Criminal Law ⚷371(1)

Presentation of evidence in abortion prosecution that defendant had under similar circumstances committed abortions upon other women than those named in information was proper as bearing upon the criminal intent with which act charged had been performed.

3. Witnesses ⚷277(4)

In abortion prosecution wherein defendant had admitted on direct examination that certain woman had brought patient to his office who had wanted abortion, and that such woman had told defendant that she had recommended him to the patient, cross-examination by which defendant was asked whether such named woman had brought patients to him when they wanted abortions, and whether he had told her that he performed such operations was proper as within the scope of direct examination and as bearing upon defendant's intent in committing the act charged. Pen.Code, § 1323.

4. Criminal Law ⚷407(1)

Accusatory statements are admissible when the accused fails to act as an innocent person would be expected to act in such circumstances.

5. Criminal Law ⚷407(2)

In prosecution for abortion testimony concerning certain accusatory statements made to defendant after his arrest, which were not denied by defendant was properly received in evidence.

6. Abortion ⚷9

In prosecution for abortion, wherein it appeared that abortion had resulted in death, testimony of officer relative to conversation between husband of victim on day of death of victim, in which husband had stated that he had talked to defendant about his wife, and that defendant had stated that women came to him and offered him large sums of money to perform abortions, but that he did not perform such operations, was admissible as relevant to the intent with which defendant performed the operation.

7. Criminal Law ⚷1169(3)

In prosecution for abortion, admission of testimony of officer concerning conversation with defendant in which defendant had stated that there was no law requiring doctor to consult other physicians prior to performing a therapeutic abortion, but that it was merely the practice to do so, was not error when the defendant had stated on witness stand that the testimony so given was in substance correct.

8. Witnesses ⚷379(1)

In abortion prosecution, admission of evidence of prior statements inconsistent with those made by defendant's nurse at trial was proper for purpose of impeachment. Code Civ.Proc. § 2052; Pen.Code, § 274.

9. Abortion ⚷13

Instruction in abortion prosecution that the essence of the offense of abortion is the intent to procure a miscarriage, and that if a person performs an act in violation of law against abortion, it is not a defense that the woman may previously have herself attempted to bring about a miscarriage, was proper statement of law.

10. Abortion ⚿1

It is not necessary in order to constitute the crime of abortion that the woman upon whom the act is perpetrated be in fact pregnant.

11. Abortion ⚿13

In prosecution for abortion, refusal of instruction that statute relating to abortion did not apply to treatments by a physician or other persons to any woman who was in the actual process of aborting a pregnancy, was proper in that if the necessary criminal intent were present, defendant would be guilty of having committed abortion whether victim was actually in process of aborting or not. Pen.Code, § 274.

12. Abortion ⚿11

Evidence sustained conviction for committing an abortion. Pen.Code, § 274.

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Warner, Peracca & Cowan, James O. Warner, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was found guilty on two counts of having committed abortions. From a judgment and order denying his motion for a new trial, he appeals.

Facts: The evidence disclosed that Molly Simon died as a result of an induced abortion. Deceased's sister testified she accompanied her sister to defendant's office where decedent stated to defendant she was pregnant and did not want to have a baby; defendant advised Molly Simon to have a test made to determine whether or not she was pregnant. Decedent's husband testified that at a subsequent date he took her to defendant's office and paid the latter's receptionist $250; he left decedent in defendant's office, went out and purchased a sandwich and at the direction of the receptionist a sanitary napkin belt; after about three hours he took decedent from defendant's office and on the way home she complained of a pain under her armpit and in her right chest; upon complaints of his wife he had called defendant's office and on instructions of the nurse gave his wife an aspirin tablet and a pill; he later again called defendant's office and on the third call talked with defendant; later his wife awakened with a gurgling sound in her throat and he called Dr. Effron, but upon this doctor's arrival at their home the witness's wife had passed away.

Mr. Simon also testified that prior to going to defendant's office his wife was in good health. There was additional testimony that defendant had voluntarily admitted in the presence of police officers he had performed a curettement upon the deceased. He also stated he had performed a therapeutic abortion.

Esther Yontz testified that on March 10, 1951, she saw defendant at his office; defendant examined her; her former husband paid defendant $200 and thereafter Esther Yontz disrobed, put on a nightgown, was given a hypodermic injection by defendant; she then lay dazed but not asleep upon an operating table in his office. Then, according to the testimony of Esther's former husband, defendant put a heavy metal instrument in her vagina. This instrument looked like a large metal spoon with a ball on the end. Defendant scraped material and blood from the vagina. Thereafter Esther left the operating table and was told to go into an anteroom and lie down which she did for about an hour. Defendant admitted he did a pelvic examination on Mrs. Yontz but denied that he operated upon her.

Questions: First: *Was the district attorney guilty of misconduct in the presentation of evidence that defendant had under similar circumstances committed abortions upon other women than those named in the information?*

[1] *No.* The correct rule is stated by Mr. Presiding Justice Moore in People v. Clapp, 67 Cal.App.2d 197, 201 [7], 153 P.2d

758, 760 thus: "Where a felonious intent is an essential ingredient of the crime and the accused claims that his act was accidentally, mistakenly or innocently done, or where the circumstances might support an inference that the act was lawful, it is proper practice to rebut such claim or inference by evidence of other criminal acts done by the accused, in which he used similar means and which produced the same result, in order to prove the criminal purpose that actuated the deed for which the prisoner is on trial." (See also People v. Coltrin, 5 Cal.2d 649, 656 [3], 55 P.2d 1161.)

[2] In the present case the testimony offered and received in evidence fell within the foregoing rule, since such evidence disclosed that previous acts of a similar nature under similar circumstances had been committed from which the jury could reasonably infer defendant in the present case had performed the acts with which he was charged with a criminal intent.

People v. Darby, 64 Cal.App.2d 25, 148 P.2d 28, 31, relied on by defendant, is here inapplicable because in the cited case evidence was received to the effect that defendant had committed abortions on two other women with "a certain surgical instrument". In the Darby case however there was no evidence that defendant had used any surgical instrument upon the patient involved in the abortion for which he was then being tried. (See People v. Thompson, 69 Cal.App.2d 80, 90 et seq., 158 P.2d 213.)

[3] There is likewise no merit in defendant's contention that after he had taken the witness stand the district attorney erred on cross-examination by asking defendant whether he had asked Mrs. Abrams why she brought patients to him when they wanted abortions, and whether he told her he performed such operations. Defendant admitted on direct examination that Mrs. Abrams had brought a patient to his office, that the patient wanted an abortion and Mrs. Abrams had told him she had recommended the patient to him. Such questions were entirely within the scope of direct examination concerning the intent of defendant when he made the examination and later operated upon the two women who he was charged with aborting in the present information. (See Penal Code, sec. 1323; People v. Buckley, 143 Cal. 375, 388 et seq., 77 P. 169.)

[4, 5] Neither is there any merit in defendant's complaint that it was improper to receive the testimony of Officer Bates relative to a conversation with defendant after his arrest. The conversation contained admissions of defendant and certain accusatory statements made to defendant. Accusatory statements are admissible, especially when the accused fails to act as an innocent person would be expected to act in such circumstances. In the instant case defendant did not deny the accusatory statements; therefore they were properly received in evidence. (People v. Ramsey, 83 Cal.App.2d 707, 724 [16], 189 P.2d 802.)

[6] Testimony of Officer Bates relative to a conversation between Mr. Simon and defendant on the day of the death of Molly Simon, in which Mr. Simon stated he had talked to defendant about his wife and defendant had stated women came to him and offered him large sums of money to perform abortions, but that he did not perform such operations, was clearly admissible. The conversation was in defendant's presence, was relevant and material to the intent with which defendant performed the operation upon Mrs. Simon and could not be prejudicial to him since the statement disclosed defendant had stated he did not perform abortions.

[7] Defendant likewise claims it was error to permit Officer Bates to testify about a conversation with defendant in which it appears defendant said there was no law requiring a doctor to consult other physicians prior to performing a therapeutic abortion, but it was merely the practice to do so. No error is discernible in the admission of this evidence since defendant, when on the witness stand, stated that in substance the testimony given by Officer Bates was correct.

[8] Defendant urges certain other trivial errors in the reception of evidence,

such as it was error for the district attorney to attempt to lay a foundation for the impeachment of defendant's nurse by showing prior inconsistent statements. Such evidence was clearly admissible. (Code of Civ.Proc., sec. 2052.) An examination of the record discloses prejudicial error was not committed by the district attorney in the offering of evidence, nor was there any prejudicial error committed by the trial judge in the reception of evidence.

Second: *Did the trial court commit prejudicial error in instructing the jury as follows?*

> [9] "The essence of the offense of abortion is the intent to procure a miscarriage. If a person performs an act in violation of the law against abortion, it is not a defense that the woman may previously have herself attempted to bring about a miscarriage."

[10] *No.* The foregoing instruction was correct. It is not necessary in order to constitute the crime of abortion in California that the woman upon whom the act is perpetrated be in fact pregnant. (People v. Ramsey, 83 Cal.App.2d 707, 717 [5a], 189 P.2d 802; cf. People v. Rhoades, 93 Cal.App.2d 448, 450 et seq., 209 P.2d 33.)

[11] Third: *Did the trial court err in refusing defendant's request to instruct the jury as follows?*

> "You are hereby instructed that Penal Code Section 274 does not apply to treatments by a physician or other persons to any woman who is in the actual process of aborting a pregnancy."

No. In view of the cases just cited it is obvious that if the necessary criminal intent were present defendant would be guilty of having committed abortion whether the victim was actually in the process of aborting or not.

[12] Fourth: *Was there substantial evidence to sustain the jury's finding that defendant was guilty of committing an abortion on Esther Yontz?*

Yes. Both Mrs. Yontz and her former husband testified to the facts set forth above relative to defendant's attempt to abort her. Such evidence shows that the complaining witness' testimony, conceding that she was an accomplice, and her husband's testimony, likewise conceded to be an accomplice, was corroborated by the admissions of defendant, and his failure to deny accusatory statements made in his presence. Of course the credibility and weight to be given to the testimony were questions to be determined by the jury in the first instance and the trial judge on the motion for a new trial latterly.

Judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; SCHAUER, J., dissenting.

112 Cal.App.2d 129

NYE v. DOTTA.

Civ. 18794.

District Court of Appeal, Second District,
Division 3, California.
June 30, 1952.

Suit by C. L. Nye against Giacomo Dotta for an accounting for value of alfalfa removed from plaintiff's land by defendant and for damages, wherein defendant filed a counterclaim. The Superior Court, Los Angeles County, Irvin Taplin, J., gave judgment for plaintiff and plaintiff appealed. The District Court of Appeal, Vallée, J., held that notice by which lessor attempted to terminate retroactively a lease of agricultural land after lessee had held over and retained possession for more than 60 days after expiration of term was wholly without effect.

Judgment affirmed.

1. Landlord and Tenant 🔑331(6)

In suit by lessor for an accounting for value of all alfalfa removed from land by lessee after attempt by lessor to terminate lease, evidence sustained finding that lessee returned and did not accept lessor's check as payment pursuant to lease provision for cancellation of lease.

2. Landlord and Tenant ⚷114(3)

Where lessee of agricultural land holds over and retains possession for more than 60 days after expiration of term without any demand for possession or notice to quit by lessor, lessee is deemed to be holding by permission of lessor and is entitled to hold under terms of lease for another full year. Code Civ.Proc. § 1161, subd. 2.

3. Landlord and Tenant ⚷118(1), 120(2)

A lease of agricultural land giving lessor right to terminate it at will creates a tenancy at will which can be terminated only by giving lessee notice in writing in the manner prescribed by statute to remove from the premises within a period of not less than 30 days to be specified in the notice. Code Civ.Proc. § 1162; Civ.Code, § 789.

4. Landlord and Tenant ⚷329

Where lessee of agricultural land held over and retained possession for more than 60 days after expiration of term without any demand for possession or notice to quit by lessor, notice thereafter given lessee, by which lessor attempted to terminate lease retroactively as of a date prior to notice, was wholly without effect, even if lease gave lessor right to terminate it at will, and lessee was entitled to his share under lease of the value of alfalfa cut on the land during remainder of the year. Code Civ.Proc. §§ 1161, subd. 2, 1162; Civ.Code, § 789.

5. Landlord and Tenant ⚷331(6)

In suit by lessor for an accounting for value of alfalfa removed from land by lessee, evidence sustained finding as to value of one-half of alfalfa which lessee removed from land without delivering one-half thereof to lessor pursuant to lease.

Marshall Stimson, Noel Edwards and Charles Murstein, Los Angeles, for appellant.

Bodkin, Breslin & Luddy and Peter E. Giannini, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment in his favor.

On October 26, 1945, plaintiff, owner of agricultural land, made the following lease to defendant to raise alfalfa:

> "Lease for 30 acres corner Gale & Hasciendo
>
> Mr. Giacoma Dotta & C. L. Nye.
>
> C. L. Nye to furnish seed and water and land.
>
> G. Dotta to furnish all work and deliver 1/2 crop to 4611 Fifth Ave. Walnut
>
> In case of cancellation of lease C. L. Nye to pay Mr. Dotta $30.00 per acre, less 1/36 for each month from Jan. 1, 1945."

Defendant took possession and planted hay the first year with plaintiff's approval; thereafter he raised alfalfa. Because it was necessary to plant hay the first year due to unfavorable weather conditions, the parties orally agreed that the lease be extended one year. Defendant remained in possession after January 1, 1949, maintained his irrigation pipes on the property, and did all acts necessary to insure a good crop. The first cutting for the 1949 season was full and mature and ready to be made about March 12, 1949. On March 12, 1949, plaintiff attempted to terminate the lease by sending defendant a letter dated March 11, 1949, reading:

> "I wish to terminate our agreement regarding the farming of the 30 acres at Gale and Hacienda St, Puente as of March 1, 1949. I am doing this as I am changing the operation of my Fifth Ave., Walnut ranch.
>
> "While legally our agreement terminated January 1, 1949, the inability of getting alfalfa established the first year and the usual agreement on alfalfa being three years, I had intended to allow you to operate the ranch until January of 1950. In order to be fair to you I am going to pay you for the next ten months that is from March 1, 1949 at our agreed price of 1/36 of

$25.00 per acre or each month of the 3 yr. period, ie $208.33.

"This is not due to any dissatisfaction with you or your work, but solely from a business necessity. I will be at the ranch Saturday afternoon and Sunday, March 19th and 20th."

Plaintiff enclosed his check for $208.33 payable to defendant. Defendant returned the check. Plaintiff then gave defendant a check for $250 which the court, on substantial evidence, found defendant did not cash or accept as payment but returned to plaintiff.

On May 28, 1949, plaintiff took possession of the premises and removed alfalfa therefrom of the value of $1,482.82. During 1949 and prior to May 28, defendant received plaintiff's share of alfalfa from the property of the value of $1,205.71, and did not pay it to plaintiff.

Plaintiff sued for an accounting of all alfalfa removed from the property by defendant, for its value, and for $2,500 damages for two crops of hay alleged to have been destroyed by defendant after March 12, 1949. Defendant counterclaimed for $1,750 damages alleged to have been sustained by him by plaintiff's appropriation of the crop after May 28, 1949. Plaintiff had judgment for $464.30. He appeals, asserting he should have had more.

[1] Plaintiff argues that the $250 check was accepted by defendant and, as we understand him, that he is entitled to the value of all alfalfa cut after March 12, 1949, on the theory that the lease was terminated on that date. The evidence supports the finding that defendant did not accept the $250 check as payment. Defendant did not cash the check; he returned it. He testified that at the time he took the check he told plaintiff "I am entitled to at least the first crop, at least, because I been take care of the land." He also testified: "Q. When you accepted this check of $250 from Dr. Nye, you accepted the check on the basis that it was a cancellation of a three-year alfalfa lease? A. I took it as cancellation of the lease. I don't know what —He didn't say three years or what it was." It is apparent from an examination of defendant's testimony that he speaks in broken English and that he did not say that he took the check in cancellation of the lease, as plaintiff argues, but that he was merely repeating the effect of the question. Plaintiff testified that defendant objected to his terminating the lease, that he felt he was entitled to continue.

Plaintiff also argues that defendant received $2,453.35 for the alfalfa cut after March 12, 1949; that the court found plaintiff's share was $1,205.71 when it should have been $1,226.67, one-half of $2,453.35, a difference of $20.96. He also says the value of the alfalfa cut by plaintiff after May 28, 1949, was $1,177.28; that the court found one-half to be $741.41 when it should have been $588.64, a difference of $152.77. He says he should have had judgment for an additional $173.73 ($20.96 + $152.77).

[2-4] The principal contention of plaintiff is that the lease was terminated on March 12, 1949. He is in error. The term of the lease was until January 1, 1949. Defendant held over and retained possession for more than sixty days after January 1, 1949, without any demand for possession or notice to quit by plaintiff. If a tenant of agricultural land holds over and retains possession for more than sixty days after the expiration of the term without any demand of possession or notice to quit by the landlord, he is deemed to be holding by permission of the landlord, and is entitled to hold under the terms of the lease for another full year. Code Civ. Proc., sec. 1161(2). If plaintiff had the right under the lease to terminate it at will, as he argues, the lease created a tenancy at will, 15 Cal.Jur. 640, secs. 48, 49, and it could only be terminated by plaintiff's giving notice in writing to defendant in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than thirty days to be specified in the notice. Civ.Code, sec. 789. The notice here was an attempt to retroactively terminate the lease and was wholly without effect; consequently, defendant is entitled to half the value of all alfalfa cut after March 12, 1949.

[5] Plaintiff's calculations are erroneous. The value of the alfalfa taken by plaintiff after May 28 is $1,482.82, and not $1,177.28 as asserted by plaintiff, and one-half is $741.41 as found by the court, not $588.64 as stated by plaintiff. Plaintiff fails to take into account between sixty and seventy tons of alfalfa which plaintiff did not sell but used on the ranch. The evidence with respect to the amount received by defendant for the alfalfa he sold after March 12 is confusing. We cannot say that the court was not justified in finding that the value of one-half was $1,205.71. Plaintiff was awarded all he is entitled to.

The suggestion is made that the findings are inconsistent. This comes about by reason of the fact that there is a finding that on March 1, 1950, the lease continued in force for another full year by operation of law. In the light of the entire record it is evident that the figure "1950" is a typographical error and that the correct year is "1949". Plaintiff is not prejudiced.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

111 Cal.App.2d 926

WISHNICK v. FRYE et al.

Civ. 18633.

District Court of Appeal, Second District, Division 2, California.

June 24, 1952.

Rehearing Denied July 14, 1952.

Action for fraud committed by representations inducing plaintiff to invest money in a corporation. The Superior Court of Los Angeles County, Paul Nourse, J., rendered judgment for plaintiff and one defendant appealed. The Court of Appeals, Fox, J., held that the judgment must be reversed because of absence of a finding of scienter.

Reversed.

1. Fraud 🔑3

The elements of actionable fraud, which must be pleaded and proved, are a false representation of material facts, made with knowledge of its falsity and with intent to induce reliance thereon, upon which plaintiff justifiably relies to his injury.

2. Fraud 🔑13(2, 3)

To satisfy the requirement of scienter, as element of fraud, it may be established either that defendant had actual knowledge of untruth of his statements, or that he lacked honest belief in their truth, or that statements were carelessly and recklessly made, in a manner not warranted by information available to defendant.

3. Fraud 🔑66

In whatever fashion scienter or knowledge is adduced from evidence, it constitutes a vital element of cause of action for fraud and must affirmatively appear in findings to support judgment.

4. Fraud 🔑66

In action for fraud, finding that representation was made as representation of fact, was untrue, and was relied upon by plaintiff was insufficient in absence of findings that representation was made with knowledge of falsity or without reasonable belief in its truth or in manner not warranted by facts used as basis for statements.

5. Fraud 🔑66

Although under certain circumstances one element of fraud may be implied from other specific findings, mere findings of falsity without finding of scienter cannot sustain conclusion of fraud. Civ.Code, §§ 1709, 1710.

6. Fraud 🔑66

In action for fraud, omnibus finding that except as expressly found to be true, all allegations of complaint herein are untrue, was not an affirmative finding that there was no scienter, in view of other findings showing intention to hold that representation was made, but not in form alleged.

William C. Stein, William H. Levit, Los Angeles, for appellant.

Milton Wichner, H. H. Cholodenko, Los Angeles, for respondent.

FOX, Justice.

Plaintiff brought an action to recover damages for fraud and deceit against defendants Frye, Newmark and the Frye-Newmark Paper Company. From a judgment in favor of plaintiff for $14,180 defendant Newmark alone appeals.

The testimony discloses that plaintiff, a retired jeweler 61 years of age, advised his attorney, Mr. Mosk, that he desired to invest in a business that would provide him with both an income and employment suitable to his physical condition. Shortly thereafter Mr. Mosk introduced plaintiff to defendant Frye and appellant Newmark, who were the controlling directors, officers, and majority stockholders in the Frye-Newmark Paper Co., a corporation engaged in the business of paper jobbing. Frye and Newmark were interested in obtaining capital to undertake the manufacture of paper boxes, which would insure them a constant supply for their jobbing business. Negotiations were commenced with the owners and operators of a small paper box manufacturing company, a Mr. Barron and a Mr. Hirshon, as the result of which plaintiff, defendants Frye and Newmark, and Mr. Barron and Mr. Hirshon agreed to become associated in the organization of a corporation known as the State Container Corporation, its business purpose being the manufacture of paper boxes. During the preliminary negotiations, which eventuated in the formation of the State Container Corporation, plaintiff was represented by his attorney, Mr. Mosk, in all the significant phases of the transaction. Defendant Frye was authorized by appellant Newmark to act as his agent in arranging the deal.

The essence of the written agreement which was finally signed by the parties on January 11, 1949, provided that plaintiff was to invest $20,000 for "the establishment and initial operation of the State Container Corporation," of which $14,000 was a loan to the corporation and $6,000 was for the purchase of the stock allocated to plaintiff and defendants. Plaintiff was to get one-third of the stock issued, one-third was to go to Barron and Hirshon, and the remaining third to Frye, Newmark and Mr. B. Weiner, an officer of the Frye-Newmark Paper Co. The assets of the small company belonging to Barron and Hirshon were to be transferred to the new corporation, which Barron and Hirshon would manage and of which plaintiff would be an employee at a salary of $100 per week. It was agreed that Frye-Newmark Company would channel to the State Container Corporation substantially all of its business that fell within the plant capacity and price range of the new corporation.

It was understood that the new corporation would have to be equipped with a substantial amount of machinery, which it was originally estimated would cost between $9,000 and $12,000, to be purchased with the money provided by plaintiff. He was concerned about the need for operating capital to enable the new plant to produce its product, but he was assured by defendant Frye that the equipment, which Barron was to purchase in the east, would be financed, so that sufficient operating capital would be available out of plaintiff's investment. Frye also advised plaintiff that if the machinery could not be financed at the place of purchase it would be financed by a local bank or, if need be, by a cousin of his in the factoring business. Barron eventually found that he was obligated to pay cash for the machinery, which cost between $13,000 and $15,000, including crating and freight charges to Los Angeles. This equipment was placed in operation in March, 1949, but from the outset the State Container Corporation found itself unable to fill or accept all the orders placed with it because of insufficient working capital. Meanwhile, the Frye-Newmark Paper Company suffered financial difficulties in April, 1949, and made a formal assignment for the benefit of creditors on June 2, 1949, at which time it was indebted to the State Container Corporation for between $3,267 and $3,865. The operations of the State Container Corporation continued until June 1, 1949, when it discontinued business because of a lack of operating capital; it made an assignment for the benefit of creditors on July 21, 1949. Plaintiff filed a claim amounting to the sum he had invested with the assignee of the State Container Corporation and received a dividend of $2,820. The judgment in the sum of $14,180 comprises the $20,000 invested by plaintiff less the dividend noted, less the $3,000 paid for the purchase of plaintiff's share of the stock.

In bringing this action for damages caused by defendants' deceit, plaintiff alleged that he had been induced to invest his $20,000 in the paper box venture because of a series of fraudulent misrepresentations knowingly made by defendants with intent to deceive. Among such representations are the following: (1) the Frye-Newmark Paper Company was in a sound financial condition, with a sufficient backlog of orders for paper boxes to keep the State Container Corporation operating at capacity for one year with this business; (2) Frye-Newmark had enough orders on hand for the State Container Corporation to enable it to repay plaintiff's proposed loan in less than a year; (3) defendants Frye and Newmark controlled most of the paper box requirements of the local garment industry, which amounted to a volume sufficient to keep the new corporation's plant working at full capacity; (4) defendant Frye had a commitment from Ohrbach's to supply all their local requirements for paper boxes; (5) defendants Frye and Newmark would deliver to plaintiff a written guarantee against any loss up to $10,000. In its treatment of the representations hereinbefore enumerated, the court found that virtually all of them were false, but refused to predicate liability thereon because of its various findings that as to certain of the representations there was no justifiable reliance on plaintiff's part, as to another that it was a mere expression of opinion, and as to the remainder that they were not the proximate cause of any damage to plaintiff.

Judgment for plaintiff is based upon his allegation that defendant Frye falsely, knowingly and with intent to deceive, represented to him that the $20,000 which plaintiff was to invest was sufficient both to purchase machinery for the new corporation and provide the enterprise with adequate working capital and that Frye had arranged for a loan secured by the machinery in the event that the equipment required cash payment. As to this allegation the trial court found that "the representation made by the Defendants to the Plaintiff that in the event State Container Corporation was unable to purchase machinery and equipment upon terms of 25% down, that the defendants would be able to secure a loan upon said machinery equal to 75% of its purchase price, was made as a representation of fact, that it was untrue, that it was relied upon by the Plaintiff, and that the Plaintiff would not have made the advances hereinafter found to have been made had he known that said representation was untrue. The Court further finds that the inability of the Defendants to procure said loan was a proximate cause of the loss suffered by the plaintiff as hereinafter found." The trial court also made the omnibus finding "that except as hereinbefore expressly found to be true, all the allegations of the complaint on file herein are untrue."

[1–3] Of the several points urged by appellant in attacking the judgment, we believe that a consideration of his argument that the judgment cannot be sustained in view of the absence of a finding of scienter suffices to dispose of this appeal. The elements of actionable fraud, which must be pleaded and proved if a plaintiff is to prevail, consist of a false representation of a material fact, made with knowledge of its falsity and with the intent to induce reliance thereon, upon which plaintiff justifiably relies to his injury. Blackman v. Howes, 82 Cal.App.2d 275, 185 P.2d 1019, 174 A.L.R. 1004; Podlasky v. Price, 87 Cal.App.2d 151, 158, 196 P.2d 608. The omission of a single one of these elements in an action for deceit will normally prevent recovery. Gonsalves v. Hodgson, 38 Cal.2d 91, 237 P.2d 656; Cox v. Westling, 96 Cal.App.2d 225, 229, 215 P.2d 52. In order to satisfy the requirement of scienter, it may be established either that defendant had actual knowledge of the untruth of his statements, or that he lacked an honest belief in their truth, or that the statements were carelessly and recklessly made, in a manner not warranted by the information available to defendant. Gonsalves v. Hodgson, supra; 12 Cal.Jur. 724–725; Restatement of Torts, sec. 526. In whatever fashion scienter or knowledge on the part of the defendant is adduced from the evidence, it constitutes a vital element of plaintiff's cause of action, and must affirmatively appear in the findings to support a judgment for fraud. Hoffman v. Kirby, 136 Cal. 26, 29, 68 P. 321; Harding v. Robinson, 175 Cal. 534, 539, 166 P. 808; Hall v. Mitchell, 59 Cal.App. 743, 748, 211 P. 853. See also Boas v. Bank of America Nat. T. & S. Ass'n, 51 Cal.App.2d 592, 599, 125 P.2d 620.

[4, 5] In applying these rules to the finding which we have quoted, it becomes apparent that it is fatally deficient in its omission to find that defendant made the representation on which the judgment is founded either with knowledge of its falsity, or without a reasonable belief in its truth, or in a manner not warranted by the facts used as a basis for his statements. Although under certain circumstances one of the elements of fraud may be implied from certain other specific findings, as where the law may supply the intent to deceive from the fact that one has knowingly made false representations, Boas v. Bank of America T. & S. Ass'n, supra, 51 Cal. App.2d at page 598, 125 P.2d 620, or where the materiality of a representation may be implied from the circumstances of plaintiff's reliance thereon, Springer v. Angeles Credit Co., 44 Cal.App.2d 712, 113 P.2d 7, the mere finding that a representation of fact is false without a finding of the presence of the requisite element of scienter cannot sustain the conclusion of fraud in an action for damages based on deceit. Hoffman v. Kirby, supra; Williams v. Spazier, 134 Cal.App. 340, 345–348, 25 P.2d 851, citing Civil Code, secs. 1709, 1710.

Plaintiff earnestly argues that scienter is an "inconvenient requirement" which has been dispensed with in eight American jurisdictions as an element of actionable fraud. However, this view is supported only by a minority of jurisdictions, while the courts of this state continue to adhere to the majority rule. See 37 C.J.S., Fraud, § 25, p. 265. Plaintiff cites a number of California decisions which he asserts show a tendency to depart from the rule requiring scienter. An analysis of these cases discloses that they do not support plaintiff's contention. A group of these cases involves recission of land sales contracts by a vendee who was induced to purchase because of representations made by the vendor which were not warranted by the information available to him, Scott v. Delta Land & Water Co., 57 Cal.App. 320, 207 P. 389; Muller v. Palmer, 144 Cal. 305, 77 P. 954; Edwards v. Sergi, 137 Cal.App. 369, 30 P.2d 541, or where recission was granted the vendee on the theory that a vendor of land is presumed to know his own boundaries. Lombardi v. Sinanides, 71 Cal.App. 272, 235 P. 455; Del Grande v. Castelhun, 56 Cal.App. 366, 205 P. 18. In all of these cases the findings fully supported the complaint of fraud. Plaintiff refers us to only two cases involving deceit actions, but neither is authority for his position. In Gaffney v. Graf, 73 Cal. App. 622, 238 P. 1054, the court found that defendant's positive statements of fact to a purchaser were made without sufficient information on which to base a reasonable belief in their truth. In MacDonald v. De Fremery, 168 Cal. 189, 142 P. 73, a judgment in a deceit action in favor of defendants was reversed, partly for the reason that the evidence revealed that defendants must have known of the falsity of their statements.

[6] Although the judgment must be reversed because of the absence of a finding of scienter, we do not agree with defendant's contention that the court's omnibus finding "that except as hereinbefore expressly found to be true, all the allegations of the complaint on file herein are untrue" is an affirmative finding that there was no scienter. This finding relates back to plaintiff's allegations "that defendant Ben Frye *had arranged* a loan secured by the machinery and equipment to be purchased in the event that such purchase required a

cash payment" and that "the said representations * * * were false and were known to defendants to be false when made, and were made with the intent to deceive plaintiff." Since the court found Frye's representation to have been that "in the event State Container Corporation was unable to purchase machinery and equipment upon terms of 25% down, that the Defendants *would be able* to secure a loan upon said machinery equal to 75% of its purchase price," it is clear that the omnibus clause was not meant to apply to this modified representation, especially where it would have had the immediate effect of destroying the validity of the judgment. (Italics added.)

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

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111 Cal.App.2d 811

PEOPLE v. RUSHTON.

Cr. 4755.

District Court of Appeal, Second District, Division 3, California.

June 19, 1952.

Defendant was convicted by the Superior Court, Los Angeles County, Ellsworth Meyer, J., of unlawfully buying and receiving property knowing it had been stolen and he appealed from the judgment of conviction and from order denying new trial. The District Court of Appeal, Wood, J., held that evidence was insufficient to overcome presumption of prejudice in misconduct of jury foreman's leaving jury room and conversing with judge.

Judgment and order reversed.

1. Criminal Law 🔑1023(10)

An appeal from a sentence is not authorized and a purported appeal therefrom would be dismissed.

2. Criminal Law 🔑1163(6), 1174(4)

In criminal cases, whether separation of jurors without permission of court after they retire for deliberation constitutes prejudicial misconduct depends upon the circumstances in each particular case but there is a presumption of prejudice to defendant with burden to rebut on the prosecution. Pen.Code, §§ 1128, 1138, 1181, subd. 3.

3. Criminal Law 🔑927(1), 1163(6)

In prosecution for receiving stolen property, where jury foreman left jury room and talked to judge, evidence was insufficient to overcome presumption of prejudicial misconduct, particularly in view of instruction relayed by foreman to jurors, and new trial should have been ordered. Pen.Code, §§ 496bb, 1128, 1138, 1181, subd. 3.

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John H. Marshall, Peter R. Hornbrook and Ames Peterson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was accused in two counts of violating section 496bb of the Penal Code in that he unlawfully bought and received certain property knowing that it had been stolen. The jury found defendant guilty as charged. His application for probation was denied. Judgment was that he be imprisoned in the state prison. The notice of appeal recites that defendant appeals from the order denying his motion for a new trial and from the judgment and sentence. Since an appeal from a sentence is not authorized, the purported appeal therefrom will be dismissed. People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253.

Appellant contends, among other things, that misconduct on the part of a juror was prejudicial.

About midnight on January 27, 1951, a Motorola television set and 27 Series E War Bonds, the total maturity value of which was $725, were stolen from the home of Lamar Criss in Sun Valley. The television set had been purchased about one month prior to the time it was stolen, and the purchase price was $320. Mrs. Criss had a card upon which appeared the serial number, model and make of the set. Names of members of the Criss family appeared on the bonds as owner and co-owner. Jack Doss pleaded guilty to the burglary. According to his testimony he helped others remove articles from the Criss home, including the television set; he did not see the bonds taken but the next day there were some bonds in the front of the automobile; on the morning of June 28th he went to the Dugout Bar, 634 South Main Street, where appellant (a former police officer) worked as a bartender; he told appellant that he (Doss) had a friend who had a television set that he would sell.

Appellant testified that when Doss came to the Dugout he was accompanied by three men and a girl; Doss pointed to one of the men, known as "Jerry," and said that Jerry and his girl were breaking up and that they had a television they wanted to sell; he (appellant) thought they said they wanted $75 for it; appellant told Doss and Jerry that Casey, who was manager of a cafe owned by appellant on Hooper Street, might like to have the television; appellant called Casey on the telephone, and Casey said he thought television would stimulate business; appellant told Casey he would send "the party" down, and if the set was all right that Casey should buy it; after Doss and his companions left the Dugout, appellant saw an envelope on the bar; a man who was seated near the place where the envelope was said he thought that the girl left it; appellant glanced at the envelope and saw that there were bonds in it; he threw them on the back bar, and the next day he put them in the office.

Casey testified that Doss came to the cafe on Hooper Street with another man and a woman in an automobile; Casey then followed them in his automobile to a place in Huntington Park where they picked up the television, put it in Casey's automobile and returned to the cafe; Casey paid Doss $75; the television was placed in the front window of the cafe with its back toward the street.

On February 2, 1951, a police officer went to the cafe on Hooper Street and saw the television. He went outside and checked the serial number, which was visible through the widow, and found that it was the serial number of the television which had been stolen from the Criss home. According to the testimony of the police officer, he then went into the cafe and had a telephone conversation with appellant; appellant and Casey came to the cafe, and the officer told appellant that the television had been stolen; appellant said that he knew Doss and Jerry, and that they were drunks and bums; he (officer) asked appellant if he had bought or received anything else from Doss and Jerry and appellant said "no"; on the following day, February 3d, the officer went to the Dugout and told appellant he had come for the envelope that the burglars had left there, and appellant said, "You mean those war bonds?" The officer and appellant left the bar by way of the rear door and walked about 40 feet to a liquor storeroom in another building. Appellant unlocked the door, entered the room and picked up the envelope, which contained the stolen bonds, from a desk and handed it to the officer.

The jury retired to deliberate at 11:35 a. m. The courtroom and judge's chambers are on the eighth floor and the jury room is on the ninth floor of the Hall of Justice. Between the courtroom and the chambers there is a hallway. The only way to enter the jury room is by a stairway which extends from the hallway to the jury room. The foreman left the jury room, descended the stairway to the hallway, and had a conversation with the trial judge who was then proceeding from the courtroom to the chambers. About 2 p. m., in the judge's chambers (in the absence of the jury), the judge told the defendant, counsel for defendant, and the deputy district attorney that after the jury had been sent to the jury room, he proceeded in the trial of another matter; he left the bench about 12:10 p. m., and while going from the courtroom to his chambers he saw one of the jurors standing on the bottom step of the stairway; the juror said, "We want to ask you a question about the verdict in this case"; the judge replied, "You have no right to leave the jury room, get back up there and stay there, and if you wish to ask the Court about any instructions or any point of law or any other matter concerning the case, you should buzz for the Bailiff and I will bring you into court and answer any questions you might have"; the juror then stated, "We just wanted to know how many verdicts we were to render in this case"; the judge replied, "You have been furnished with proper forms. Now get back up in the jury room." Counsel for defendant then requested that the court declare a mistrial, which request was denied.

About 3:15 p. m. the jury returned to the courtroom and the verdicts of guilty on both counts were read. The judge then stated that he recognized the foreman of the jury as the juror who left the jury room. The foreman, thereupon being sworn, testified that about 10 minutes after the jury retired he left the jury room; he went to the judge's chambers "and told him we were in doubt about the case and whether we should find the defendant guilty or not guilty on one or two counts"; that "He [judge] said we had to find him guilty or not guilty on two counts"; he (foreman) then left the judge's chambers and went up to the jury room and repeated to the other members of the jury the conversation he had with the judge; he was gone from the jury room not more than a minute or two, and he saw no one and spoke to no one except the judge during his absence. Another juror, who was sworn, testified that no vote was taken by the jury during the time the foreman was out of the room.

[2] Whether the separation of jurors without permission of court, after they have retired for deliberation, constitutes prejudicial misconduct depends upon the circumstances in each particular case. See People v. Weatherford, 27 Cal.2d 401, 418, 164 P.2d 753.

Section 1128 of the Penal Code provides in part as follows: "After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed."

Section 1138 of the Penal Code provides in part: "After the jury have retired for deliberation, * * * if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called."

Section 1181 of the Penal Code provides in part: "When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial * * * 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented".

In a criminal case when there is a separation of jurors without permission of court, after they have retired for deliberation, there is a presumption of prejudice to the defendant. People v. Cross, 64 Cal. App. 443, 449, 221 P. 684. The burden is upon the prosecution to rebut that presumption. People v. Martin, 87 Cal.App.2d 581, 590–591, 197 P.2d 379.

[3] In the present case, after the jury had retired for deliberation, the foreman of the jury left the jury room, without permission of the court, and went down the stairway to the hallway between the courtroom and chambers. He remained away from the jury room and the other jurors a minute or two, according to one of his statements before the court. He also said that he left the jury room about 10 minutes after the jury had retired. Since the jury retired at 11:35 a. m., it

appears that he left the jury room about 11:45 a. m. The judge saw him in the hallway about 12:10 p. m. It thus appears from his statement as to when he left the jury room, and from the judge's statement as to when the judge saw him, that he was away from the jury room and the other jurors about 25 minutes. It is clear that the bailiff was negligent and that he failed to perform the duties required of him under his oath and by said section 1128 of the Penal Code with respect to keeping the jurors together. There is no explanation or any statement in the record regarding the whereabouts of the bailiff at the time the foreman left the jury room or during the one or two or twenty-five minutes the foreman was away from the other jurors. The judge's statement regarding the incident pertained, of course, only to what occurred during his brief conversation with the foreman. If the foreman was away from the other jurors about twenty-five minutes, as indicated by the above computation, there was considerable time, prior to the arrival of the judge in the hallway, as to which there was no explanation or statement by anyone regarding the conduct of the foreman. As indicated in People v. Adams, 143 Cal. 208, at pages 210–211, 76 P. 954, 66 L.R.A. 247, it would be impossible in almost every criminal case for a defendant to be in a position to establish the fact of prejudice as a result of the improper separation of jurors. It is obvious that a defendant in a criminal case must rely almost exclusively upon the bailiff, in the faithful performance of his duties, to safeguard the defendant's rights in the matter of keeping the jurors together during their deliberation. In view of the gross neglect of the bailiff herein and his failure to offer any explanation by way of accounting for the conduct of the foreman while he was separated from the other jurors, and in view of the bailiff's failure to offer any statement at all regarding the incident, it must be held, in the interests of according to defendant a fair and due consideration of his case by a jury, that the evidence was not sufficient to overcome the presumption of prejudicial misconduct as a result of the separation of the jurors. The judge's version of the incident and the foreman's version of it were at wide variance. Irrespective of what was said by the judge and the foreman in the hallway, it appears that the foreman told the other jurors, upon his return to the jury room, that the judge said that they "had to find him [defendant] guilty or not guilty on two counts." Even if the judge did not so advise the foreman, it is reasonable to believe that the absence of the foreman from the jury room would tend to add verity to his assertion that the judge had made that statement. Such purported advice was, of course, erroneous. The jurors could have understood therefrom that they could not find the defendant guilty on one count and not guilty on the other count. The incriminatory evidence herein was circumstantial. The evidence under the count regarding the bonds was not as strong as the evidence under the count regarding the television. Under the evidence the jury might have found the defendant not guilty on one count and guilty on the other count. The separation of the foreman from the other jurors, resulting in such a relayed instruction to the other jurors, constituted prejudicial misconduct. The defendant was entitled not only to a trial that was fair as a matter of fact, but he was entitled to a trial that appeared to be fair. Under the circumstances herein, it would seem that due regard for the rights of the defendant would have required the trial judge to promptly grant defendant's motion for a new trial.

By reason of the above conclusions, it is not necessary to discuss other contentions of appellant.

The judgment and the order denying the motion for a new trial are reversed. The purported appeal from the sentence is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

111 Cal.App.2d 766

PETERSON v. MORAN et al.

Civ. 18848.

District Court of Appeal, Second District, Division 1, California.

June 19, 1952.

Action by William E. Peterson against Arthur Moran, E. T. Hermann, and others. After quitting time and while traversing employer's premises for purpose of leaving work, plaintiff was given his pay and notified of his discharge. Plaintiff returned to foreman to learn reason for discharge, engaged in short argument with foreman, and was injured while still on premises. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgment on verdict for plaintiff, and E. T. Hermann appealed. The District Court of Appeal, Hanson, J., held that employee's injury was compensable under Workmen's Compensation Act only and not by court action.

Judgment reversed.

1. Workmen's Compensation ⚷52, 2084

Statutory requirement of liberality of construction of the Workmen's Compensation Act in favor of its applicability requires, where question is reasonably debatable, conclusion that injuries sustained by employee in course of his employment fall within purview of the Act and such rule is not altered because employee believes that he can establish negligence of employer and brings a civil suit for damages. Labor Code, § 3202.

2. Workmen's Compensation ⚷2084

If employee's injury falls within scope of the Workmen's Compensation Act, a proceeding thereunder constitutes employee's exclusive remedy. Labor Code, § 3202.

3. Workmen's Compensation ⚷730

The protective scope of the Workmen's Compensation Act applies not only while a servant is actively at work on master's premises, but also while he is properly traversing premises in going to, or coming from work, so long as his act involves no unreasonable delay. Labor Code, § 3202.

4. Workmen's Compensation ⚷730

The discharge of employee, after quitting time and while he was in act of traversing employer's premises for purpose of leaving work, terminated his further employment, but not his right to leave premises in capacity of employee under protective scope of the Workmen's Compensation Act. Labor Code, § 3202.

5. Workmen's Compensation ⚷2089

Where, after quitting time, employee was given his pay and notified of his discharge while he was traversing employer's premises on way home from work, employee did not unreasonably delay his departure by stopping to inquire of foreman why he had been discharged and by entering into short argument with foreman which consumed less than two minutes, and employee's remedy was under Workmen's Compensation Act only and not by action in court. Labor Code, § 3202.

6. Workmen's Compensation ⚷2089

Where employee was injured on employer's premises after quitting time and after employee had been notified of his discharge, employer was not estopped from contending that employee's only remedy was under the Workmen's Compensation Act. Labor Code, § 3202.

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Roland Maxwell, Paul H. Marston, Pasadena, for appellant.

Charles P. Lester, Pasadena, for respondent.

HANSON, Justice pro tem.

The question brought here for determination is whether the relation of master and servant between the parties here involved terminated instantly upon the discharge of the servant on the premises of the employer or whether the relation with respect to any injuries thereafter sustained by the servant continued until he left the premises, even though he did not proceed to leave them as quickly as he could have done. The answer, we think, depends entirely upon whether the servant's delay in quitting the premises was unreasonably prolonged. If it was not, then the injury the respondent sustained was compensable, as we view it, under the Workmen's Compensation Act only and not by any action in court, such as was instituted, and which resulted in a verdict and judgment in his favor.

On the date of his discharge the plaintiff was employed as a carpenter by the defendant Hermann, a building contractor doing business as the Hermann Company. At the close of his day's work the employee placed his personal tools in his carpenter kit as was his custom and privilege and started for a gate which was the only exit from the fenced premises. A short distance from the gate he met his employer's timekeeper who handed him two checks for his labor up to and including the day in question, although it was not payday, and then demanded his employee identification button. The employee promptly accepted the checks and handed over the button, but thereupon inquired why he was being discharged. The timekeeper replied he would have to ask the foreman, who at the moment was on the premises only some twenty feet away. The plaintiff thereupon walked over to the foreman and put the same question to him. The answer of the foreman that he was "no damn good" brought on a short running argument between the parties which led to an assault and battery by the foreman upon the plaintiff, after the latter had picked up his tool kit and dinner pail and started to resume his trip toward the exit. The sharp evidential controversy directed to the point whether the plaintiff turned back to speak to the foreman or otherwise detoured in his progress toward the gate we regard as of no materiality.

[1, 2] Under the express language of the Workmen's Compensation Act its provisions "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Labor Code, sec. 3202. This statutory injunction necessarily implies and requires that the courts shall conclude where the question is reasonably debatable that injuries sustained by persons injured in the course of their employment fall within and not without the purview of the statute. The wishes or desires of either the employee or employer are a false quantity and are not to be regarded. As was aptly stated in Freire v. Matson Navigation Co., 19 Cal.2d 8, 10, 118 P.2d 809, 810: "The rule [liberally construing the Act in favor of its applicability] is not altered because a plaintiff believes that he can establish negligence on the part of his employer and brings a civil suit for damages. If the injury falls within the scope of the act, a proceeding thereunder constitutes his exclusive remedy. * * *"

[3] In this state it is a well-established rule that the protective scope of the Workmen's Compensation Act applies not only while a servant is actively at work on the employer's premises, but also while he is properly traversing the premises in going to or coming from work so long as his act involves no unreasonable delay. Freire v. Matson Navigation Co., 19 Cal.2d 8, 118 P.2d 809; Pacific Indemnity Co. v. Industrial Accident Commission, 28 Cal.2d 329, 170 P.2d 18. The theory back of the rule is that the employment necessarily contemplates not only such a use of the premises but that during its use the servant is subject to the control of the employer.

[4, 5] The discharge of the employee after quitting time and while he was in the act of traversing the premises, in order to leave them, terminated his further employment as a carpenter for hire, but not his right to leave the premises—as he had come to them—in the capacity of an employee under the protective scope of the Workmen's Compensation Act. Gardner v. Stout, 342 Mo. 1206, 119 S.W.2d 790; Anderson v. Hotel Cataract, 70 S.D. 376, 17 N.W.2d 913; W. B. Davis & Son v. Ruple, 222 Ala. 52, 130 So. 772; Zygmuntowicz v. American Steel & Wire Co., 240 Mass. 421, 134 N.E. 385. In that view there remains for consideration merely the question whether the employee unreasonably delayed his departure by stopping to inquire of the foreman why he had been discharged and in entering into the short argument that ensued, which evidently consumed less than two minutes. Plainly, such a delay may not be classed as unreasonable, nor may it be said that the employee was not entitled to inquire why he was being discharged.

The cases cited by respondent are not in point or else on their facts are not persuasive. For instance, National Biscuit Co. v. Litzky, 6 Cir., 22 F.2d 939, 56 A.L.R. 853, upon which respondent leans so heavily merely held that in view of the language of the Michigan Workmen's Compensation Act and the holdings of the Michigan court interpreting the statute that it was required to hold that a discharged employee who was injured before she left the premises was not under the Act because the injury she sustained had no proximate causal connection with and was not the direct result of any duty of the employment. In that case, the employee was discharged at 11:30 a. m. and thereupon went to the employee's lunch room, ate her lunch and then took an elevator which fell to the basement injuring her. The interpretation placed on the Michigan statute by the Supreme Court of Michigan and necessarily controlling on the federal court in the case before it does not accord with the interpretation placed by our Supreme Court upon the California statute. In that connection it suffices to quote from 1 Honnold on Workmen's Compensation, sec. 6, as follows: "Contrary to the rule of strict construction prescribed by the Supreme Court of Michigan for the construction of the Act of that state, Compensation Acts, being highly remedial in character, though in derogation of the common law, should generally be liberally and broadly construed to effectuate their beneficent purposes."

[6] Respondent's contention that the employer is estopped to contend that plaintiff's only remedy is under the Workmen's Compensation Act because he discharged the plaintiff is patently without merit and requires no discussion.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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111 Cal.App.2d 807

BESEAU v. GEORGE et al.

Civ. 18855.

District Court of Appeal, Second District, Division 3, California.

June 19, 1952.

Action by Ann D. Beseau against Norma May George and others for damage sustained in intersection collision when defendant attempted to cross through boulevard on which plaintiff was travelling. On defendants' motion, the Superior Court, Los Angeles County, A. A. Scott, J., entered an order setting aside the verdict and judgment for plaintiff and granting a new trial on ground of insufficiency of evidence, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that since the evidence was sufficient to have sustained a finding by the jury that plaintiff had been guilty of contributory negligence, the order would not be disturbed.

Affirmed.

1. Automobiles 🔑244(11)

Evidence established that motorist who, in crossing through boulevard, had right angle intersection collision, had been guilty of negligence. Vehicle Code, § 552.

2. Automobiles 🔑204

Although defendant motorist had duty to yield right of way to vehicles which were so closely approaching intersection on through highway as to constitute an immediate hazard, plaintiff motorist was not excused from exercise of ordinary care under circumstances that were known or should have been known to her. Vehicle Code, § 552.

3. Automobiles 🔑206

A motorist has the right to expect driver of an approaching vehicle to obey the law, and is not necessarily negligent in failing to anticipate danger that would come only through violation of law, but requirements of due care do not permit him to be indifferent to movements of such vehicle, and he must exercise ordinary care to observe whether driver of other vehicle is proceeding in violation of law, and he must conform his own conduct to standards of common prudence and caution.

4. New Trial ⚷72
Trial ⚷139(1), 140(1)

It is the duty of the trial judge, as it is the duty of the jury, to judge of credibility of witnesses and weight of evidence, and it is court's duty to grant new trial if convinced that verdict is contrary to preponderance of evidence.

5. Appeal and Error ⚷1015(1)

A reviewing court will not reverse an order granting new trial for insufficiency of evidence unless as matter of law evidence was insufficient to sustain verdict in favor of moving party.

6. Automobiles ⚷244(43)

In action arising out of right angle intersection collision, evidence was sufficient to have sustained finding by jury that plaintiff motorist, who had right of way, had been guilty of contributory negligence in failing to do anything to prevent the accident. Vehicle Code, § 552.

7. Appeal and Error ⚷1015(1)

Order setting aside verdict for plaintiff and awarding new trial of automobile case would not be disturbed where evidence was sufficient to have sustained finding by jury that plaintiff had been guilty of contributory negligence.

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E. Arnold Oppenheim, Los Angeles, Frank Alef, Los Angeles, of counsel, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff appeals from an order granting a new trial after she had won a verdict and judgment of $15,000 for injuries suffered in a collision of two automobiles. The motion was granted upon the sole ground of insufficiency of the evidence.

The collision occurred in the intersection of Third Avenue, a north and south street, and Venice Boulevard, an east and west street. Tracks of the Pacific Electric Railway are located in its right of way on Venice Boulevard. The right of way is 34 feet wide, the portion of the boulevard north of the right of way is 28 feet wide, and the portion south of the right of way is of the same width. Third Avenue is 40 feet wide. The portion of Venice Boulevard north of the tracks is exclusively for westbound traffic and that portion south of the right of way is exclusively for eastbound traffic. There are boulevard stop signs controlling traffic on Third Avenue at the intersection, but none on Venice Boulevard. The accident happened about 10:00 o'clock in the morning. It had been raining earlier but the day was clear and the visibility good. Defendant drove south on Third Avenue into the intersection and had crossed the Pacific Electric tracks when she collided with the automobile of plaintiff. The front of defendant's car struck the left side of plaintiff's car when the two cars were some 24 feet east of the west curb line of Third Avenue and 14 feet north of the south curb line of Venice Boulevard. Defendant testified she made a stop before entering the intersection; she put her car in first gear and proceeded slowly onto the tracks where she put it in second gear; she looked and kept looking to the east, west and south, and saw no vehicles approaching from any direction; at the time of the collision she was looking straight ahead and did not see plaintiff's car until a moment before the collision; she was traveling only about five miles an hour when the collision occurred, and stopped her car immediately. Mr. McDonald, a witness for plaintiff, estimated the speed of defendant's car, at a point some distance north of the intersection, at 25 miles an hour. He did not see it enter the intersection. Plaintiff testified she was traveling 25 miles an hour; when she was about 35 feet west of the intersection she saw defendant's car about 15 feet north of the intersection; defendant was traveling very fast, at least 45 miles an hour, and did not make a boulevard stop; she watched her on that account; defendant could not have stopped at the intersection; she did not know whether defendant was going to stop and that is the reason she watched her; at the time defendant's car reached the car tracks it was going faster than plaintiff's car—about 30 or 32 miles an hour; defendant gave a signal by raising her hand high, indicating an intention to turn to the right on the south side of Venice Boulevard and plaintiff thought she was going to make that turn; plaintiff "checked" the intersecting streets, and when she turned her head to the left defendant's car was but a few feet away.

Officer Brown testified for the defendant that he interviewed plaintiff at the scene of the accident; plaintiff told him she first saw defendant's car as it entered the railway tracks; she said nothing about having seen the car fail to make a boulevard stop; she said she was traveling about 30 miles an hour and that when she saw the other car she thought it was going to stop and she did not slow down because she knew she had the right of way.

Defendant denied she had signaled for a righthand turn, and testified that she knew she could not turn right on the south half of Venice Boulevard; that she intended to continue straight south.

Officer Smith testified that he interviewed defendant at the scene of the accident; that she said she thought she was traveling about 15 miles an hour and did not have time to apply her brakes after she saw plaintiff's car.

[1-3] The negligence of defendant was established by her own testimony. There was nothing to obstruct her view of plaintiff's approaching car. It is evident that she did not look for vehicles approaching from the west; this is more reasonable than to believe that she did look and failed to see a vehicle that was in plain sight. We do not see how a new trial could have been granted on the theory that the court was in doubt as to defendant's negligence. It is not so clear, however, that plaintiff was free from negligence. Although it was the duty of defendant to yield the right of way to vehicles which were so closely approaching the intersection on the through highway as to constitute an immediate hazard, Vehicle Code, sec. 552, this did not excuse plaintiff from the exercise of ordinary care under circumstances that were known or should have been known to her. While one has the right to expect the driver of an approaching vehicle to obey the law, and is not necessarily negligent in failing to anticipate danger that would come only through violation of law, the requirements of due care do not permit him to be indifferent to the movements of such other vehicle. He must exercise ordinary care to observe whether the driver of the other vehicle is proceeding in violation of law, and he must conform his own conduct to standards of common prudence and caution. Hendricks v. Pappas, 82 Cal.App.2d 774, 187 P.2d 436. If, as plaintiff testified, defendant failed to make a boulevard stop and entered the intersection at a speed of 45 miles per hour her conduct was both reckless and unlawful. Even if she was traveling at only 30 or 32 miles per hour as she entered upon the railway tracks this continued speed in crossing an intersection was dangerous. Plaintiff testified that she was aware of the reckless manner in which defendant was driving and yet she took no precautions to avoid an accident. In view of what she had observed, her statement to Officer Brown that she made no effort to slow down because she knew she had the right of way indicated an attitude of mind not entirely consistent with the exercise of due care. Although the jury determined that she was justified in failing to slow down, this was not the only reasonable inference that could have been drawn from her testimony. While she estimated her distance from the intersection at 35 feet when she saw defendant's car 15 feet north of the intersection, it is clear that if she did observe defendant's car in that location she, plaintiff, must have been considerably more than 35 feet from the intersection, and probably far enough away to have enabled her to come to a stop before reaching the intersection.

[4-7] It is the duty of the trial judge, as it is the duty of the jury, to judge of the credibility of the witnesses and the weight of the evidence. It is the court's duty to grant a new trial if convinced that the verdict is contrary to a preponderance of the evidence. Tice v. Kaiser Co., 102 Cal.App.2d 44, 226 P.2d 624; Jones v. City of Los Angeles, 104 Cal.App.2d 212, 217, 231 P.2d 167. A reviewing court will not reverse an order granting a new trial for insufficiency

of evidence unless as a matter of law the evidence was insufficient to sustain a verdict in favor of the moving party. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465; Williams v. Field Transportation Co., 28 Cal.2d 696, 171 P.2d 722; Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689. The evidence here was sufficient to have sustained a finding by the jury that plaintiff was guilty of contributory negligence. The order therefore may not be disturbed.

The order granting a new trial is affirmed.

WOOD and VALLÉE, JJ., concur.

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112 Cal.App.2d 57

BRYON v. MacDONALD.

Civ. 15175.

District Court of Appeal, First District, Division 2, California.

June 27, 1952.

Action by wife against divorced husband for sale of certain property alleged to have been community property and for division of the proceeds therefrom. The husband filed a cross-complaint alleging that at time of separation of the parties, plaintiff had agreed to divide the community property. The husband died before trial and his executrix was substituted. The Superior Court, City and County of San Francisco, Edward P. Murphy, J., quieted title in the defendant and plaintiff appealed. The District Court of Appeal, Dooling, J., held that the evidence was sufficient to show that plaintiff had entered into a settlement agreement.

Affirmed.

1. Evidence 🔑587

Circumstantial evidence will support a finding against direct testimony to the contrary.

2. Evidence 🔑213(1)

An offer of compromise may ordinarily not be shown in evidence, but where purpose of evidence of the offer is to show an acceptance thereof, admission of evidence is proper.

3. Husband and Wife 🔑278(1)

In wife's action against former husband for sale of certain property alleged to have been community property and for division of proceeds therefrom, wherein husband in cross-complaint alleged that wife had accepted oral property settlement agreement, it was not necessary to plead or prove facts showing that settlement agreement was fair and equitable or for court to so find, in view of rule that where consideration agreed on in a contract has been accepted, the acceptance constitutes a waiver of any claim of inadequacy.

4. Appeal and Error 🔑1050(1)

In wife's action against former husband for sale of property alleged to have been community property and for division of proceeds therefrom, wherein husband in cross-complaint alleged that wife accepted oral property settlement agreement, action of court in permitting a former attorney of wife to testify to statements of wife made to him of value that she placed on real property at time of alleged property settlement, although in violation of privilege, was not prejudicial in view of fact that court found that wife had accepted full consideration for her promise.

5. Husband and Wife 🔑278(1)

In wife's action against former husband for sale of certain property alleged to have been community property and for division of proceeds therefrom, evidence was sufficient to show acceptance by wife of oral property settlement agreement.

6. Husband and Wife 🔑278(1)

In wife's action against former husband for sale of certain property alleged to have been community property and for division of proceeds therefrom, wherein husband in cross-complaint alleged that wife had orally agreed to divide community property at time of their separation, where it appeared that settlement agreement was conceived by wife and was not the result of any suggestion or act on part of husband, trial court was justified in concluding that any presumption of undue influence or fraud had been rebutted.

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Delany, Fishgold, Werchick & Minudri, San Francisco, for appellant.

Erskine, Erskine & Tulley, J. Benton Tulley, San Francisco, for respondent.

DOOLING, Justice.

In 1916 the plaintiff and appellant married Charles Barnes. In 1945 she obtained a decree of divorce from Barnes in Nevada and shortly thereafter married her cousin Bryon. In 1949 she commenced an action against Barnes for the sale of a parcel of real property standing of record in her name and that of her former husband together with some miscellaneous tools claimed to have been community property and the division of the proceeds. Barnes filed a cross-complaint in which he alleged that at about the time of their separation in 1945 he and appellant had orally agreed to divide their community property, she to get most of the household furniture and an automobile and he the tools. It was further alleged that in consideration of the payment by him to her of $2000, which had in fact been paid, she agreed to quitclaim and convey to him her right, title and interest in the real property. Before the trial Barnes died and his executrix was substituted as defendant and cross-complainant.

[1] The court found this agreement to have been made and that it was fully performed by Mr. Barnes and quieted title in the cross-complainant to the real property and tools. On her appeal from this judgment plaintiff argues that there is no evidence of the oral agreement as found. There is no direct evidence of such agreement except the testimony of a self-serving statement of Barnes elicited on cross-examination of the respondent executrix. However respondent introduced certain letters written by an attorney who represented appellant in 1945 offering to settle the property rights of the parties on that basis and cancelled checks from Barnes to appellant extending over a two year period in 1945 and 1946 aggregating more than $2000. While appellant testified that these checks were in payment of an antecedent debt to her mother and denied that she had ever entered into a settlement agreement with Barnes, we cannot say that the trial judge could not reasonably draw the inference that an oral agreement had been made as suggested in the letters from appellant's attorney and that the cancelled checks were in satisfaction thereof. We need hardly repeat the settled rule that circumstantial evidence will support a finding against direct testimony to the contrary. Gray v. Southern Pacific Co., 23 Cal.2d 632, 641, 145 P.2d 561. This rule seems particularly apposite where the death of the other party to the transaction deprives the court of the benefit of his testimony.

[2] Although an offer of compromise may ordinarily not be shown in evidence, here the purpose of the evidence of the offer was to show its ultimate acceptance, a perfectly proper procedure.

[3] It was not necessary to plead or prove facts showing that the agreement was fair and equitable or for the court to find them since it is "well settled that where the consideration agreed on in a contract has been accepted, the acceptance constitutes a waiver of any claim of inadequacy." Peters v. Binnard, 219 Cal. 141, 150, 25 P.2d 834, 838; Westwood Temple v. Emanuel Center, 98 Cal.App.2d 755, 759, 221 P.2d 146; Conway v. Moore, 70 Cal.App.2d 166, 174, 160 P.2d 865; Hercules Glue Co. v. Littooy, 25 Cal.App.2d 182, 187, 76 P.2d 700; Lerma v. Flores, 16 Cal.App.2d 128, 131, 60 P.2d 546.

[4] The attorney whose letters admitted in evidence contained the offer of property settlement was allowed to testify to statements of appellant made to him of the value that she placed on the real property at that time. No prejudice resulted from this violation of the privilege in view of the rule last above stated since the court found that she had accepted the full consideration for her promise and the value of the property thereby became immaterial. It also appears in evidence that appellant had stated to re-

spondent executrix that she and this attorney had "arrived at the conclusion that $1800 would be about right for her community interest in the property."

[5, 6] The trial court found that in making the agreement the parties acted "after being independently advised by attorneys of their own choice", there is no evidence that appellant was not fully advised of her rights and the offer of settlement came from her not her husband. "Since the agreement was conceived by her and not the result of any suggestion or act on the part of her husband, the trial court was justified in concluding that any presumption of undue influence or fraud had been rebutted." In re Estate of Wieling, 37 Cal.2d 106, 110, 230 P.2d 808, 810.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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111 Cal.App.2d 695

PEOPLE v. KRISTY.

Cr. 4783.

District Court of Appeal, Second District, Division 1, California.
June 17, 1952.

Hearing Denied July 17, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Philip H. Richards, J., of murder in the first degree, and his motion for new trial was denied, and he appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1144(13), 1160

On appeal in a criminal case following a conviction, the evidence must be considered in the light most favorable to the prosecution, and it is only when it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court, that verdict returned by jury and approved by trial judge on motion for new trial, may be set aside upon the ground of insufficiency of the evidence.

2. Homicide 🔑173

In prosecution for murder wherein there was testimony that victim had met death by shooting, and that defendant possessed a small gun, admission of testimony concerning blood spots in victims automobile and of finding therein a cartridge case corresponding in calibre with gun of defendant, was proper as tending to show a means and method employed in the commission of the crime.

3. Criminal Law 🔑338(1)

The relevancy of proffered proof in criminal case depends upon whether it tends to sustain a legitimate hypothesis of guilt of defendant, and, as general rule, an incidental fact is relative to the main fact in issue when, in accord with the ordinary course of events and common experience, existence of the incidental fact, standing alone or when considered in connection with other established facts, tends in some degree to make the main fact in issue certain.

4. Criminal Law 🔑351(8, 10)

Deception, falsehood and fabrication by defendant as to facts of criminal case are treated as tending to show consciousness of guilt, and are admissible on the same theory as flight and concealment of person charged with crime.

5. Criminal Law 🔑384

Where there was evidence in murder prosecution that killing had resulted from shooting with .25 calibre pistol, and that killing had occurred in deceased's automobile, objections to admission of evidence of .25 calibre cartridge case and blood stains found in automobile on ground that time of discovery was too remote from date of crime, or because defendant was not in actual control of automobile at time of discovery, merely went to probative force or weight of the evidence, and did not militate against its admissibility.

6. Criminal Law 🔑1170½(6)
Witnesses 🔑277(2)

In prosecution for murder, wherein deputy sheriff had testified concerning imprisonment of defendant in New Jersey for forgery, a crime which there was a high misdemeanor, subsequent cross-examination of defendant concerning such high misdemeanor, though improper, was not prejudicial error, when objection thereto was promptly sustained and jury was instructed to disregard questions.

7. Criminal Law 🔑1169(5)

In prosecution for murder by defendant of his stepdaughter, wherein defendant had testified, without objection, that he had been having sexual intercourse with victim during past year, and that 16 year old stepson had been present, no prejudicial error occurred when defendant was asked on cross-examination concerning presence of stepson at such time as contributing to his delinquency when objection was sustained and answer stricken, and defendant did not request court to instruct jury to disregard answer.

8. Criminal Law 🔑1037(2)

Where misconduct of prosecuting attorney is charged, in absence of proper request for court to instruct jury to disregard such misconduct, it cannot be reviewed on appeal.

9. Criminal Law 🔑1037(2)

Where question to defendant in murder prosecution whether he knew that it was a felony for an ex-convict to have a gun was objected to and objection sustained, but defendant failed to request that court instruct jury to disregard the question, such claimed misconduct could not be considered on appeal.

10. Criminal Law 🔑1186(4)

Evidence in murder prosecution was sufficiently convincing as to defendant's guilt to warrant conclusion that jury's verdict of guilt would not have been otherwise had certain allegedly improper questions not been asked, and to bring into operation constitutional provision precluding reversal unless error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4½.

11. Criminal Law 🔑409, 516

Where defendant in murder prosecution did not admit at any place in statement given to Colorado officers who apprehended him that he had done any wrongful or unlawful act in connection with murder for which he was indicted, statement was not a "confession", but was an "admission", and no foundation of voluntariness need have been laid by prosecution for its allowance in evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Admission" and "Confession".

12. Criminal Law 🔑406(3)

In prosecution for murder, wherein it appeared that defendant had made statement to chief of police of Colorado town in which defendant was apprehended, and that contents of such statement had been transmitted by telephone to Los Angeles Chief of Police, such statement, constituting an admission and not a confession, was properly admitted in evidence after testimony that defendant had voluntarily admitted to witness that defendant had made such statement, even though defendant contended that prior statement was in whole or in part false.

13. Homicide 🔑232

In prosecution for murder, evidence showing that the killing was the result of a wilful, deliberate and premeditated intent to kill need not be shown by direct evidence, but may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such conclusion.

14. Homicide 🔑332(2)

If ultimate fact found in trial court that appellant was guilty of murder of first degree is supported by substantial evidence in the record, that determination must be upheld by appellate court.

15. Homicide 🔑253(1)

Evidence sustained conviction for murder of the first degree.

◆

Robert B. Heggen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an indictment returned by the Grand Jury of Los Angeles County and an amendment thereto, defendant was accused of the crime of murder. It was also alleged that he suffered a prior conviction of the crime of forgery, a felony, for which he served a term in the state prison. To the charge contained in the indictment as amended, defendant entered pleas of not guilty and not guilty by reason of insanity. He denied the prior conviction.

Trial was had before a jury which returned a verdict finding defendant guilty of murder of the first degree and recommending that he be punished by imprisonment in the state prison for the term of his natural life. The jury also found that the allegation of a prior conviction was true. The plea of not guilty by reason of insanity was withdrawn by defendant. A motion for a new trial was denied and sentence of imprisonment in the state prison for life was pronounced against defendant.

From the judgment of conviction and the order denying his motion for a new trial, defendant prosecutes this appeal.

[1] Before epitomizing the factual background which gave rise to this prosecution, we pause to note appellant's claim that where there is a conflict in the evidence the testimony given "on both sides" should be narrated. However, the rule is that on appeal in a criminal case following a conviction, the evidence must be considered in the light most favorable to the prosecution. This, for the reason that an appellate tribunal is not authorized to retry the cause. It is the function of the jury in the first instance, and of the trial court after verdict to determine what facts are established by the evidence. It is only when it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the trial court, that the verdict returned by the jury and approved by the trial judge on motion for a new trial, may be set aside upon the ground of insufficiency of the evidence. As was said in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, "We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict".

With the foregoing rules in mind and after reading the voluminous record herein, covering more than 1,000 pages, we regard the following as a fair résumé of the evidence as reflected by the record herein, and sufficient for an understanding of the points presented for our consideration.

The record reveals that in 1937 defendant and Margaret Frances Thomas commenced living together as man and wife, and in December, 1937 a daughter, Helen, was born to them. However, defendant denied the truth of this testimony given by Helen's mother. After the birth of Helen the defendant and the mother of the former were known as Mr. and Mrs. Kristy, although the defendant's name was Krystopik.

In 1940 or 1941 Mrs. Kristy's two children, who were not the children of defendant, named Betty and Raymond, came to live with them. In this regard defendant's testimony was that the two children just mentioned had lived with foster parents for several years, were grossly neglected, and that he was responsible for and insisted upon bringing the children into his home. All of them continued to live together until April, 1950, when Mrs. Kristy left their home in Downey, California, at the request of defendant. She left the three children with defendant when she moved away, but Helen went to live with her in June of 1950. During the year following her departure from the home, Mrs. Kristy did not see her children Betty or Raymond, although she talked to Betty on the telephone.

In June, 1951 defendant and Betty asked Mrs. Kristy to return to the family home, which she did on June 15, 1951. It appears from the record that about a week before Mrs. Kristy returned Betty had told her that the defendant had "had things to do" with her. Betty was then 20 years old.

On June 20, 1951, a few days following her return, Mrs. Kristy received her paycheck. When she arrived home defendant, who was there, commenced a discussion with her as to what bills she should pay and their conversation led into an argument during which defendant told Mrs. Kristy about "having things to do with Betty". Testimony reveals that defendant said, "Well, * * * I'll tell you now, * * * I have screwed her, * * * I intend to screw her as long as she is in this house". This conversation is denied by defendant. There is in the record evidence that Mrs. Kristy then said, "Oh, no, you won't," and that defendant said, "Well, pack your damned clothes and get out of here than". Mrs. Kristy told defendant that she would. Later, when Betty came home from work Mrs. Kristy talked to her about what the defendant had stated, saying to Betty, "He said, Betty, that he had screwed you and he was going to keep on screwing you as long as you was in this house." That Betty, according to the witness, "turned at him (defendant) and her blue eyes turned black" and that she said, "You won't Daddy, * * * you are not touching me another time." That defendant then said, "You all can pack your clothes and move". According to the testimony of Mrs. Kristy she said that they would do so but that when defendant discovered that all of the children were going to go with their mother, he asked her not to leave, with which request she complied.

On June 20, 1951, after Mrs. Kristy had agreed to remain, she and defendant had a talk. He said, "If Betty leaves this house I'll kill her". Mrs. Kristy testified that she told him he wouldn't "get by" with it and he said that he knew that, but that he would kill her and that if Mrs. Kristy interfered he would kill her also. On June 22, 1951, defendant was drinking, and he kept repeating that he was going to kill Mrs. Kristy and Betty.

On June 23, 1951 Mrs. Kristy and the children were going to a square dance and she asked defendant to go. He stated that he had a telephone call to make and whether or not he went would depend on the outcome of the telephone call. However, he refused to telephone unless the others went out to the automobile. Mrs. Kristy, listening from the outside, heard defendant say over the telephone, "Well, my son likes to shoot too." Mrs. Kristy had seen defendant tear out an advertisement from a newspaper that afternoon and the next day after hearing the foregoing telephone conversation she obtained an unmutilated copy of the paper and compared it with the one from which the advertisement had been torn. She thereby discovered that the advertisement which had been torn out was one which offered guns for sale. On June 23, someone who gave his name as "Frank Kristy" called a telephone number listed in an advertisement in the paper and asked to buy a small gun. During the week following June 24, 1951, defendant threatened Mrs. Kristy and Betty practically every other night and upon one such occasion told Betty that she did not have long to live.

On July 3, 1951, defendant said that he was going to make it a "real Fourth of July"; that it was not going to be "with just firecrackers". When Mrs. Kristy asked defendant what he meant, the latter replied that he was going to kill Betty on the Fourth of July, and when Betty came in that night defendant told her she did not have very much longer to live. After the girls had retired for the night defendant remained seated on the side of the bed occupied by Mrs. Kristy and himself. He kept repeating that he was going to kill Betty. Helen got up and went out to the kitchen. Upon her return defendant asked her three times what she had and she finally said, "Well, Daddy, * * * I have got a butcher knife. If you dare lay your hands on Betty, * * * I'll cut your throat from ear to ear". Defendant then accused Mrs. Kristy of influencing the children against him and when she said for that he was himself responsible, he stated, "Well, I guess I'll just have to do away with the whole family". It is in evidence that defendant, during that evening, was drinking.

On the morning of July 4, Mrs. Kristy discovered both telephone wires in the house had been cut. Defendant taped them together, saying, "Well, I must have done it".

On July 5, 1951, Mrs. Kristy, Betty and Helen were planning to swim at Long Beach. After dinner they went to Bellflower to purchase a suit for Helen. Upon their return Mrs. Kristy sat in the dining room altering the buttons on the suit when the girls started to take care of the dishes in the kitchen. Mrs. Kristy mentioned that she was going to take the girls swimming. Defendant was sitting in the living room and without saying anything he went to the bedroom or back porch and returned to the kitchen. Thereupon, he pulled a gun out of his shirt and said, "You didn't think I had a gun, did you?" Mrs. Kristy jumped between defendant and Betty, whereupon the former told her to get out of the way. He kept the gun pointed at the three of them. The testimony was that it was a small gun and that defendant's hand covered most of it. Mrs. Kristy said, "Frank, * * * for God's sake. Don't do anything drastic". Whereupon defendant said, "Well, that son-of-a-bitch there should be pleading for her life, not you". Helen stepped toward him and defendant told her to get back, that he would just as soon kill her as anybody else. He went to the service porch and motioned with the gun for the women to come out there. They went out and while he kept the gun pointed at them defendant reached into his bedroom and got Betty's purse which he handed to her together with her keys. He then told them to go out through the front of the house. He declared that if Betty did not go with him, three dead bodies would be found there. The women complied, with defendant walking behind them armed with the gun. When they reached the living room defendant pushed Betty on ahead of him through the front door. As he went out the front door defendant put the gun back in his shirt, saying that if Mrs. Kristy called the "cops", and if a "cop" drove up behind or beside him he would shoot Betty right on the spot.

According to her testimony, Mrs. Kristy was begging defendant not to take Betty but he said, "I'm going to make her drive me out here ten miles * * * I will kill myself so she can see it * * * then I will let her come back". With defendant following her, Betty walked through the front gate. Mrs. Kristy went to the gate but defendant turned around and said, "If you come through that gate * * * I'll shoot you right here". Mrs. Kristy asked if defendant would let her kiss Betty goodbye, but he told her not to go through the gate. Turning to Betty he directed her to get into her automobile. She got in on the driver's side. The vehicle was a light green Ford with license number 9Y7578. Defendant got in on the other side of the car. Betty started the motor and they drove away.

Betty did not take any clothes with her. While defendant was pointing the gun at her she said nothing. He and Betty drove away about five minutes before 7 o'clock and Mrs. Kristy notified the police about two and a half hours later. She never again talked with or saw Betty alive.

On July 9, 1951, in response to a telephone call, Lloyd Bell, Deputy Sheriff of Clark County, Nevada, went to McCarren Field, which is located on the road from Los Angeles to Las Vegas, Nevada. There he found the green Ford automobile and license number belonging to Betty. The automobile was impounded and on July 14, Mr. Bell searched it. He found an expended cartridge on the ledge between the back seat and the back window. He put the cartridge in an envelope and subsequently delivered it to Deputy Sheriff Lacey.

About 7 o'clock on the night of July 13, 1951, Richard Hill, his wife and three children, were driving north on Highway 6 in the direction of Palmdale and Mojave, the latter of which is located in Kern County. They parked beside the road to permit the children to drink some chocolate milk. After running up and down the hill for some little time, one of the girls ran to her father and said there was a "dead man in the gully". The father thought the child was mistaken until the other girl and the boy came to him with the same information. Mr. Hill left his automobile, walked to the top of the gully and looked down. He observed a body. Placing the children back in the automobile he drove away to find a telephone or highway patrol car. About a mile down the road he saw Officer Nelson, a highway patrolman, stop beside the road in his car, and Mr. Hill reported the matter to the officer. Both Mr. Hill and the officer drove back to the place where the former had first stopped and he showed the body to the officer. The body was located in the ravine about 15 feet from the top thereof. The head was lying northwest, and the right hand and right arm were draped over a barrel.

Going down into the gully about four feet, Officer Nelson there found a silver cigarette lighter and silver cigarette case which belonged to the defendant and which he had with him when he left his home on the night of July 5, 1951. The initials "F. W. K." were on the lighter. There was a pair of women's shoes lying near a bush 1 or 2 feet from the top of the gully, 5 feet to the east of the lighter and case, and 8 to 10 feet from the body. The shoes were the ones Betty had worn the night of July 5 when she drove away with defendant. Officer Nelson notified the sheriff's office in response to which some deputy sheriffs arrived. One of them, Officer Manley, went down into the gully to determine if there was anything which would indicate a homicide. On his way down he found the beads which Betty had on when she left home on July 5, lying just above the body. He saw no gun. The body was in a state of decomposition and there were indications that it had been there for several days. One of the officers picked up the shoes and noticed there was dried mud on them, more noticeable on the left than the right one. A ring and wristwatch were taken from Betty's body.

On July 14, 1951, an autopsy on the body of Betty revealed that the immediate cause of her death was a gunshot wound of the head. From the right posterior portion of the brain the autopsy surgeon took a deformed copper-jacketed bullet of small calibre which was turned over to the sheriff's crime laboratory along with the hands from the body. Deputy Sheriff Thomas of the sheriff's crime laboratory made a finger print impression of the right thumb of the hand which was delivered to him. This print was compared with that on a driver's license bearing the name of Betty Jean Hansen and the conclusion was reached that they were the prints of the same person.

W. W. Thomas, who qualified as a ballistics expert, examined the bullet and formed the opinion that it was a .25 calibre bullet, manufactured by Western Arms Company, Western Cartridge Company, or Winchester Repeating Arms Company, and that it showed an ejector mark of the type made by an automatic pistol.

On July 17, 1951, George W. Lacey, a Los Angeles County Deputy Sheriff, went to Las Vegas, Nevada. He examined the aforesaid light green Ford. It had the appearance of having been recently washed. On the right-hand door near the center, 4 or 5 inches from the bottom, he found a reddish-brown stain. He removed the stain and saved it for examination. There were 5 reddish-brown spots in the middle section of the back seatcover near the front edge thereof. He removed the seatcover for examination. On the inside of the righthand door there was a reddish-brown spot which appeared "to have dripped with a very small spatter". This he also removed for examination. There were several spots on the front floormat, which spots appeared to have been caused by the dripping of a liquid. Mr. Lacey took the floormat with him. The latter also received an envelope which contained an exploded shell which he later gave to Mr. Thomas of the Los Angeles Sheriff's Crime Laboratory.

After preliminary check of the spots on the car by Mr. Lacey while he was in Las Vegas, Nevada, and which showed that each of the spots could be blood, he returned to Los Angeles with the spots from the door, the seatcover, and the floormat. He subjected them to further examinations and formed the opinion that each had been caused by human blood; that the blood on the front floormat appeared to have been diluted. He could not state definitely how long the blood had been there, but in his opinion it could have been there for a week or a little longer. but not over 10 days or 2 weeks at the most.

On August 3, 1951, Los Angeles County Deputy Sheriff Jolivette was in Denver, Colorado, for the purpose of returning defendant to California after the latter's arrest. On that date he took some statements from defendant. These statements, it was testified, were free and voluntary and no force or violence was used on defendant's person, and that there was no promise of immunity or hope of reward extended to him for his statements.

Deputy Sheriff Jolivette asked defendant if he had made a statement in Sterling, Colorado to Chief of Police Walker; defendant replied that he had. Deputy Sheriff Jolivette had in his possession at that time a document which had been given to him in Los Angeles by Captain Burns, his superior officer, who told Deputy Sheriff Jolivette that Chief of Police Walker had read the statement to him over the telephone, that a stenographer had listened in on the reading, had made a transcription of the statement, and that the document in Deputy Sheriff Jolivette's possession contained the transcription of such statement. Deputy Sheriff Jolivette showed the transcription to the defendant. The latter did not have his glasses so the deputy sheriff read the statement to defendant and asked the latter if it was a true copy of the statement that he had made to Chief Walker. Defendant said, "Well, that isn't the way it happened". The deputy sheriff said, "Well, all I want to know is if this is a true copy of the statement that you gave to the chief". Defendant then stated that it was a true copy of what he gave to the chief, but that it was not true as to the facts. Defendant, however, signed the document in the deputy sheriff's presence as being a true transcription of what he had told Chief Walker. This document will be later referred to and discussed.

During the ensuing days, Deputy Sheriff Jolivette had other conversations with defendant, during which no force or violence was used and no promise of immunity or hope of reward extended. During these conversations, defendant denied that he had made love to Betty on July 5; denied that he had her on the backseat of the automobile that day, and denied that they were in the vehicle when the gun was discharged. He stated that he had left the trousers he was wearing on July 5 in the bleachers in Las Vegas and had purchased another pair. He stated that he threw away in Las Vegas the shirt he had on July 5; that he had also thrown away his wallet and I. D. card. He stated that the lighter and cigarette case which had been found beside Betty's body were his and that he did not know he had lost them. He denied he had been looking for a gun when he got the gun he possessed, saying that he just happened to meet a man who wanted to sell a gun and purchased it.

On August 15, 1951, Deputy Sheriff Jolivette and other law enforcement officers, took defendant in a car to the place where the body had been found. After they stopped at the place where the body was found they attempted to take defendant to the lip of the gully, but he refused to go. He told the officers that after Betty fell into the canyon he stood there about three minutes listening, then got into the automobile and drove away. At 8:20 p. m. defendant stated that it was about the same time of night as when he was at that scene with Betty. According to the testimony, it was then just getting dark.

Appearing as a witness in his own behalf, defendant testified that he was 43 years old, that he started to live with Margaret Frances Kristy in 1937; that at the time they commenced living together she was pregnant and that he did not know that she had other children. That Helen was born in December, 1937. He further testified that in 1939 Mrs. Kristy told him that her two children were being mistreated by the people with whom they were living and that in 1942 defendant and Mrs. Kristy took the children home with them, when they resumed their own names of Betty Jean Hansen and Raymond Earl Thomas. That during the succeeding few years they all lived together in various places in California, New Jersey and Kansas, and that they returned to Los Angeles in 1945 and that in 1948 he and Mrs. Kristy purchased a home in Downey, California. That about May of 1950, while he was lying in bed with Betty and Helen, Mrs.

Kristy entered the room and accused him of having intercourse with Betty. He testified this accusation was untrue; that Mrs. Kristy constantly accused him of having intercourse with Betty and that the latter resented the accusation. That arguments and accusations continued for several days when Mrs. Kristy moved away. That he next saw her in July of 1950 when Mrs. Kristy and Helen returned to live with him. That after Mrs. Kristy left the house defendant and Betty commenced having sexual intercourse. That about June 20, 1951, when Mrs. Kristy returned, she and defendant engaged in an argument concerning Betty, Mrs. Kristy admonished defendant "not to mess around with Betty", but that he did not know what she meant by that and told her he "wasn't messing with Betty and didn't intend to". He, however, testified that he had sexual intercourse with Betty about 7 times prior to the last-named conversation. That on every occasion when he had intercourse with her Betty had agreed to it. That arguments between Mrs. Kristy and the defendant continued. That on the night of July 3rd he did not make any threats against or statements about Betty. That he did not say he had been having intercourse with Betty and that he would continue so to do as long as she remained in his house. That Betty did not say, "No you won't, Daddy". That on July 5th defendant sold his automobile, and that on that evening during dinner there was an argument whether Betty should go out with a man on that evening. That defendant objected to it while Mrs. Kristy approved of it. That on this evening Mrs. Kristy and the girls went to Bellflower to procure a bathing suit for Helen and that defendant remained at home watching television. That he had several drinks of liquor in addition to those he had consumed before dinner and was getting "pretty drunk". That upon their return the two girls started to wash dishes and that Mrs. Kristy was in the living room sewing buttons on the bathing suit. That Mrs. Kristy informed defendant that she, Helen and Betty were going swimming and invited him to go along. That he declined the invitation and advised them that Betty had made different arrangements. That Mrs. Kristy told him that Betty was not going with him. That thereupon, he got up and went into the bedroom where he got a bottle of whiskey and some money which he had behind some books. That as he was getting the money he noticed his gun which he had put there over a month before following his purchase of it from a man in a saloon. He testified that he had purchased the gun so that Raymond would have it and be able to "protect" the girls when defendant was gone from the house. That he had inspected the gun within a few days after he purchased it and discovered that there were no bullets in it and that the trigger would not move. Defendant further testified that his telephone call with reference to the weapon was in connection with his effort to find a gunsmith who would repair the gun. That the person who answered the telephone call was desirous of selling guns but that defendant advised her he was not interested in "big guns"; that he wanted a small gun for his boy to use. That he was trying to have the gun repaired and was not desirous of purchasing one. Defendant testified that he picked up the gun and went back into the kitchen, keeping it in the palm of his hand. That he stopped by the door between the kitchen and the living room, showing his gun to Mrs. Kristy, and said, "I suppose you thought I didn't have a gun, but I fooled you. I have got a gun". That Mrs. Kristy jumped up and stood by the girls while defendant said, "Betty is not going swimming, she is going with me". That Mrs. Kristy requested him not to take Betty with him and that he told them all to go out onto the back porch. That after they did so, he told Betty to get her purse and that she did so. That she walked in front of him, or alongside of him into the kitchen. That Helen and Mrs. Kristy were still on the back porch watching Betty. That Mrs. Kristy again requested him not to take Betty with him. Defendant testified he did not make any threats to kill anybody or use force or violence on any of those present. That Betty went through the kitchen followed by Helen, Mrs. Kristy and defendant. That they all walked out through the front door except Helen who stayed inside. That as Betty was going from the gate to the automobile, defendant stopped at the gate when Mrs. Kristy asked Betty to come back and kiss her, but that Betty did not do so. Defendant testified that he did not order Betty to get into the automobile and that he did not admonish Mrs. Kristy not to call the police or say that he would shoot Betty if he discovered that the police were following them. That he did not call Betty a son-of-a-bitch, nor say that she should be pleading for her life instead of Mrs. Kristy. Defendant denied that he stated he was going to have Betty drive him out some ten miles and that he would then shoot himself and let Betty return.

Defendant testified that after they got into the automobile and started to drive away the only conversation between him and Betty was that the latter asked defendant which would be the best way to go. That they drove through various streets and at one place stopped where defendant went into a store and bought a bottle of whiskey, and, at Betty's request, attempted to telephone to advise her mother that everything was "alright". That he was unable to complete the telephone call and that they then drove on and did not stop until they got to the top of a hill on Highway 6. That when they stopped, they sat in the car and that the reason for their stopping was that Betty said she wanted to rest. That it was getting dark. That after awhile they got out of the automobile and walked around to the edge of the gully to see what the noise was that they had heard. That they were walking slowly and talking about what they were going to do when they arrived at Reno, Nevada. That Betty suggested she had no clothes and that defendant advised her he would buy clothes for her. That it was getting darker and that he was attempting to convince her that he would purchase all the clothes she would need but that she was insisting upon returning home to obtain her clothes. That she was holding him and he was holding her. That as they were standing there with her "pushing toward the car" and him "trying to hold her back", the gun dropped from his shirt to the ground. That he released his hold on her and stooped over to pick up the gun. That as he was thus engaged she "grabbed his hand" and as he raised it up he pulled away from her and the gun "went off". That she "let go" and rolled sideways down the hill. That he stood there for about three minutes and then got on his hands and knees and looked down the hill. That it was dark and that at the time he kneeled down and looked he had a cigarette lighter and cigarette case in his shirt pocket. That he did not hear anything. That he called Betty's name several times but received no answer. That when Betty did not answer he "got scared", entered the automobile, and drove away. That he had the gun in his hand until he got into the vehicle when he put it on the seat. That as he drove along he stopped at a few places for something to eat and drink. That somewhere along the way he threw the gun out of the window of the automobile. That he drove until he came to Las Vegas, Nevada, where he parked the car in an open field and abandoned it.

As a first ground for reversal appellant urges that the trial court erred in refusing to strike out testimony concerning blood spots and a cartridge case found in the deceased's automobile when it was discovered in Las Vegas, Nevada. It is appellant's contention that these items of evidence were neither relevant nor material and that they did not tend to prove any involved issue.

It is not necessary to here repeat the evidence given at the trial concerning the blood spots and cartridge case because such evidence is fully set forth in the factual narrative heretofore given.

[2] The admission of this testimony was not error. It was necessary for the prosecution to show as accurately as circumstances would permit, the means by which and the manner in which Betty Jean Hansen had come to her death.

[3] As was said in People v. Billings, 34 Cal.App. 549, 552, 553, 168 P. 396, 398, "* * * The relevancy of proffered proof in a criminal case depends upon whether or not it tends to sustain a legitimate hypothesis of the guilt of the defendant and, generally speaking, an incidental fact is relative to the main fact in issue when, in ac-

cord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends in some degree to make the main fact in issue certain. It is not necessary that such incidental fact should bear directly upon the main fact in issue, for it will suffice as a pertinent piece of proof if it can be said to constitute a link, however small, in the chain of evidence, and tends thereby to establish the existence of the main fact in issue. (Citing authority.) Hence any fact is relevant evidence which naturally tends to show the means and method employed in the commission of a crime, and therefore it was proper in the present case to admit evidence of the identification of the cartridges picked up near the scene of, and shortly after, the explosion and, having been so identified, they were rightfully admitted in evidence."

[4] It was established that Betty was last seen in her automobile with appellant; that he had a small gun; that she met her death from a .25 calibre bullet, and that subsequently, an expended .25 calibre cartridge case and blood spots were found in the vehicle. From all of these proven facts the jury might well have drawn the inference that she was killed in her automobile by the small weapon which appellant had been seen with in the vehicle, thus tending in some degree to connect appellant with the homicide and establish him as the perpetrator thereof, People v. Sambrano, 33 Cal.App.2d 200, 211, 212, 91 P.2d 221; Code Civ.Proc., secs. 1958, 1960, 1870. Furthermore, whatever inferences could be drawn from the foregoing evidence that the victim was killed in her automobile would also serve to contradict the statements of appellant that she had fallen into the gully where her dead body was subsequently discovered after, according to appellant, his weapon had inexplicably discharged while he and Betty were standing in the road at the edge of the gully. It was also admissible as tending to refute the verity of such statements. Deception, falsehood and fabrication as to the facts of a case are treated as tending to show consciousness of guilt, and are admissible on the same theory as flight and concealment of the person when charged with crime. People v. Arnold, 43 Mich. 303, 5 N.W. 385.

[5] Objections to the evidence concerning the cartridge case and blood stains to the effect that the time of the discovery was too remote from the date of the crime, or that appellant was not in actual control of the automobile at the time of discovery, and that there existed a possibility that unknown persons may have occupied the vehicle in the intervening time, all go to the probative force or weight of the evidence, but do not militate against its admissibility. People v. Peete, 54 Cal.App. 333, 351, 202 P. 51.

[6] It is next contended that the district attorney was guilty of prejudicial misconduct. In support of this claim appellant directs attention to that portion of the record wherein appears the following, all of which occurred during his cross examination.

As to the first occasion about which complaint is made, the following occurred:

> "Q. (By Mr. Powers, Deputy District Attorney) I will ask you if you were convicted in New Jersey of the crime of forgery, a high misdemeanor? A. But it is not a felony.
>
> "Mr. Heggen: If the Court please, I will object to that as being improper cross examination, improper impeachment. The answer was it was a misdemeanor and counsel has no evidence adduced that it is a felony.
>
> "The Court: Objection sustained, the answer is stricken.
>
> "Mr. Heggen: And the jury should be, I think, requested, your Honor, to disregard the question and answer if there was any answer.
>
> "The Court: I think the jury has learned by this time that any matters which are stricken out are to be disregarded by them.
>
> "Q. By Mr. Powers: You say the matter in New Jersey was handled as a misdemeanor? A. Yes, sir.
>
> "Mr. Heggen: If the Court please, I will object to that as having absolutely

> no materiality in this case, and designed to prejudice the defendant in the eyes of the jury and the Court.
>
> "The Court: Objection sustained. it is material, but—
>
> "Mr. Powers: I am sure the Court appreciates that I have some knowledge of the New Jersey law under which my question is asked, and that there are in New Jersey offenses that are denoted high and low misdemeanors.
>
> "The Court: Mr. Powers, the witness has denied he has been convicted of any other felony other than the one in California.
>
> "Mr. Heggen: If you have any other evidence to produce to rebut that you can go ahead, but I won't go along with your knowledge of New Jersey law.
>
> "The Court: Proceed."

While this line of cross examination was highly improper and the court promptly and correctly sustained objections interposed thereto, we are not prepared to say that the substantial rights of appellant were prejudicially affected thereby. An examination of the record reveals that during the direct examination of Deputy Sheriff Jolivette, the latter testified to a conversation had with appellant after the latter's arrest. Without objection, this witness testified that he inquired of appellant whether he "had any record?", to which the latter replied that "he did 15 or 18 months in a workhouse in Trenton, New Jersey, for forgery * * *, that he had served 20 months in San Quentin before going to Trenton". Furthermore, in closing his direct examination of appellant, the latter's counsel interrogated him as follows:

> "Q. And there was some reference made to some difficulty in New Jersey. Is that a felony or was that a misdemeanor? A. That is a misdemeanor.
>
> "Q. That was over 20 years ago, too, wasn't it, sir? A. Yes, sir."

The cross examination was then commenced and after he had been asked a few questions concerning his conviction in California, appellant was asked the questions of which he now complains.

We are persuaded that the error on the part of the district attorney could not have prejudicially injured appellant's substantial rights for the reason that testimony to the same effect as that sought to be elicited by the district attorney had crept into the record as above outlined, prior to the time when the questions now complained of were asked. People v. Mancuso, 23 Cal.App. 146, 147, 137 P. 278.

[7, 8] The next occasion about which complaint is made that the deputy district attorney resorted to prejudicial misconduct occurred after appellant had testified, *without objection*, that he had been having sexual intercourse with the victim during the past year, in his home in Downey, and that Raymond, the 16-year-old son of Mrs. Kristy, had been present in the house when such actions had taken place.

Thereafter, the following occurred:

> "Q. You didn't consider having relations with your daughter Betty in the presence of a 16 year old boy—
>
> "Mr. Heggen: Just a moment. Just a moment.
>
> "Q. By Mr. Powers: —as contributing to his delinquency?
>
> "Mr. Heggen: I will object to that as being immaterial and an attempt to prejudice the defendant before the jury.
>
> "The Court: Objection sustained.
>
> "Q. By Mr. Powers: Was your son Raymond home on every evening when you had sexual relations with your daughter Betty? A. No, sir.
>
> "Mr. Heggen: I object to that as being immaterial.
>
> "The Court: Sustained. The answer is stricken."

In view of the fact that appellant had theretofore testified without objection that he had been having sexual intercourse with Betty and that Mrs. Kristy's 16-year-old boy had been present in the house at the time such acts took place, coupled with the fact that the court promptly and decisively sustained an objection to the question, ordered the answer stricken, and that appellant did not request the court to instruct the jury to disregard the answer, and while we do not commend or even condone such conduct on the part of the prosecutor, nevertheless, under the circumstances of this case, we are satisfied that neither prejudicial error nor reversible error was committed. In the light of the circumstances under which the challenged misconduct of the district attorney occurred, we can not say that the effect of such misconduct could not be overcome or removed by appropriate instructions to the jury. The authorities are uniform that under such circumstances, in the absence of proper request for the court to instruct the jury to disregard such misconduct, it may not be reviewed on appeal. People v. Nakis, 184 Cal. 105, 116, 193 P. 92; People v. Mancuso, 23 Cal.App. 146, 148, 137 P. 278; People v. Ward, 40 Cal.App.2d 143, 150, 104 P.2d 537.

Finally, during the cross examination of appellant the following transpired:

> "Q. Did you know, sir, that as an ex-convict it was a felony for you to have a gun?
>
> "Mr. Heggen: If the Court please, I will object to that as immaterial. He is still trying to prejudice the defendant in the eyes of the Court and the jury. I wish he would stick to the facts in this case instead of trying to besmirch the defendant.
>
> "Mr. Powers: I am not trying to besmirch the defendant. This goes to motive. He said he bought it for a particular motive. I am endeavoring to show it is a felony for an ex-convict to have a gun and there might be other motives—
>
> "Mr. Heggen: I fail to see any motive in this. And I know it is calculated to prejudice the defendant, to try to accuse him of some other crime which he never committed. I suggest you stick on the issues of this case.
>
> "The Court: The objection to the question is sustained."

[9] Again the court promptly sustained an objection to the questions and again appellant refrained from requesting that the jury be instructed to disregard the questions and comments. In view of the failure of appellant to ask the court to admonish the jury to disregard the questions and when such an admonition would, doubtless, have been sufficient to cure any effect the questions might have produced, the claimed misconduct cannot be considered on appeal.

[10] Furthermore, when, upon the first occasion herein narrated, wherein objection was made to questions concerning appellant's prior conviction of a felony and such objection was sustained, the court upon request of appellant's counsel stated, "I think the jury has learned by this time that any matters which are stricken out are to be disregarded by them." While the ruling was possibly not as emphatic as might be desired under the circumstances, nevertheless, since it was given immediately following the sustaining of an objection to the first challenged question involving a charge of misconduct by the district attorney, it can not be said that it was not sufficiently definite for the purpose of advising the jury that the question that had just been asked as well as the subsequent interrogatories were to be disregarded by them. We are impressed that in view of the overwhelming evidence of appellant's guilt, the jury's verdict would not have been different had the questions not been asked (Const.Calif., Art. VI, sec. 4½).

While even convincing proof of the guilt of the accused does not necessarily mean, under all circumstances, that there has been no miscarriage of justice, we regard the evidence in the instant case as sufficient, under the circumstances here present, in so far as the claimed misconduct of the district attorney is concerned, to put into operation the provisions of the Constitution just cited. We are satisfied that the acts of the district attorney, although misconduct, did not prevent appellant from having a fair trial or result in a miscarriage of justice. In view of the court's prompt rulings and instructions to disregard the questions when requested by appellant, which it will be presumed were heeded by the jury, it can not be said under the facts of the instant case, that the cause of the accused suffered by reason of anything contained in the challenged questions however improper they may have been. People v. Cook, 93 Cal.App. 174, 176, 269 P. 176; People v. Scott, 24 Cal.App. 440, 447, 141 P. 945; People v. Duncan, 31 Cal.App. 772, 773, 161 P. 763; People v. Sprado, 72 Cal.App. 582, 597, 237 P. 1087.

Another ground relied upon for reversal is that the trial court erred in admitting what appellant characterizes as a "written confession made by the defendant to one Captain Walker, Chief of Police of Sterling, Colorado".

In this regard the record reflects that Deputy Sheriff Jolivette of Los Angeles County first saw appellant in Denver, Colorado, on August 3, 1951. The deputy had in his possession a document which had been given to him by Captain Burns in Los Angeles with the explanation that it was a transcription of a statement which had been read to the latter over the telephone by Chief Walker of Sterling, Colorado, and which statement the latter said appellant had made to him. Appellant concedes that no force nor violence was used on him, no promise of immunity nor hope of reward were extended to him for any statement and that his statements to Deputy Sheriff Jolivette were free and voluntary. The latter asked appellant if he had made a statement in Sterling, Colorado, to Chief of Police Walker. Appellant stated that he had. Deputy Sheriff Jolivette showed appellant the document which had been given him by Captain Burns in Los Angeles. At that time appellant did not have his glasses, so Deputy Sheriff Jolivette read the document to him and asked him if it was a true copy of the statement he had made to Chief Walker. Appellant said that it was a true copy of what he said to the chief, but that it was not true as to the facts. Appellant thereupon signed the document in Deputy Sheriff Jolivette's presence, stating that it was a true copy of what he said to the police chief. We deem it unnecessary to here set forth the somewhat lengthy statement, because, except for those facts which appellant testified were untrue, the statement parallels the testimony given by him.

[11] Although appellant makes no contention that the aforesaid statement was obtained by force or violence, threats, intimidation, or of immunity or hope of reward, the prosecution was not required to lay any foundation for a "confession" before offering appellant's statement in evidence. Manifestly, the statement was not a "confession", but an "admission", and as such receivable without any prior evidence of its voluntary character. In no part of appellant's recital of what he claimed to be his own conduct toward the victim did he state or admit that he had done any wrongful or unlawful act in connection with the murder for which he was indicted. None of the facts admitted by appellant imported guilt or involved a crime—at least not any such crime as murder. While the statement may be said to contain admissions which when taken in connection with other proved facts in the case, are circumstances of a highly incriminating nature, the statement by no means contains an admission of guilt. Before an admission or declaration may be characterized as a "confession" it must in some way be an acknowledgment of guilt and be so intended. People v. Clifton, 186 Cal. 143, 198 P. 1065; People v. Fowler, 178 Cal. 657, 174 P. 892; People v. Sambrano, 33 Cal.App.2d 200, 212, 91 P.2d 221.

[12] In the case at bar there was read to appellant what purported to be a statement which he had theretofore made to the Chief of Police of Sterling, Colorado. He admitted that he had freely and voluntarily made that statement to the police chief, although contending that some of the facts in the statement were untrue. Under the rule announced in People v. Sberno, 22 Cal.App.2d 392, 395, 71 P.2d 274, the written document purporting to be a transcript of appellant's statement to Chief Walker was properly admitted after Deputy Sheriff Jolivette laid the foundation for such admission by testifying that appellant voluntarily admitted to the officer that he had made such statement.

Appellant's contention that because at the time he signed the statement for Deputy Sheriff Jolivette, he denied the truth of certain declarations therein contained, the signed document was inadmissible, is without merit. Manifestly, the contention of an accused that prior statements made by him were in whole or in part false does not render the declarations inadmissible. In fact the prosecution clearly has the right to show that one suspected of or charged with the commission of crime made false statements. People v. Cole, 141 Cal. 88, 90, 74 P. 547. Satisfactory proof having been made that the original statement to Chief Walker was freely and voluntarily given, appellant can not now be heard to complain of its inadmissibility upon the ground that certain of the declarations therein contained were false.

Finally, it is urged by appellant that the evidence is insufficient to support a verdict of murder of the first degree.

[13, 14] In a prosecution for murder, evidence showing that the killing was the result of a wilful, deliberate and premeditated intent to kill need not be shown by direct evidence, but may be inferred from the proof of such facts and circumstances as will furnish a reasonable foundation for such a conclusion. And the triers of fact—jury or judge—are invested with the exclusive province of drawing such a conclusion. An appellate tribunal is not authorized to determine conflicts in the evidence nor to choose between different inferences which reasonably may be drawn from the testimony. The sole question presented to us in so far as the admissible evidence is concerned, is as to its sufficiency to support the verdict. If there is substantial evidence in the record to support the ultimate fact found in the trial court that appellant was guilty of murder of the first degree, that determination must be upheld.

[15] Applying these rules to the evidence in this case which has heretofore been narrated, involving as it does, the conduct of appellant both prior to and immediately after the victim met her death, his neglect to aid her after he says she was accidentally shot, his subsequent flight from city to city, all tend to refute the story of appellant that the homicide occurred accidentally while he and Betty were standing near a gully. From all the evidence in this record we are persuaded that a deliberate intention to kill is fairly deducible. The verdict was justified by the evidence and there is no prejudicial error appearing in the record.

The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

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111 Cal.App.2d 943

REED v. GARFINKLE.

Civ. 15004.

District Court of Appeal, First District,
Division 1, California.

June 25, 1952.

Rehearing Denied July 25, 1952.

Hearing Denied Aug. 21, 1952.

Action by Frank J. Reed against Ben E. Garfinkle for cancellation of certain agreements of sale and partnership. The Superior Court in and for the City and County of San Francisco, Sylvain J. Lazarus, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence supported the court's findings of fact.

Judgment affirmed.

1. Partnership ⇨25
Sales ⇨52(7)

In action by buyer of general insurance agency business for cancellation of certain agreements of sale and partnership, evidence supported court's finding that buyer relied upon the truthfulness of the representations made by seller and seller's agent, and by reason thereof was induced to execute agreements and pay a sum of money on account of the purchase price.

2. Sales ⇨38(9)

In the sale of general insurance agency business where buyer relied on seller's representations that seller would immediately take the necessary steps to have buyer appointed agent of certain companies and to file with state insurance commissioner documents evidencing such appointments, the fact that the companies, not the seller, had the power to appoint or not to appoint buyer, general agent and that insurance commissioner, not seller, had the granting or withholding of the state license, could not save seller from the legal consequences of his false representations.

3. Trial ⚿107

In action by buyer of general insurance agency business for cancellation of certain agreements of sale and of partnership, record supported trial judge's finding that seller was represented by legal counsel throughout the trial, and that there was no need or occasion for a substitution of attorneys to effect such representation during the last two days of the trial. Code Civ. Proc. § 286.

4. Partnership ⚿25
Sales ⚿130(3)

In action by buyer of general insurance agency business for cancellation of certain agreements of sale and of partnership on the ground that seller failed to use his good offices in furthering buyer's appointment as general agent of certain insurance companies and failed to put buyer in contact with local agents, evidence supported court's finding that seller ratified and accepted rescission of the agreements.

◆

Philip Steiner, Webb, Webb, & Steiner, San Francisco, for appellant.

A. Brooks Berlin, Alvin A. Lobree, Neil Cunningham, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant has appealed from a judgment which rescinded and canceled three agreements executed by the parties in June and July 1946, and awarded plaintiff $5,500 plus interest to the date of the judgment, and his costs of suit.

The trial court found: (1) April 25, 1946, plaintiff at defendant's solicitation commenced negotiations for the purchase of defendant's general insurance agency business for the price of $25,000, plaintiff paying defendant $500 on May 2, $2,000 on May 16, and $3,000 on July 1, 1946, on account of the purchase price. (2) June 29, 1946, the parties executed a written agreement as of July 1, for the purchase of a one-half interest in defendant's business for $12,500 payable in installments, the parties agreeing they would enter into a partnership agreement, which latter agreement was executed July 16, as of July 1, for a period ending January 2, 1947, plaintiff to have the management of the business and on January 2, 1947, to buy defendant's remaining one-half interest for $11,250 payable in installments, that in the latter part of July the parties executed a supplemental agreement stipulating that defendant was not required to devote more time to the partnership than necessary to give his advice and administrative assistance and that in view of defendant's not taking any of the profits of partnership operations plaintiff would hold him clear and harmless from all obligations of the partnership; that the agreements of sale and of partnership were executed as part of one entire transaction for the purchase and ultimate acquisition by plaintiff of defendant's entire insurance agency business, the partnership being formed for the purpose of permitting plaintiff to hold and obtain the benefit of the business of the companies represented by the agency, which could be better accomplished by defendant's continuing endeavors to that end and continued identity in the business for six months. (3) It was orally agreed between the parties that plaintiff would require 30 to 60 days to arrange to take over the management and operation of the business, delivery of which by mutual consent was effected August 17, 1946. (4) Prior to the execution of this agreement, defendant represented to plaintiff (a) that the business to be sold consisted principally of a general insurance agency business for Merchants Fire Insurance Co., Halifax Insurance Co., and Mid-States Insurance Co.; (b) defendant was a general agent for these three companies; (c) that the business done for Mid-States Insurance Co. would be particularly beneficial because the company was writing casualty insurance as distinguished from fire insurance written by the other two companies and plaintiff could rest assured that the agency for Mid-States would be retained and plaintiff should have no concern in that regard; (d) for plaintiff's benefit and during the partnership and a reasonable period thereafter, defendant would utilize his identity and render his efforts to the retention of the general agency business being sold, particularly the general agency for the three companies mentioned; (e) all accounts owed by defendant to said companies up to July 1, 1946, would be adjusted and paid in full at the time plaintiff would take over management and operation; (f) that each of said three companies had at all times been thoroughly satisfied with the results achieved by defendant in their behalf and that the business done by his agency for each during the period of their accounts had been transacted at a profit to each company and there had been no complaints by any of the companies or any disputes or differences between them and said agency respecting the manner in which the agency business was being conducted or the results obtained by said agency for them; (g) defendant would immediately take the necessary steps to have plaintiff appointed agent of said companies and to file with the State Insurance Commissioner documents evidencing such appointments, in order that plaintiff after taking over the management could legally carry on the business of said companies; and (h) defendant would personally introduce plaintiff to various local agents doing business for the agency being sold, would do so after plaintiff's taking over the management of the agency. (5) All of said representations were made by defendant solely for the purpose of inducing plaintiff to purchase defendant's agency business, execute the agreements of sale and of partnership and part with the payments on account of the purchase price, and for other valuable considerations. (6) Said representations were false and fraudulent and were known by the defendant to be false and untrue when made. (7) The facts respecting these representations were (a) February 8, 1946, Merchants Fire Insurance Co. canceled its general agency contract with defendant, effective April 15; plaintiff had no knowledge thereof when he executed the agreements; because of this cancellation plaintiff never received any business for or on behalf of said company; (b) prior and subsequent to the execution of said agreements a controversy existed between Merchants Fire Insurance Co. and defendant respecting a certain credit taken by him; prior to and for many months after execution of said agreements, defendant was indebted to said company in respect to his account for May and June, 1946, all of which was known to defendant, unknown to plaintiff, and concealed by defendant; (c) said company canceled because of the high loss ratio of business developed by defendant during preceding years, a fact concealed from plaintiff; (d) subsequent to execution of the agreements, defendant at all times failed and neglected: (i) to take any steps to introduce plaintiff to any of the representatives of said three insurance companies or to apprise them of these agreements with plaintiff and never had any intention of fulfilling any of his promises in regard to such matters; (ii) to take any steps toward procurement of a license from the state, licensing plaintiff to act as agent for the companies represented by defendant's agency, or to appoint or have plaintiff appointed agent for any of such companies, and defendant never had any intention to take such steps; and (iii) to introduce plaintiff to any of defendant's various [local] agents and defendant never had any intention of fulfilling his promises in that regard. (8) Plaintiff relied solely, absolutely and in good faith upon said representations and executed the three agreements with defendant and made the purchase price payments in sole reliance upon said representations and each of them. (9) In the latter part of July, 1946, plaintiff discovered that the business did not include any agency for the Merchants Fire Insurance Co. and immediately notified defendant he could not carry out the transaction for the full amount of the agreed purchase price. (10) Between August 17 and September 3, 1946, plaintiff discovered that said company had canceled its agency contract with defendant because of the high loss ratio developed by defendant over a period of several years. (11) Between August 17 and September 3, 1946, (except as otherwise found by the court) plaintiff for the first time discovered the falsity of the representations mentioned in clause (4), above, and on or about September 3 notified defendant that by reason of the falsity of those representations plaintiff was released from making further purchase price payments and demanded the return of the $5,500 already paid. (12) At defendant's request negotiations for settlement of the rights and duties of the parties ensued until about November 21 when defendant notified plaintiff that further settlement negotiations were terminated and plaintiff would be held responsible for the purchase price payments, which liability plaintiff disclaimed and continued to demand the return of the $5,500. (13) At defendant's request plaintiff continued the management of the agency business pending the outcome of negotiations, subsequent to the termination of which and on December 10, 1946, plaintiff served on defendant a notice of rescission of the agreements and demanded return of the $5,500. (14) In addition to the false and fraudulent representations and conduct hereinabove specified, defendant during the entire period of the partnership conducted himself in relation to the partnership as follows: (a) when plaintiff took over the management of the business defendant represented he had credits due from Merchants Fire Insurance Co. and requested plaintiff to pay defendant on account thereof, representing that any such payments could be recovered from the company in the adjustment of current accounts with the company, and plaintiff relying solely and in good faith upon the truth of such representations paid defendant, in August, 1946, from general agency accounts $1,879.27 and the sum of $1,356.86 for expenses allegedly incurred by defendant in connection with said business; that, instead, defendant, to his own knowledge, was indebted to the company on his accounts for May and June, 1946, and a controversy then existed between him and the company concerning the same; that by reason of the foregoing plaintiff was never able to obtain any credits from that company and the company held up payments of all credits otherwise due the partnership and applied them to the indebtedness of defendant to the company; (b) about August 8, 1946, Mid-States Insurance Co. notified defendant of cancellation of its agency contract with him, effective September 9, 1946; defendant for the fraudulent purpose of inducing plaintiff to take over management of the business and to make the payments mentioned in sub-clause (a), above, concealed the fact of such cancellation until August 17, or shortly thereafter; if plaintiff had known of such cancellation when made, he would not have taken over management of the business, nor would he have made said payments to defendant; (c) in spite of repeated requests by plaintiff, defendant during the partnership agreement, to the date of formal rescission, failed, neglected and refused to deliver to plaintiff any and all agency contracts, correspondence, documents or other records between the companies represented by the general insurance agency and defendant. (15) After receipt of said notice of rescission, defendant for a valuable consideration transferred to third parties the assets of said general agency business, receiving approximately $5,261 therefor, plaintiff having no knowledge or notice of said transaction until after the commencement of this action, which transfer defendant made and consummated for his sole use and benefit and thereby ratified and accepted the rescission of the agreements executed by plaintiff and defendant in June and July, 1946. (16) Solely by reason of defendant's false and fraudulent representations and defendant's conduct, the carrying on of the partnership agreement was seriously impaired and prejudiced and at the time of the formal notice by plaintiff was at a standstill; on or about December 19, 1946, the Halifax Insurance Co. served defendant with notice of cancellation of its agency contract with defendant. (17) Plaintiff received nothing of value from defendant pertaining to the agreements of June and July, 1946, and no compensation out of the business; there has been a material failure consideration for plaintiff's obligations under the agreements and consideration for such obligations has wholly failed.

These findings of fact are amply supported by the evidence, including the testimony of the plaintiff and that of Jack Piver who, engaged by defendant to find a purchaser of the business, found the plaintiff, brought the parties together and on behalf of defendant participated in some of the negotiations.

In support of his appeal, defendant presents a number of points which we will consider in the order in which he presents them.

[1] (1) Defendant claims that plaintiff did not rely upon defendant's representations but made his own independent investigation of the business; that plaintiff retained an expert insurance accountant, Bell, who examined the books of the business, defendant placing at the disposal of plaintiff and the accountant every record and document asked for. That accountant, however, testified he did not audit defendant's books, was not asked to do so; was not employed to do so; that he went over the trial balance, making a cursory examination without pay; that the trial balance indicated that the three principal companies of the agency were still being actively represented; that the loss ratios of those companies could not be determined from the books of the general agency; that he was not informed by defendant that Merchants Fire Insurance Co. had canceled, and defendant told plaintiff and Bell it would not be necessary for Bell to contact the companies. Plaintiff testified that he completely relied upon the truthfulness of the representations made by defendant and defendant's agent and by reason thereof was induced to execute the three agreements and pay the $5,500 on account of the purchase price, and the trial court believed him.

(2) Defendant asserts that the general agency contracts with the Merchants, Halifax and Mid-States companies were "illusory" in that they did not impose upon anyone an obligation to do anything, each reserving to the company the right to reject, cancel, or reduce its liability in respect to policies initially accepted; that those contracts merely established a market to which the agent might submit risks for acceptance or rejection by the company. Defendant also states in this connection that the cancellations by Merchants and Mid-States pertained only to future business, not to business previously written by the general agent. He then urges that these matters must have been well known to plaintiff who had had years of experience in this field.

Defendant does not state clearly or with precision what these facts have to do with the case. By these contracts each of the insurance companies mentioned had appointed defendant its general agent in a given territory with power in him to appoint local agents and the right to receive commissions upon business written. Such an agent is in effect the general representative of the company in the area defined by the contract, which, until canceled by either party, creates a relationship and opens up a market which the evidence indicates is a substantial asset of the agent's business.

(3) Defendant asserts that the subject matter of the sale was the agency business (the records and files, the clientele and good will, the services of the employees and of the defendant) which plaintiff did obtain. He asserts that the existence or non-existence of a general agency contract with any particular insurance company or companies was therefore quite immaterial. The fallacy of this argument inheres in the fact that it ignores, among other things, defendant's representations that he had general agency contracts with certain companies and that his relationship with those companies was satisfactory and profitable to the companies and the agency, upon the truth of which representations plaintiff relied in making his decision to buy this business. As we have already indicated those contracts constituted a material part of the consideration.

(4) In relation to the partnership, defendant claims that if it was a partnership no action could be maintained by one partner against another until the rights of the creditors had been determined, and then says this transaction was really a sale (not a partnership), and concludes that the liability, if any, to the Halifax Insurance Co. should have been assessed to the plaintiff as purchaser. It is true that the partnership was but an incident of the sale, a temporary "partnership" to facilitate the

transfer of this business from defendant to the plaintiff in such a manner as to give added assurance of acquisition by plaintiff of the clientele and of the business of the companies for whom defendant had been acting as general agent. The argument fails because the entire transaction (the sale and the incidental partnership) was rescinded by the plaintiff because of the false representations of the defendant upon which plaintiff relied when making the purchase.

(5) Concerning the settlement of accounts as of July 1, 1946, defendant says that the accounts current were customarily settled in approximately ninety days, involving as it did the clearing of accounts with local agents, a custom or practice which in no way interfered with the sale of the business and had no significant bearing upon the sale. However, there is evidence showing an unqualified representation that all indebtedness to the companies would be paid and settled (as of July 1, 1946) by the time agreed upon for plaintiff to take over the management, and that this was not done.

[2] (6) Concerning his undertaking to procure plaintiff's appointment as general agent for the insurance companies and to procure for plaintiff a license from the State Insurance Commissioner, defendant claims those were not representations upon which plaintiff could rely because he must have known that defendant did not have the power to effect them. This argument also misses the point. The representations upon which plaintiff relied were defendant's undertaking to utilize his identity, render his efforts to the retention of the agency business being sold, and to take the necessary steps to have plaintiff appointed general agent and to file with the Insurance Commissioner documents evidencing such appointments, promises which defendant made without any intention of carrying them out. The fact that the companies, not defendant, had the power to appoint or not to appoint plaintiff their general agent and that the Insurance Commissioner, not defendant, had the granting or withholding of the state license, can not save defendant from the legal consequences of his falsely promising and failing to use his good offices in furtherance of those appointments and the issuance of the license.

(7) A further argument of the defendant turns upon the asserted fact that plaintiff had been and was general agent for a certain board fire insurance company and could not (under board of fire underwriters regulations) retain that agency if he became general agent for defendant's fire insurance companies, which were non-board.* What that had to do with the truth or falsity of the representations which defendant made concerning his companies and his status with them, and his promise to use his best efforts to have plaintiff appointed their general agent, is not clear. Plaintiff's retention or loss of his board company would seem to be of no concern to defendant. Moreover, among the representations which defendant made was one that his companies were going board. Halifax did go board before plaintiff took over the management of the business, and we have found nothing in the record indicating that there was anything to prevent a person from being general agent for a non-board casualty company (Mid-States) while also representing board fire insurance companies. Merchants Fire Insurance Co., as we have noted, canceled defendant's agency with it prior to the commencement of negotiations between plaintiff and defendant. We find no merit in this contention.

[3] (8) Defendant claims he was prejudiced and denied a fair trial because, assertedly, he was not represented by his attorney during the last two days of the trial and was not given the notice required by section 286 of the Code of Civil Procedure. There is no merit in this contention. The trial extended over ten court days. Milton Marks was attorney of record for defendant. He conducted the first

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* This transaction took place prior to the rendition (September 20, 1946) of the decision in Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867, which determined that such regulations were proscribed by the Cartwright Act, Business and Professions Code, § 16700 et seq.

eight days of the trial on behalf of defendant and then became ill and was hospitalized. His son, Milton Marks, Jr., associated with him in the practice of the law, attended and assisted during all of those eight days, except one day when he was ill, and actively participated throughout the remainder of the trial. That was in March, 1950. On May 5, 1950, defendant filed a writing subscribed by him declaring that he thereby substituted "Philip Steiner * * * as his attorney * * in the place and stead of Milton Marks, Jr." This document also bore the signature of Marks, Jr., consenting to the substitution, and of Steiner agreeing to be substituted. Yet, on July 7, 1950, in support of his motion for new trial, defendant filed an affidavit in which he said he was not advised that the son could not appear for defendant until "substituted" for the father; that defendant did not express consent to the "substitution" of the one for the other; that he made no application to the court for such a "substitution"; and, to the best of his knowledge and belief, no order of court was made providing for such "substitution." Significantly, we think, defendant in this affidavit did not say that Milton Marks, Jr., conducted the last two days of the trial on behalf of defendant without the latter's consent or without defendant's having requested him so to act. Defendant, in his affidavit, was speaking only of a *formal* "substitution." It further appears from an affidavit by Milton Marks, Jr., that at the outset of the trial the court announced that the affiant was one of the attorneys for the defendant; that, to the best of his recollection, his father during the course of the trial stated in open court that he was associating affiant as one of the attorneys for the defendant; that affiant participated in the trial on defendant's behalf with defendant's full knowledge, authority and consent; that upon the day of his father's hospitalization he informed defendant of his readiness to conduct the trial to a conclusion and defendant told affiant he had confidence in affiant and desired him to proceed in defendant's behalf; that counsel for plaintiff offered to postpone the trial but defendant desired to have the case go on without further interruption and delay; that affiant continued to represent defendant and acted as his attorney during the two remaining days of the session with defendant's full knowledge, authorization and consent; that after the cause was argued and submitted for decision defendant expressed his complete satisfaction as to the manner in which affiant had handled the case. Alvin A. Lobree, one of plaintiff's attorneys, in his affidavit stated that at the beginning of the trial the court announced the names of all the attorneys of record for the parties, specifically announcing Milton Marks, Jr., as one of the attorneys of record for the defendant; that during the course of the trial Milton Marks, Sr., stated in open court that Milton Marks, Jr., was associated with him as one of the attorneys of record for the defendant; that Milton Marks, Jr., actively participated except for one day during the first eight days of the trial; that defendant was present throughout and conferred actively with Milton Marks, Sr., and Milton Marks, Jr. The trial judge had these affidavits before him when considering defendant's motion for a new trial. In denying that motion the judge, who presided at the trial and knew what happened during its course, impliedly found that defendant was represented by legal counsel throughout the trial and that there was no need or occasion for a substitution of attorneys to effect such representation during the last two days of the trial. The record amply supports that finding.

(9) Next, defendant claims he was excused from performing that part of the agreement which dealt with the appointment of plaintiff as general agent and the introduction of plaintiff to the local agents because after respondent took over management of the business August 17, 1946, the parties were negotiating with respect to termination of the agreement. This point is without merit. Prior to August 17, plaintiff discovered the falsity of the representation concerning Merchants Fire Insurance Company. It was between August 17 and September 3 that he discovered the falsity of the other representations,

and notified defendant thereof and demanded return of the $5,500. Thereupon, at defendant's request, negotiations ensued for settlement of the respective rights and duties of the parties, negotiations which defendant terminated in November, followed by plaintiff's formal notice of rescission in December, 1946. There was nothing in that situation which could or did absolve defendant from the legal consequences of defendant's failure, before or after August 17, to use his good offices in furthering plaintiff's appointment as general agent and in failing to put him in contact with the local agents.

[4] (10) Defendant claims that the transaction between him and third parties after receipt of plaintiff's formal notice of rescission did not operate as ratification and acceptance of the rescission as found by the court. Defendant claims that he was merely making the best of a difficult situation thrust upon him by the plaintiff when the latter assertedly "abandoned the office." The answer to this contention is that the trial court found as a fact that defendant ratified and accepted the rescission of the agreements, a finding which the evidence supports.

(11) In his closing brief defendant discusses at some length a point not developed in his opening brief. It bears upon the propriety of the trial court's denial of defendant's motion for a new trial. One of the grounds of that motion was the asserted discovery of new evidence, consisting of an agreement for the dissolution of the partnership of Reed & Ellis, dated July 1, 1946, and the transcript of a hearing held in July, 1947, before a hearing officer for the State Insurance Commissioner in the matter of the application of plaintiff herein (doing business as Frank J. Reed General Agency) for a license to act as an insurance agent.

He claims these documents are material to show: (a) Plaintiff knew the insurance business, already represented nine companies, testified at the state insurance hearing that the value of a general agency company is the right to participate and the chance that the representation will continue; hence, that plaintiff could not have relied upon defendant's assurance he would get those agencies. The evidence thus proffered is merely cumulative upon an uncontroverted issue. Plaintiff testified he had been in the insurance business ever since 1920, and demonstrated by his testimony through familiarity with the distinction between board and non-board companies and the relationship between a company and its general agent. The remainder of the answer to this contention will be found in paragraph (6), above. (b) Plaintiff testified before the hearing officer that conditions were strained between him and a former partner, Ellis, at the time of the dissolution of their partnership in July, 1946, which, coupled with plaintiff's desire to retain a general agency contract which that partnership had with a certain board company and the fact that defendant was getting the additional insurance business, defendant claims would show that in his agreements with defendant plaintiff was merely buying a business, not bargaining for company representation. Defendant has not directed our attention to any of plaintiff's testimony given upon the trial of this action which was inconsistent with that given before the hearing officer and we do not see the cogency or the relevancy of defendant's highly speculative process of reasoning. His argument under this heading is somewhat akin to the arguments discussed in paragraphs (3) and (7), above. (c) In his testimony before the hearing officer, plaintiff said there was no discussion between him and defendant as to obtaining a partnership license. Defendant does not indicate how that bears upon the issues in this case or that it tends to impeach any of plaintiff's testimony which in this regard was that, as found by the trial court, defendant promised to file with the Insurance Commissioner documents evidencing the appointment of plaintiff as general agent for the Merchants, Mid-States and Halifax companies. (d) Two accountants employed by the Halifax company testified that they had examined the books of the business which defendant sold to plaintiff and found no deficit as of July 1, 1946. They found an excess of receipts over expenditures of about $600 during July and about $400 in August and a loss during each of the months of September through December, 1946. We fail to see how the transcript of their testimony in such a proceeding could have been introduced at the trial of this case. Those witnesses were not the agents of plaintiff. Their statements were not his statements, nor has defendant made any affirmative showing that the facts purportedly evidenced by the testimony of those accountants were unknown or unavailable to defendant prior to or during the trial of this action, however relevant or irrelevant those facts may have been to the issues of this case.

Moreover, defendant has not made a clear showing of lack of knowledge and inability to produce at the trial the two documents here under discussion. As early as October 19, defendant verified and on October 20, 1949, filed his answer to a supplemental complaint which described in some detail the proceedings and issues before the Insurance Commissioner, and mentioned the firm of Reed & Ellis and the date of its dissolution. The taking of evidence upon the trial took place during the period March 7 to 24, 1950. The substitution of defendant's present attorney was dated May 4 and filed May 5, 1950. In his affidavit upon motion for new trial defendant said he knew his former attorney, Milton Marks, Sr., had evidence of the administrative hearing before the Department of Insurance, that during the trial he heard plaintiff testify that the firm of Reed & Ellis had been dissolved, that about May 8, 1950, he was asked by his new attorney concerning the terms of that dissolution and on May 10, 1950, first learned of the existence of a written agreement containing the terms of that dissolution. The record discloses no move upon behalf of defendant to reopen the trial for presentation of this evidence even though it was not until June 5, 1950, that findings of fact and conclusions of law, bearing date May 5, were filed. Application for the consideration of that evidence was not made until after judgment, upon motion for a new trial. We find nothing in the record that would serve as a basis for holding that the court below committed any abuse of discretion in denying that motion.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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112 Cal.App.2d 27

AHERN et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 19088.

District Court of Appeal, Second District, Division 3, California.

June 25, 1952.

Margaret F. Ahern, and others, suing on their own behalf and on behalf of all other stockholders of Southern California Meat Co., filed a petition against Superior Court of the State of California, in and for the County of Los Angeles, for writ of mandate, commanding respondent court to annul its order granting a motion by defendants to quash a subpoena for the taking of a deposition in an action pending in respondent court, and for other relief. Charles M. King, and others, were the real parties in interest. The District Court of Appeal, Vallée, J., held that deposition could be taken under provision of Code of Civil Procedure authorizing taking of deposition to be used in pending trial when witness is only one who can establish facts material to issue and presence of such witness cannot be procured at time of trial.

Order in accordance with opinion.

1. Depositions 🔑2

Section of Code of Civil Procedure authorizing taking of depositions to be used in pending trial should be liberally construed with a view to effect its objects and to promote justice. Code Civ.Proc. § 2021.

2. Depositions 🔑1

Provisions of Code of Civil Procedure relating to taking of depositions were designed to simplify procedure, to promote and protect it by enabling litigants to protect their substantial rights by simpler, speedier and more efficacious means. Code Civ.Proc. § 2021.

3. Depositions ⚷8

Ordinarily a person is entitled as matter of right to take a deposition in cases provided for by section of Code of Civil Procedure authorizing taking of depositions to be used in pending trial. Code Civ. Proc. § 2021.

4. Witnesses ⚷83

A party to an action may be a witness in his own behalf. Code Civ.Proc. § 1878.

5. Depositions ⚷17

A party to an action was not a "witness" for purpose of section of Code of Civil Procedure authorizing taking of depositions to be used in pending trial when witness is only one who can establish facts material to issue and presence of such witness cannot be procured at time of trial. Code Civ.Proc. § 2021, subd. 6.

See publication Words and Phrases, for other judicial constructions and definitions of "Witness".

6. Depositions ⚷17

Where defendant rented premises to third person in behalf of corporation, and defendant and lessee were only persons present when lessee made alleged rental payments to defendant which defendant allegedly did not pay to corporation, and derivative stockholder's action for accounting was brought against defendant who would contradict testimony of lessee relative to making of such statement, deposition of lessee could be taken under provision of Code of Civil Procedure authorizing taking of deposition to be used in pending trial when witness is only one who can establish facts material to issue and presence of such witness cannot be procured at time of trial, notwithstanding defendant would also testify. Code Civ.Proc. § 2021, subd. 6.

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Thomas R. Fisher, Los Angeles, and Holbrook, Tarr & O'Neill, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

McLaughlin & Casey, Los Angeles, for real parties in interest.

VALLÉE, Justice.

Petitioners seek a writ of mandate commanding the Superior Court of the County of Los Angeles 1) to annul its order granting a motion of defendants to quash a subpoena for the taking of the deposition of one Jack Kissel in an action pending in that court entitled Margaret F. Ahern et al. v. Charles M. King et al., #567,679, 2) to deny the motion, and 3) to enforce the claimed right of petitioner to take the deposition under subdivision 6 of section 2021 of the Code of Civil Procedure.

Petitioners brought action 567,679, a stockholder's derivative suit for an accounting, for the benefit of Southern California Meat Company, a corporation, referred to as the corporation. The named defendants are Charles M. King, William L. Koch, Herbert Kinney, and Trophy Meat Packers, Inc., a corporation. The complaint alleges that during 1943, 1944, and 1945 the defendant Charles M. King, acting on behalf of the corporation, leased some of its wholesale facilities to others at a stated rental; that in addition to the stated rental which was paid to the corporation, King exacted rent from said wholesalers for the use of the facilities of the corporation in the sum of $140,000; that King collected the $140,000 and did not pay it to the corporation.

The defendants Charles M. King, William L. Koch, and Trophy Meat Packers, Inc., filed an answer, verified by King, specifically denying the aforesaid allegations of the complaint.

Thereafter at the request of the plaintiffs a subpoena issued for the taking of the deposition of Jack Kissel. The affidavit upon which the subpoena issued states that Kissel is the only witness who can testify that: about November, 1942, he, as a partner in a hotel and restaurant supply company, leased space and facilities from the corporation; King acted for the corporation; commencing in November, 1942, and continuing through 1944, Kissel and his partners continued to lease the space and facilities; during this period of time King demanded sums of money of Kissel to be paid weekly to King in addition to the agreed rent; Kissel will testify that the sums so paid exceeded $140,000; Kissel is the only person who can testify to the payments of said sums and to the amount; no person other than King and Kissel was present at the times the sums were paid.

The defendants filed a motion to quash the subpoena, which was granted. The affidavit filed in support of the motion did not deny that Kissel and King were the only persons present at the times of the alleged payments. The motion was based on the ground that the facts do not come within subdivision 6 of section 2021 of the Code of Civil Procedure.

The matter is submitted on the petition for the writ, the demurrer of respondent court, and the demurrer and answer of the real parties in interest. No issue of fact is made.

Section 2021 provides: "The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases: 1. When the witness is a party to the action or proceeding * * *; * * * 6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause; * * *."

Is Kissel the only witness who can establish facts or a fact material to the issue? Does the fact that King, a party-defendant to the action, will testify contrary to the testimony to be given by Kissel, preclude Kissel from being the only witness who can establish the facts or a fact, as argued by respondents? The question presented was expressly left open in Verdier v. Superior Court, 88 Cal.App.2d 527, 535, 199 P.2d 325.

[1–3] Section 2021 is "to be liberally construed, with a view to effect its objects and to promote justice." Code Civ.Proc. § 4. "The statute authorizing the taking of depositions to be used in pending trials should be liberally construed to the end that a litigant in a pending action may be afforded a reasonable opportunity to procure available testimony in support of his cause. Pollak v. Superior Court, 197 Cal. 389, 240 P. 1006. That opportunity, under some circumstances, might prevent a miscarriage of justice." Moran v. Superior Court, 38 Cal.App.2d 328, 334, 100 P.2d 1096, 1099. "The taking of a deposition is one of the most efficient and necessary proceedings known to the law in aid of the court and in furtherance of the ends for which the court was created." Burns v. Superior Court, 140 Cal. 1, 10, 73 P. 597, 601. The provisions of the code with respect to the taking of depositions "were designed to simplify procedure—to promote the ends of justice by enabling litigants to protect their substantial rights by simpler, speedier, and more efficacious means. Among the most important rights of a litigant is that of securing the evidence by which the justice of his claim or defense may be established, and when there is but a single witness upon a material point, * * * the necessity of taking [his deposition] is apparent." San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 35–36, 99 P. 359, 361; Golden State Co. v. Superior Court, 25 Cal.App. 2d 176, 178, 76 P.2d 728. Ordinarily a litigant is entitled to take a deposition in the cases provided for, as a matter of right. Carnation Co. v. Superior Court, 96 Cal. App.2d 138, 140, 214 P.2d 552; Patrick Farms, Inc., v. Superior Court, 13 Cal.App. 2d 424–425, 56 P.2d 1283.

[4–6] A party to an action may well be, and usually is, a witness in his own behalf, Code Civ.Proc. § 1878; but such a person is not thereby to be considered a "witness" for the purposes of subdivision 6. See Bagley v. District Court, 218 Iowa 34, 254 N.W. 26, 28–29; Hamilton Co. v. Goring, 65 R.I. 459, 16 A.2d 334–335; Hubbard v. Haynes, 189 Tenn. 335, 225 S. W.2d 252; Ex parte Cross, 247 Ala. 85, 22 So.2d 378, 381–382; In re Denning, 5 Terry 470, 44 Del. 470, 61 A.2d 657, 659. Subdivision 1 of section 2021 declares that the deposition of an adverse party and certain officers, agents, and employees of an artificial entity which is a party, may always be taken. The remainder of the section authorizes the depositions of witnesses not parties to an action. The two types of depositions are distinguishable: one is discovery, the other is not. The fundamental purpose of taking the deposition of a party is to obtain information, to give a party the advantage of knowing prior to the trial what his opponent's testimony will be, and to serve the very useful purpose of limiting the need of proof of issues by substituting for testimony given at the trial the admissions and the information secured from the adversary before the trial. The basal purpose of taking the depositions of witnesses is to make certain that their testimony will be available at the trial. This is evident from the fact that such depositions cannot be taken unless it appears probable that the attendance of the witness at the trial may not be secured. In the case of a party, no such showing is necessary. The Legislature evidently considered the fact that when the witness is the only one who can establish facts or a fact material to the issue the danger of loss of proof is aggravated. The distinction is evidenced further by the provision that a witness must be unavailable at the trial in order to use his deposition as evidence, whereas the deposition of a party is admissible as evidence even though the party who gave the deposition is present at the trial. Code Civ.Proc. §§ 2021(6), 2032. It has been said that subdivision 6 refers to the taking of the deposition of a witness who is not a party to the action. Johnston v. McDuffee, 83 Cal. 30, 23 P. 214; Verdier v. Superior Court, 88 Cal. App.2d 527, 532, 199 P.2d 325; 4 So.Cal. L.Rev. 184. The obvious object of subdivision 6 is to vest in a party to an action the right to make certain that the testimony of a witness, as distinguished from a party, shall be available at the trial to prove one or more issues in the case when the witness is the only one who can establish facts or a fact material to such issue or issues.

We are considering a fact or facts to be established by the plaintiffs. Manifestly, a party cannot establish a fact or facts by an adverse party who has denied in his answer that such fact or facts occurred. Can it be said that anyone other than Kissel can establish the fact that he paid money to King over and above the agreed rent for the facilities of the corporation, the times payments were made, and the amounts? Obviously not. The facts cannot be established by King. To establish is to prove as true. King denies Kissel paid him any money over and above the agreed rent. If King were called as a witness by the plaintiffs, instead of establishing—proving true—the facts they seek to establish, they would establish the contrary.

We conclude that upon the facts Kissel is the only "witness" who can establish facts or a fact material to the issue, and that petitioners are entitled as a matter of right to take his deposition.

In view of our conclusion it is unnecessary to consider petitioners' further contention that they made a case for the taking of the deposition under subdivision 4 of section 2021.

The demurrers to the petition are overruled. Let a peremptory writ issue as prayed.

SHINN, P. J., and PARKER WOOD, J., concur.

111 Cal.App.2d 843

WESTERN LOS ANGELES CITIZENS' COMMITTEE ON LIQUOR LICENSES et al. v. STATE BOARD OF EQUALIZATION et al.

Civ. 18678.

District Court of Appeal, Second District,
Division 3, California.

June 20, 1952.

Rehearing Denied July 8, 1952.

Hearing Denied Aug. 14, 1952.

Western Los Angeles Citizens' Committee on Liquor Licenses, a corporation, and others, sued the State Board of Equalization of the State of California, and another, for

a writ of mandate ordering named defendant to revoke an "on sale" liquor license. The Superior Court, Los Angeles County, Frank G. Swain, J., issued peremptory writ ordering revocation of license, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that evidence was not sufficient to support finding that applicant's place of business was within 1½ miles of a home, retreat, or asylum for veterans, and that such issue would be referred back to the Board for redetermination.

Judgment affirmed as modified.

Parker Wood, J., dissented in part.

Prior opinion, 240 P.2d 627.

1. Intoxicating Liquors ⊂=59(2)

Medical and surgical hospital where veteran patients remained only while undergoing treatment did not come within meaning of quoted words of statute prohibiting sale of intoxicating liquors on premises within one and one-half miles of a veterans' "home," "retreat," or "asylum." Pen.Code § 172, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Asylum", "Home" and "Retreat".

2. Intoxicating Liquors ⊂=59(2)

In determining whether premises for which "on sale" liquor license was sought was within one and one-half miles of Veterans' Administration barracks, measurement was to be made to locked and unused barracks door closest to such premises rather than to main entrance. Pen.Code, §§ 172, subds. 1, 4, 172a.

3. Mandamus ⊂=168(4)

In mandamus proceedings to set aside Board of Equalization's order granting a general "on sale" liquor license, evidence was not sufficient to sustain finding that applicant's place of business was within 1½ miles of a building actually occupied as a home, retreat, or asylum for ex-soldiers, sailors and marines, and matter would be referred to the Board for redetermination of the distance.

4. Mandamus ⊂=176

Where Board of Equalization, by misinterpretation of statute prohibiting sale of intoxicating liquors on premises within 1½ miles of veterans' home, retreat or asylum, failed to consider material evidence which, if found reliable, would have supported board's findings and order on application for liquor license, in mandamus proceeding court should not annul the order upon ground that there was other evidence which would have supported findings contrary to those made by Board, nor should court affirm Board's order when to do so would require decision of fact upon conflicting evidence. Pen.Code, §§ 172, 172a.

5. Intoxicating Liquors ⊂=70

In proceeding to obtain liquor license, Board of Equalization has exclusive function and duty to determine facts where evidence is conflicting. Pen.Code, §§ 172, 172a.

6. Mandamus ⊂=143(1)
Time ⊂=10(4)

Where "on sale" liquor license was issued October 26, but Board of Equalization's order granting license was not rendered until November 10, 30-day period for filing petition for mandate began to run not earlier than November 10, and therefore petition filed December 11 was timely, in view of fact that December 10 fell on Sunday. Pen.Code, §§ 172, 172a; Code Civ. Proc. § 1094.5(e); Government Code, §§ 11518, 11519(a), 11521, 11523.

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Edmund G. Brown, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for appellant, State Board of Equalization.

David P. Connelly, Beverly Hills, for appellant, Louis L. Lasher.

J. Henry Schweitzer, Los Angeles, for respondents.

SHINN, Presiding Justice.

Defendants Louis L. Lasher and the Board of Equalization appeal from a judgment ordering the Board to vacate and set aside its order granting a general "on sale" liquor license to Lasher for premises located at 1776 Westwood Boulevard, Los Angeles, and to enter a new order denying the license. The superior court granted a peremptory writ of mandate on the ground that Lasher's premises are within one and one-half miles of "a building actually occupied as a home, retreat or asylum" for veterans, which would render any sale of intoxicating liquor on the premises a violation of Penal Code section 172(1). In our former opinion we affirmed the judgment which directed the board to deny Lasher's application. We assumed there was no substantial conflict in the evidence before the board as to the distance between the two buildings. There was a conflict, although plaintiffs argued that evidence given by officers of the board with respect to a measurement they made, showing the distance to be more than one and one-half miles, was so uncertain and unreliable as to have no force or value. We granted a rehearing for the reason that there was inherent in our former opinion a decision of a controlling question of fact, as to which the evidence before the board was in substantial conflict. As will be developed in our discussion we are now of the opinion that the order should be annulled, but that the matter should be referred to the board for further consideration.

As assignee of an existing license, Lasher applied for a general "on sale" license for his cafe. There were existing "off sale" licenses at Harold's across the street, and Tony's next door. The application was opposed by plaintiffs on the ground it would be against public welfare and morals to license the premises for the reason that Y. M. C. A. and Y. W. C. A. buildings, schools and churches were in the immediate vicinity, and the further reason that the premises were within a mile and a half of Sawtelle Soldiers' Home Building (No. 215) and Wadsworth General Hospital (Veterans Administration facilities). The examiner recommended denial of the application because of the churches and youth groups in the vicinity, and it was denied by the Board on October 9, 1950, for that reason. The Board then found that the license would not conflict with sections 172 or 172a of the Penal Code. Lasher's petition for reconsideration was granted and a hearing was held by the Board on October 26, 1950. The Board again found that sales at the location would not be in violation of section 172(1). The Board granted the license and plaintiffs petitioned for a writ of mandate. After a consideration of the transcript of the Board hearing the court rendered judgment issuing a peremptory writ ordering the Board to revoke the license.

[1] The court found that Wadsworth Hospital is a "retreat, or asylum" within the meaning of Penal Code section 172. All the evidence was that it is exclusively a medical and surgical hospital where patients remain only while undergoing treatment. Under no tenable theory could it be regarded as a home, retreat or asylum. The type of building to which the code section relates is one which provides residential facilities. There are no such facilities for patients in the Wadsworth Hospital. When the legislature specified "home, retreat or asylum" it did not also mean "hospital." The finding would appear to have been made inadvertently. It is not sustained by the evidence, and therefore cannot lend support to the judgment.

Building "215" is a barracks building of the Veterans Administration. It is not questioned that it is a building to which section 172(1) would apply if it is within the minimum distance. At the hearing before the hearing officer petitioner Lasher introduced in evidence a map of the vicinity showing the measurement of the distance between building 215 and the licensed premises along a route following roads as delineated upon the map. According to these measurements, the distance was 8022.22 feet (102.22 feet greater than a mile and a half). The route followed in this measurement extended to the main center entrance of building 215. At the hearing before the board objectors, plaintiffs herein, introduced another copy of the same map showing measurements along the same route up to a point about 200 feet from building 215; from that point the measurement ran to the south end entrance of the building. From the point where the two routes separated the distance to the south entrance to the building is 186.86 feet shorter than the distance to the main center entrance. Taking the shorter measurement, the distance between the licensed premises and building 215 is 7835.36 feet (84.64 feet less than the required distance).

Lasher and the board stood upon the measurement to the main center entrance of the building; plaintiffs herein contended for the shorter measurement. It is not questioned that up to the point of this deviation both measurements were in compliance with section 172(4) of the Penal Code which provides that the distance is to be measured by "following the shortest road or roads connecting the points in question." The trial court adopted the measurement to the south entrance of the building and consequently found the distance to be less than a mile and a half. Our first question is to determine which was the correct terminus of the measurement.

[2] The evidence indicates the end entrance is at present locked and not used. It is argued that the Board reasonably decided that the main entrance, which is the one generally used, should be one terminus of the measurement. We might agree if the statute left any room for interpretation, but it does not. Section 172 mentions two points—the place of sale and the "building" described—making no provision for method of measurement other than that it is to be by "the shortest road or roads connecting the points in question." The Board used a practical method in measuring between the entrances of the two buildings, but if a door in the Veterans building was taken as a terminus of the measurement, it should have been the one which would first come within the minimum distance. This is the door at the south end of the building, which is upon an established road. It is not necessary to consider respondents' contention that the approach to the main entrance is a walkway, and not a road.

[3] Although the measurement adopted by the trial court conforms to the statute, the result reached would not furnish a ground for annulment of the order unless, upon the evidence which was before it, the Board was required to find the distance to be less than one and one-half miles. It was alleged in the petition for writ of mandate and the court found: "That at said hearing for reconsideration petitioners presented *uncontroverted* evidence proving that the location of respondent Louis L. Lasher's place of business at 1776 Westwood Boulevard is within one and one-half miles of a 'building actually occupied as a home, retreat or asylum for ex-soldiers, sailors and marines,' as provided in section 172 of the Penal Code of the State of California, when measured in conformity with the requirements of said section and the rules of respondent, State Board of Equalization." (Emphasis added.) If this finding is supported by the evidence, it is sufficient to support the judgment. The Board would have been without authority or discretion to issue such a license if it was established by uncontradicted and satisfactory evidence that the place of intended sale was within a prohibited area. But the finding in question is not supported by the evidence. The conclusion of the trial court may be accounted for in this manner: It appears that upon the trial attention was centered upon the question of law whether the proper measurement would be the longer route adopted by the board, or the shorter route for which the objectors contended. In our former opinion the only matter we discussed and decided in this connection was the one pertaining to the entrance of building 215 which should be taken as a terminus of the measurement.

There was a clear and substantial conflict in the evidence as to whether the two points are more or less than one and one-half miles apart. The record shows affirmatively that upon the reconsideration the board considered the entire record, including a transcript of the evidence taken by the hearing officer. A witness before the hearing officer was a Mr. Barham, a liquor control officer. He testified that he, assisted by officers Dunham and Thompson, measured the distance by automobile speedometers, following the route shown on the maps, and that they found the distance to be 8,329 feet (*409* feet more than a mile and a half). They taped the distance between the south wall of building 215 and the nearest roadway, and from that point used two cars, the speedometers of which had been calibrated by the Automobile Club of Southern California. If it be granted that this was not a satisfactory method of measurement, where exactness was required, the record shows that the officers used great care and the evidence was clearly sufficient to constitute a substantial conflict with the measurement shown on the map. Normally, a map prepared by a licensed surveyor would be accorded greater authenticity than the kind of measurement made by the officers, but, as previously stated, the map here in question was not authenticated by the testimony of the maker, or in any other manner. At the hearing one member of the Board stated that the testimony of the officers should be deemed controlling and there was no dissent. However, the board decided only that the distance was more than a mile and one-half measured to the main central entrance of building 215, and for that reason granted the license.

[4, 5] The rights of the parties cannot be fairly adjudicated until it is established to a certainty whether the applicant's premises are within a prohibited area. Although the evidence upon that point was conflicting, it is clear from the record that the Board considered it unnecessary to resolve that conflict and did not resolve it. In the Board's opinion, it was not material which was the correct measurement, inasmuch as by either method the distance to the main entrance was in excess of the minimum. We do not know what the Board would have decided as between the measurement made by the officers and the figures shown on the map, or whether additional evidence would have been taken if it had been deemed necessary to make that decision. It is clear, however, that we cannot weigh the evidence upon this point and reject altogether that given by the officers. The Board must decide one way or the other. Where the record clearly shows that the Board, by reason of its misinterpretation of the law, failed to consider material evidence which, if found reliable, would have supported the Board's findings and order, the court should not annul the order upon the ground there was other evidence which would have supported findings contrary to those made by the Board. Neither should the court affirm the Board's order when to do so would require a decision of fact upon conflicting evidence, which is the exclusive function and duty of the Board. Lasher, being the real party in interest, should not be prejudiced by mistakes of the Board. The only course that will give assurance that no injustice will be suffered by either of the parties is to modify the judgment so as to refer the matter back to the Board for a redetermination of the controlling fact, namely, the distance between the two buildings, measured in accordance with the views we have expressed. Appellants very properly suggest that this should be done in accordance with section 1094.5(e), Code of Civil Procedure. We think the trial court would have referred the matter to the Board if the parties had made a clear presentation of the evidence that is in the record. We may add that we do not suggest that it is a proper practice to measure distances by mileage registered on automobile speedometers where the question is a close one. Surveying is the proper method. We hold only that the Board should weigh the conflicting evidence and determine the correct distance in accordance with evidence that is entirely free from doubt.

[6] Appellants contend the petition was filed after the 30-day limitation period of section 11523 of the Government Code for review by mandamus. Section 11518 of the code provides that: "The [Board's] decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any * * *. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail." Section 11519 provides: "(a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: A reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted." Section 11523 provides, in part: "Except as otherwise provided in this section any such petition [mandate] shall be filed within 30 days after the last day on which reconsideration can be ordered." Under section 11521, "The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on

the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the 30-day period." The court found the license was issued to Lasher October 26, 1950, and further, "that the decision of the Board [as defined in Government Code, sec. 11518] ordering that the application of respondent Louis L. Lasher for such license be granted was not rendered until November 10, 1950, and was not effective until November 13, 1950."

On October 26th the Board adopted a resolution granting the license, but it did not render its decision in writing and findings until November 10th. These were mailed in Sacramento to the defendant at Los Angeles on November 10th. The Board contends that the 30-day period within which a petition for mandate could be file commenced to run October 26th for the reason that the matter was actually decided and the license was issued on that date. We cannot agree. The resolution of the Board did not order the license to be issued at that time nor fix any date for its issuance. The decision of November 10, 1950, provided that it would be "effective on notice hereof." The time would commence to run not earlier than November 10th when the written decision and findings were filed. December 10th fell on Sunday, and the petition for mandate was filed on the following day, or within the 30-day period. This being true, it is unnecessary to determine whether the fixing of November 13th as the effective date of the order affected in any manner the element of time for filing a petition for writ of mandate. Neither is it material that November 11th and 12th were holidays, and, as implied by the court's finding, that notice of the order was not received by the defendant until November 13th.

The judgment is modified as follows: The court is directed to vacate its finding that the premises of Louis L. Lasher are within one and one-half miles of a home, retreat or asylum, and to add to the findings a recital that the court makes no finding upon that issue for the reason that it is the duty of the Board of Equalization to determine the same upon the evidence already taken, and that may be taken upon a further hearing; judgment shall be entered directing the Board to vacate its order granting the application of said Lasher and to rehear and redetermine the matter of said application and protests as of the date of the former reconsideration. As so modified the judgment is affirmed.

VALLÉE, J., concurs.

PARKER WOOD, Justice.

I concur in the part of the opinion wherein it is held that the measurement should be to the south entrance, and that the order of the board should be annulled. I cannot agree, however, that there was a substantial conflict in the evidence as to whether the south entrance was less than 1½ miles from Lasher's place of business. The matter was submitted to the trial court and to this court (at the first hearing) upon the basis that it was uncontroverted that the distance to the south entrance was less than 1½ miles and that the distance to the main entrance was more than 1½ miles. The trial court found that there was uncontroverted evidence that Lasher's place was within 1½ miles of building 215. In my opinion the evidence supports that finding. The principal question for the trial court and this court (at the first hearing) was whether the measurement should be made to the south entrance or the main entrance. The trial court and this court held that the measurement should be to the south entrance. It was only after these rulings, unfavorable to the board, had been made that the board raised the question as to conflicting evidence—asserting in effect that when it decided the case, by relying upon the survey *introduced in evidence by Lasher,* there was conflicting evidence before the board, in that, the evidence as to measuring with automobiles was in conflict with evidence as to the survey made by a licensed surveyor. It seems to be the board's position that, by reason of such alleged conflict, it should now be entitled to redecide the fact as to the distance by relying, presumably, upon the purported measurement by automobiles which *exceeded the survey measurement by 409 feet.* It is to be remembered that Lasher, petitioner for a license, is the one who furnished the first survey map showing the distance to the main entrance to be 8,022.22 feet (being more than 1½ miles). It is not to be assumed that he presented untrustworthy evidence. He does not claim that the survey was wrong. The objectors herein (the Western Los Angeles Citizens' Committee) accepted Lasher's survey as being correct. They introduced a survey map which was a copy of Lasher's survey map, except that their map showed the distance from a certain point in the road (near building 215) to the south entrance. Their map showed that the whole distance from Lasher's place to the south entrance was 7,835.36 feet (being less than 1½ miles). Both survey maps, which were made by the same surveyor, showed the same distance from Lasher's place to a certain point in the road near building 215 (from which point measurements were made to the two entrances). From that common point to the main entrance, both maps showed the distance to be 384.62 feet. From that point to the south entrance, the objectors' map showed the distance to be 197.76 feet. No one objected to the survey as to the distance from that common point to the south entrance. Under such circumstances, wherein the genuineness and accuracy of the survey were not questioned, it seems to me that in reality no point regarding authenticity of the survey maps is involved. The pathway or roadway from said common point on the road to either entrance was not an automobile road and those distances were not, and could not be, measured by automobile. Even if the automobile method of measuring were a proper method of measuring, it is clear that measuring by automobile was not in conflict with the survey from said common point on the road to the entrances. In other words, if any measuring by automobile is to be regarded as being in conflict with the survey it would be the automobile measurement from Lasher's place to the said common point on the road. Certainly there was no conflicting evidence as to the distances from the common point in the road to the entrances. In my opinion the automobile method of measuring is so unreliable that the evidence as to measurement by that method from Lasher's place to the common point on the road should not be regarded as substantial evidence in conflict with the survey covering that distance. Measuring by automobile is unreliable for many reasons, one of which is that the odometer registers only in units of tenths of a mile (528 feet), and if the automobile does not start and stop when the odometer registers exactly the beginning of a tenth of a mile it would be a matter of guesswork as to how far the automobile had gone after the last tenth was registered. If the board should decide that measuring by the automobile method, which involves meandering and guessing, is controlling as against a survey, I think it would be acting arbitrarily and capriciously, and that its order should be annulled. In the present case it appears that the board did reject the automobile method of measuring, and based its finding upon the survey. Its order recites in part: "The nearest such barracks is Building 215 which is over one and one-half miles from the premises in question by the nearest road or roads, being, *according to a survey submitted by applicant,* 8,022.22 feet distant." (Emphasis added.) In my opinion our first opinion was correct and the judgment of the trial court should be affirmed.

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112 Cal.App.2d 133

MANSFIELD v. HYDE et al.

Civ. 18921.

District Court of Appeal, Second District,
Division 3, California.

June 30, 1952.

Hearing Denied Aug. 28, 1952.

Willie K. Mansfield sued Hazel Hyde, the First Trust and Savings Bank of Pasadena, and others for money had and received by first named defendant pursuant to a contract for care, training and education of plaintiff's mentally defective minor grandson by defendant in consideration of plaintiff's deposit of a specified sum monthly in defendant bank to defendant's credit for payment of expenses incurred and services rendered on the minor's behalf. Defendant filed a cross-complaint to recover a balance due from plaintiff under the contract. From a judgment of the Superior Court of Los Angeles County, Robert H. Scott, J., for defendant on the cross-complaint, plaintiff appealed. The District Court of Appeal, Vallée, J., held that the contract was illegal, void, and unenforceable by either party because defendant had no license, required by statute, to maintain and conduct a place for and engage in the business of receiving and caring for children under sixteen years old in their parents' or guardians' absence.

Judgment reversed with directions.

1. Appeal and Error 🔑110

No appeal lies from order denying motion for new trial. Code Civ.Proc. § 963.

2. Infants 🔑19

The word "business," used in statute providing that no person shall engage in business of receiving or caring for children under sixteen years old without having obtained license therefor from state social welfare department, embraces, in broad sense, everything about which one can be employed and is often synonymous with calling, occupation or trade engaged in for purpose of obtaining livelihood, profit, or gain. Welfare and Institutions Code, § 1620.

See publication Words and Phrases, for other judicial constructions and definitions of "Business".

3. Infants 🔑19

To "engage in," as within statute providing that no person shall engage in business of receiving or caring for children under sixteen years old without having obtained license therefor from state social welfare department, is to be occupied or employed in. Welfare and Institutions Code, § 1620.

See publication Words and Phrases, for other judicial constructions and definitions of "Engage In".

4. Infants 🔑19

The word "care," used in statute providing that no person shall maintain or conduct place for reception or care of children under sixteen years old, nor receive or care for such children in absence of their parents or guardians, without having obtained license therefor from state social welfare department, means charge, oversight or management, implying responsibility for safety, and also custody or temporary charge. Welfare and Institutions Code, § 1620.

See publication Words and Phrases, for other judicial constructions and definitions of "Care".

5. Infants 🔑19

A contract by woman maintaining and conducting place for, and engaged in business of, receiving and caring for children under sixteen years old in their parents' or guardians' absence, to take care of, train and educate seven year old mentally defective boy in her residence in consideration of his grandmother's agreement to deposit specified sum monthly in bank to promissor's credit for payment of expenses incurred and services rendered on minor's behalf, was illegal and void, where promissor had no license, required by statute, from state social welfare department or state health department to engage in such business or conduct establishment providing organized services for handicapped persons. Health and Safety Code, §§ 1501, 1502; Welfare and Institutions Code, §§ 1620, 1629.

6. Contracts 🔑138(1)

A contract made contrary to terms of law designed to protect public and prescribing penalty for violation thereof is illegal and void, and disclosure of its illegality by evidence of either party to action to enforce contract is fatal to plaintiff's case.

7. Infants 🔑2

The state, as parens patriae, is charged with continuing interest in minor children's welfare.

8. Infants 🔑19

The legislative purpose of statute requiring license from state social welfare department for privilege of maintaining or conducting place for, or engaging in business of, receiving or caring for children under sixteen years old in their parents' or guardians' absence, is to prevent improper persons from being thus engaged and improper facilities from being used for such purposes. Welfare and Institutions Code, § 1620.

9. Licenses ⚷39.1

When object of statute requiring license is to prevent improper persons from engaging in particular activity or to regulate an occupation or business for protection of public, imposition of such penalty amounts to prohibition against engaging in such occupation or business without a license, and contract made by unlicensed person in violation of statute is invalid.

10. Infants ⚷19

Failure of woman maintaining and conducting place for, and engaged in business of, receiving and caring for children under sixteen years old in their parents' or guardians' absence, to obtain license therefor from state social welfare department, precluded her recovery of compensation for services performed and monies advanced by her under her contract to take care of, train and educate a mentally defective seven year old boy, nor could his grandmother recover monies paid for such services pursuant to contract. Welfare and Institutions Code, § 1620.

11. Contracts ⚷138(1)

Generally, party to illegal contract cannot obtain courts' aid to enforce contract directly or recover consideration parted with pursuant thereto, as law leaves parties to such a contract where it finds them.

12. Infants ⚷19

A judgment directing that amount deposited in bank savings account by mentally defective boy's grandmother for payment of expenses incurred, and compensation for services rendered, by another woman in caring for, training and educating boy in her residence pursuant to contract, be paid to such woman and credited on her judgment against grandmother for balance of payments due under contract, was erroneous, where woman rendering such services had no license, required by statute, to engage in business of receiving and caring for minor children or maintain establishment providing services for handicapped persons, but court should have adjudged that grandmother was entitled to such balance with accumulated interest. Health and Safety Code, §§ 1501, 1502; Welfare and Institutions Code, § 1620.

◆

Krag & Sweet, Alhambra, for appellant.

Barrick & Wright, Pasadena, for respondent Hazel Hyde.

No appearance for respondent First Trust & Savings Bank of Pasadena.

VALLÉE, Justice.

[1] Appeal by plaintiff and cross-defendant from a judgment for defendant and cross-complainant on her cross-complaint in an action for money. Since there is no appeal from an order denying a motion for a new trial, Code Civ.Proc., sec. 963, the appeal therefrom will be dismissed.

On May 3, 1949, plaintiff, the maternal grandmother, Betsy Mansfield Lovett, the mother, and Herman W. Lovett, the stepfather, of Jay Mansfield Lovett, a minor aged seven and one-half, entered into a written agreement with defendant whereby she was given the sole and exclusive care of the minor free from all interference by plaintiff, his mother, and stepfather. Defendant agreed to devote her best efforts to the training and education of the minor during the term of the agreement, which was for a period of not less than one year, beginning April 25, 1949. Defendant agreed to reside with the minor "and assistant, or assistants, in her residence in Twenty-nine Palms, California, or other appropriate residence." It was agreed that the grandmother, mother, and stepfather would abide by the decisions of defendant "in matters of care, training and education." Plaintiff agreed to deposit $1,000 each month in a bank to the credit of defendant, and defendant agreed to use it for the payment of all expenses incurred on behalf of the minor, other than doctor, druggist, and clothing bills, and to retain the balance in payment for her services. From April, 1949, until May, 1950, the minor resided continuously with defendant in her home at Twenty-nine Palms except for trips to the east which he took in company with defendant.

Defendant did not, at the time the contract was entered into, have a license or permit from the State Department of Social Welfare, or from an inspection service approved or accredited by the department, or from the State Department of Health, to do any of the things done by her; nor did she have such a license or permit during the life of the contract.

On June 19, 1950, plaintiff-grandmother brought the present action for money had and received, alleging that between April, 1949, and January, 1950, defendant had received $10,250 from plaintiff, to and for the use and benefit of plaintiff. Defendant filed an answer and cross-complaint, setting up the written contract of May 3, 1949, alleging full performance by her and default by plaintiff in payment of $1,700 on account of monthly payments falling due in February and March, 1950. Plaintiff's answer to the cross-complaint alleges as an affirmative defense that the written contract was illegal and void.

The issue presented to the trial court was whether the agreement was illegal and void by reason of defendant's failure to obtain a license or permit under the provisions of section 1620 et seq., of the Welfare and Institutions Code[1] or section 1500 et seq. of the Health and Safety Code,[2] as they read at the date of the contract.

The court found: the written agreement was valid and enforceable; defendant had fully performed all her duties and obligations in accordance with its terms; in performing, she did not violate the provisions of the Welfare and Institutions Code, sec. 1620 et seq., or the provisions of the Health and Safety Code, sec. 1500 et seq.; plaintiff was in default under the terms of the agreement in that she has refused to pay a balance of $1,700 due on account of monthly payments falling due on February 25, and March 25, 1950. The court concluded that plaintiff was not entitled to "any" judgment on her complaint but made no adjudication thereon in the judgment. It adjudged that defendant on her cross-complaint recover from plaintiff $1,700 with interest.

Plaintiff argues that the judgment is contrary to law, the findings are not supported by the evidence, that defendant clearly comes within the provisions of section 1620 of the Welfare and Institutions Code, since the evidence conclusively established that defendant maintained and conducted a place for the reception or care of children under the age of sixteen years, also that she was engaged in the business of receiving or caring for children, and further that she received and cared for the child in the absence of its parents, without a license or permit contrary to the provisions of section 1620.

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[1] Sec. 1620, Welfare and Institutions Code: "No person, association, or corporation shall, without first having obtained a written license or permit therefor from the State Department of Social Welfare or from an inspection service approved or accredited by the department:

"(a) Maintain or conduct any institution, boarding home, day nursery, or other place for the reception, or care, of children under sixteen years of age, nor engaged in the business of receiving or caring for such children, nor receive nor care for any such child in the absence of its parents or guardian, either with or without compensation.

"(b) Engage in the finding of homes for children under sixteen years of age, or place any such child in any home or other place, either for temporary or permanent care or for adoption."

[2] Sec. 1502, Health and Safety Code: "No person shall establish, conduct, or maintain in this State any establishment which provides for handicapped persons organized services including any special services without first obtaining a license therefor as provided in this chapter."

Sec. 1501, Health and Safety Code: "As used in this chapter the following terms have the meanings set forth in this section:

"(a) 'Special services' means schooling, medical advice or treatment, physiotherapy, any form of muscle training, massage, speech training, occupational therapy, vocational training, and custodial care, or any of them.

"(b) 'Establishment' means any school, institute, institution, center, custodial home, facility, or other place which provides services for handicapped persons, but does not include any sanatorium, establishment, home or institution conducted by or for the adherents of any well recognized religious sect, denomination or organization for the purpose of providing facilities for the care of handicapped persons who depend upon prayer or spiritual means for healing in the practice of the religion of such sect, denomination or organization, nor does it include any private business school or college, the principal purpose of which is the teaching of business, commercial, and vocational courses."

A license or permit is required if a person maintains or conducts any place for the reception or care of children under sixteen years of age, or engages in the business of receiving or caring for such children, or receives or cares for any such child in the absence of its parents or guardian, either with or without compensation. Section 1629 of the Welfare and Institutions Code makes it a misdemeanor to operate as provided in section 1620 without first having secured a license or permit.

At the time the parties entered into the contract, plaintiff's grandson was seven and one-half years of age. He suffered from an impairment of faculties which required, in addition to medical attention, the constant supervision of a person of skill and training in the educational treatment of such cases. During the life of the contract, he resided with, and was cared for by defendant in her home. When defendant first met plaintiff in March of 1949, she had in her charge, under a contract similar to that involved here, a "little" girl from New York suffering from cerebral palsy. The "little" girl resided with her in her home until the arrival of plaintiff's grandson. She lived with, and in the home of, defendant for two short periods while plaintiff's grandson was also living there; on the other occasions she lived in the home of one of defendant's assistants some little distance from defendant's home. Although she lived elsewhere the "little" girl was brought to defendant's home "for the things that I [defendant] was doing with her," and defendant continued to receive compensation for her services to the "little" girl three months after plaintiff's grandson was taken in charge by her. Besides herself and the children, defendant's household consisted of a maid and a housekeeper. Although defendant did not personally take care of the feeding, clothing, and similar needs of the children, but had others do so, and in the case of plaintiff's grandson, employed additional assistants to teach him formal school work, music, and physical education, defendant testified that "Both he [plaintiff's grandson] and the people I engaged were under my direction. * * * I would say that my direct relationship with the child was that of teaching him decent habits of conduct." She also testified that her work was "conduct problems, cerebral palsy and polio." The foregoing is all of the evidence bearing on the question for decision.

[2, 3] "Business" in its broad sense embraces everything about which one can be employed; the word is often synonymous with calling, occupation, or trade, engaged in for the purpose of obtaining a livelihood or profit or gain. Marin Municipal Water Dist. v. Chenu, 188 Cal. 734, 738, 207 P. 251. "To 'engage in' is to be occupied in, to be employed in." People v. Coppla, 100 Cal.App.2d 766, 768, 224 P.2d 828, 830.

[4] "Care" is defined as charge, oversight, or management, implying responsibility for safety; also custody; temporary charge. (Webster's New Internat. Dict., 2d ed.) The care of children encompasses a variety of duties and services which may consist of something more than mere custodial care—i.e., housing, feeding, and attention to the usual needs of children. It may consist of additional duties and services, depending upon the particular training, qualification, special skill, and talent of those who hold themselves out as qualified to do certain things with children which serve as an inducement to their selection and employment.

[5] There is no evidence that defendant's work with "conduct problems, cerebral palsy and polio" was confined to children of tender years, but there is evidence that the children she cared for during the life of the contract here were such, and that she made her livelihood thereby. While defendant's fine educational background, her outstanding qualifications, ability and experience rendered her eminently qualified in her field of endeavor and these, neces-

sarily, were important factors taken into consideration by those who placed children in her care, the conclusion is inescapable that the evidence, without conflict, conclusively establishes that defendant 1) maintained and conducted a place for the reception or care of children under the age of sixteen years, 2) was engaged in the business of receiving or caring for children, and 3) that while so engaged she received and cared for such a child in the absence of its parents, within the purview of section 1620 of the Welfare and Institutions Code. Compliance with the licensing provisions thereof is, therefore, essential to her right of recovery on the contract. Since she had no license, the contract was illegal and void.

[6] "[I]t has been repeatedly declared in this state that 'a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract' [Citations]; and that 'whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.'" Loving & Evans v. Blick, 33 Cal.2d 603, 607, 204 P.2d 23, 25, and cases there cited; see, also, Franklin v. Nat. C. Goldstone Agency, 33 Cal.2d 628, 204 P.2d 37; Annotation, 30 A.L.R. 834; 42 A.L.R. 1226; 118 A.L.R. 646.

[7, 8] The state, in its position of *parens patriae*, is charged with continuing interest in the welfare of minor children and has surrounded the matter of their custody and care with many protective laws. Ex parte Barents, 99 Cal.App.2d 748, 750, 222 P.2d 488. The legislative purpose in requiring a license or permit for the privilege of maintaining or conducting a place for the reception or care of children under the age of sixteen years, or engaging in the business of receiving or caring for such children, or receiving or caring for such child in the absence of its parents or guardians, is obviously, to prevent improper persons from being thus engaged and improper facilities from being used.

[9] When the object of a statute requiring a license is to prevent improper persons from engaging in a particular activity, or is for the purpose of regulating an occupation or business for the protection of the public, the imposition of the penalty amounts to a prohibition against engaging in the occupation or business without a license, and a contract made by an unlicensed person in violation of the statute is invalid. Joseph v. Drew, 36 Cal.2d 575, 577, 225 P.2d 504; Wood v. Krepps, 168 Cal. 382, 386, 143 P. 691, L.R.A.1915B, 851.

[10, 11] Defendant's failure to comply with the licensing provision of section 1620 therefore precludes her recovery of compensation for the work and services performed and monies advanced while so unlicensed. Holm v. Bramwell, 20 Cal. App.2d 332, 337, 67 P.2d 114. Neither can plaintiff recover the monies paid pursuant to the terms of the contract. It is a well settled general rule that a party to an illegal contract may not obtain the aid of the courts either to enforce such agreement directly or to recover any consideration parted with pursuant thereto; the law leaves the parties where it finds them. Restatement, Contracts, sec. 598; Woodward, The Law of Quasi Contracts, sec. 135; 17 C.J.S., Contracts, § 272, p. 656. Nor does there appear here to be any basis for application of the recognized qualification to this general rule, that a party not equally at fault may secure relief from the consequences of an illegal agreement. 17 C.J.S., Contracts, § 274, p. 660.

[12] Plaintiff, pursuant to the agreement, deposited $5,000 in a savings account in First Trust and Savings Bank of Pasadena, from which payments were made to defendant. Subsequent deposits and withdrawals were made from time to time, leaving a present balance of $1,319.31, with accumulated interest. The bank was named as a party defendant and, in its answer, offered to pay the balance to the person or persons adjudged entitled thereto. The court adjudged that the bank pay the same to defendant and that, when paid,

it be credited against the judgment of $1,700 awarded her against plaintiff. The court should have adjudged that plaintiff is entitled to the $1,319.31 and accumulated interest.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is reversed with directions to the Superior Court to amend its findings of fact and conclusions of law and render judgment in accordance with the views herein expressed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

111 Cal.App.2d 626

LLOYD v. SOUTHERN PAC. CO. et al.

LLOYD et al. v. SOUTHERN PAC. CO. et al.

Civ. 14777, 14778.

District Court of Appeal, First District,
Division 2, California.

June 14, 1952.

As Amended on Denial of Rehearing
July 14, 1952.

Hearing Denied Aug. 11, 1952.

Actions for death and personal injuries arising out of a collision between automobile and locomotive. The actions were consolidated for trial. The Superior Court, City and County of San Francisco, Robert McWilliams, J., rendered judgment for the plaintiffs and defendants appealed. The District Court of Appeal, Goodell, J., held that the evidence established that driver of automobile had exercised some care and therefore question of whether he was contributorily negligent was for the jury.

Affirmed.

1. Railroads 🔑330(2)

An automobile driver approaching railroad crossings guarded by flagman or other moving or automatic warning signal is encouraged thereby to relax his vigilance, but nevertheless he cannot place blind reliance on the signals but must still exercise ordinary care.

2. Negligence 🔑136(9)

Ordinarily the question of whether a plaintiff has been guilty of contributory negligence is one of fact for the jury and it becomes a question of law for the court only where the facts are undisputed and where, from those facts, reasonable minds can draw but one conclusion on issue of plaintiff's negligence.

3. Negligence 🔑136(26)

Where it is shown that plaintiff in negligence action has exercised some care, the question of whether or not the care actually exercised was due and sufficient will always be a matter for jury but where unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such plaintiff's case should be submitted to jury.

4. Railroads 🔑350(18)

Testimony of driver of automobile, which collided with a locomotive, that on approaching railroad crossing he looked in both directions and, seeing railroad crossing sign, he took his foot off accelerator, was evidence that he exercised some care which was sufficient to take the question of whether he was contributorily negligent to the jury.

5. Negligence 🔑134(1, 11)

In negligence action, the so called defense of inevitable accident is no more than a denial by defendant of negligence or a contention that defendant's negligence was not the proximate cause of the injury, and it is not an affirmative defense but is raised by general denial of negligence and the burden of proof rests upon plaintiff to prove negligence and proximate cause by preponderance of evidence.

6. Trial 🔑260(8)

In railroad crossing collision action, instruction as to unavoidable accidents, while not erroneous if given, was not erroneously refused where all elements of defendant's liability were covered by other instructions.

7. Railroads 🔑350(5)

Regulations of public utilities commission concerning warning and safety devices at railroad crossings prescribe only the minimum measure of care required and the jury is free to conclude that circumstances may require a railroad to do more.

8. Railroads ⚷351(3, 7)

In action arising out of collision between automobile and locomotive at railroad crossing, instructions, that presumption that railroad performed its duties in installing protective devices was not conclusive and that it was railroad's duty to install other devices than those prescribed by public utilities commission if ordinarily prudent person in exercise of ordinary care would have supplied such additional warning, were not erroneous as usurping exclusive jurisdiction of public utilities commission.

9. Trial ⚷260(1)

Refusal to give requested instructions was not error where the subject had been covered by other instructions.

10. Trial ⚷260(8)

In action by motorist and passengers for injuries and death resulting from collision with locomotive at a railroad crossing, where plaintiffs did not request any instruction that there was a presumption that they did exercise ordinary care for their own safety, it was not error to refuse defendants' requested instruction that there was no presumption that plaintiffs exercised ordinary care for their own safety, particularily in view of other instructions on contributory negligence.

11. Trial ⚷295(7)

In action by motorist and passengers for death and injuries arising out of collision with locomotive at railroad crossing, instruction with respect to whether crossing was obstructed or not depending on the ability of motorist to see lighted traffic along railroad and with respect to lawful speed in traversing obstructed crossings was, when read as a whole, not erroneous. Vehicle Code, §§ 510, 511.

12. Trial ⚷295(1)

Upon appeal, instructions are to be regarded as a whole and no instruction is to be considered apart from the context of the balance of the instructions.

◆

Arthur B. Dunne, Dunne, Dunne & Phelps, San Francisco, for appellants.

Howard H. Desky, Nichols, Richard, Allard & Williams, Oakland, for respondents.

GOODELL, Justice.

In one action Lillian M. Lloyd, an incompetent person[1] (by Harold E. Lloyd, her guardian ad litem) and Harold E. Lloyd, her husband, sued the railroad company and five of its employees for personal injuries sustained by Lillian, and for the death of Donald Lloyd their son aged about 4. In another action Bessie A. Lloyd, the mother of Harold, sued the same defendants for personal injuries which she had sustained. The actions were consolidated and tried together and in the first case the judgment was for $75,000 in favor of Lillian and her husband for her injuries, and $5000 for the death of their son while in the second Bessie A. Lloyd was awarded $15,000. A motion for judgment notwithstanding the verdict was made in each case and denied, and a motion for new trial in each case was likewise made and denied. These appeals followed.

The actions arose out of a collision between the 1939 Buick driven by respondent Harold E. Lloyd, and a Southern Pacific locomotive and tender engaged in switching operations just north of Modesto.

In the late afternoon of December 31, 1948 the Lloyd family set out from their home in Oakland to visit Lillian Lloyd's sister, who lived in Atwater. Harold Lloyd drove, and with him in the front seat were his wife and Donald; in the back seat were Bessie Lloyd and another son, Harold Jr., aged 7 or 8.

The collision occurred at about 6:50 p. m. on highway 99 about a half mile northerly of the northerly city limits of Modesto at a point where that highway is intersected by a county road and by a railroad track as well. The track crosses the highway at an angle of about 45 degrees.

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[1] Incompetent as a result of the injuries sued on.

The Southern Pacific main line parallels the highway to the west. East of the highway there are industries, including an icing plant of the Pacific Fruit Express, and the track which crosses the highway runs from these industries lying east of the highway to the main line on the west thereof. At the time in question the locomotive was pulling three refrigerator cars from the icing plant over to the main line group of tracks. The locomotive was backing, hence the rear end of its tender was the front of the train as it crossed the highway from southeast to northwest. The locomotive was not a switch engine, but a road engine, and the tank on the tender was cylindrical in shape.

The front of the Buick came into violent contact with the left rear corner of the tender which for the time being was the right front corner of the train's leading unit as it moved across (at about 6 miles per hour). Donald, in the front seat, was killed, Lillian Lloyd sustained extremely serious injuries, and Bessie Lloyd was injured less seriously.

The train crew consisted of a conductor, an engineer, a fireman and two brakemen. All five were joined as defendants, but the actions were dismissed as to the brakemen.

The claim of negligence is the alleged failure of the defendants to sound any warning signal by bell or whistle, or to have the "headlight" on the rear of the tender lighted as it approached and crossed the highway. The crew members testified that the bell was ringing and the rear-end "headlight" lighted before they started across and that both were actively functioning at the time of impact. Harold Lloyd and his mother testified that they heard no bell and saw no light on the engine or tender. They testified, however, that all the windows of their car were up (although the little wing in front of the windows might have been open for ventilation).

The principal question on appeal is whether the respondent Harold E. Lloyd was guilty of contributory negligence as a matter of law.

The testimony of the train crew, on the one hand, that the bell was ringing and the rear-end headlight burning, and the testimony of the Lloyds, on the other, that they heard no bell and saw no headlight created a conflict, see Reynolds v. Filomeo, 38 Cal.2d 5, 236 P.2d 801, and cases cited, and for the purpose of the discussion of contributory negligence we must assume that the bell was not ringing and the "headlight" was not lighted.

The following facts are established by plaintiffs' witnesses without dispute: that Lloyd had driven over this crossing 8 or 10 times before; that the night was rainy, misty, with a spotty fog and very poor visibility. Lloyd testified that the night was "very dark, very gloomy", and that as he drove southerly from Manteca the pavement was wet. "It had to be wet", he said, "The windshield had water running off it from the windshield wipers, and had had for some time."

There were several warning signs indicating a railroad crossing, including an illuminated panel suspended over the highway along the approach to the intersection. Lloyd testified that he saw no overhead signs, but admitted seeing a painted crossing sign on the highway. This was sufficient to put him on notice, so there is no need to discuss the other signs. This crossing sign painted on the surface of the highway was 345½ feet northerly of the crossing.

Highway 99 was divided by an "island"; the southbound half was 26 feet wide with two lanes, and the northbound half likewise. Lloyd was driving in the right-hand lane of the southbound half.

On direct examination Lloyd testified that he had been following another car for some time, at a distance of 75 to 100 feet; that his headlights were on the driving beam; that for the last several miles before the collision he had been traveling "at around 40 to 50 miles per hour". When asked if he knew he was coming to a railroad crossing he answered: "Yes. I took my foot off the foot-feed at about, oh, 300 feet—I seen cross-marks in the pavement indicating a railroad crossing". He then testified:

"Q. What was the first indication that you had that there was anything wrong ahead at all? A. The car in front of me put on its brakes and swerved to one side, to the right * * *

"Q. How far ahead of you * * * would the lights light up the roadway, can you tell us? A. Thirty—maybe 30 feet.

"Q. What was there that restricted it to that amount? A. Well, the fog, or the mist. You could see the shininess off the pavement.

"Q. When the automobile that was ahead of you swerved, was it in your lane? A. Yes, sir, it was right directly in front of me, in my lane.

"Q. In which direction did it swerve? A. It swerved to the right.

"Q. What did you do? A. Soon as it swerved out of the path I was driving in I seen a dark object. I had my foot on the brake at that time when it swerved, because that is danger, when a car does that. I put my foot on the brake, and immediately I seen this big object in front of me, and I put them on as hard as I could.

"Q. Was there any light of any kind that you saw on that object? A. No, sir, not on that object.

"Q. Were you looking ahead all the time as you went down the road? A. Yes, sir.

"Q. Did you hear any bell or any whistle sounded, in the car? A. No, sir, not a sound.

"Q. How far would you say you were away from where the accident happened when you got your brake on? A. Thirty to fifty feet, maybe.[2]

"Q. Do you know whether or not your car changed its course at all? A. Yes, it did. I felt it swerve when the brakes were applied * * *."

The witness testified that when he saw the object ahead of him it looked "like these oil tank cars." He did not remember the impact.

On cross-examination he testified that as he approached the crossing he saw no overhead signs but did see the "RR" and "X" painted on the highway, and "knew from experience that that indicated that there was a railroad crossing ahead." He testified that after passing over that sign the tail lights of the automobile ahead flared up and swerved to the right, and in the interval between seeing the crossing marks on the highway and seeing the tail lights flare up and swerve, he was looking at the road straight ahead, and at the car at the same time, and saw nothing but the tail lights until the car ahead went clear off the road, whereupon he saw for the first time "this big black object, the tank" and up to that time he had seen no light except the tail lights of the automobile ahead. He added: "I remember a light way up high. It was foggy; I mean, you know, it was kind of a hazy like light.

* * *

"Q. Now * * * when these automobile tail lights flared up and swerved to the right and you saw a black object, what, if anything, did you do with your brakes? * * * A. I immediately took my foot off the foot feed and put it on the brake. * * *

"Q. At that time your speed was 40 to 50 miles an hour, was it not? A. Yes, sir. * * *

"Q. When you took your foot off the foot feed and applied your brakes, what then happened? A. I didn't say I applied my brakes at that time. I simply put my foot on the brakes until the car went clear off the highway, and that is when I put my brakes on.

"Q. * * * So when the tail lights flared up and swerved, you then took your foot off the foot feed? A. And jammed it on the brake. * * *

"Q. How long after? A. Just a split second.

"Q. When was it with respect to seeing this [train] object ahead of you that you applied your brake? * * * The Witness: Immediately at that time. * * *

[2] A 51-foot skid-mark led into the point of impact.

"Q. And not when you saw the tail lights flare up and swerve to the right? A. I didn't put my brakes on hard at that time, no, I just slowed down.

"Q. Now, * * * immediately before you applied your brakes, your speed was 40 to 50 miles an hour? A. Yes.

"Q. Now, when this object showed up, what was it that you saw? A. Just like I told you, just a big black tank."

On redirect examination Lloyd testified:

"Mr. Nichols. This is Exhibit D * * * and it shows * * * some marks across the highway * * *. After you saw those lines, did you look in either direction to see if there were any lights coming off the highway? A. Yes, sir—I took my foot off the foot feed—

"Q. What looking did you do? A. I looked both directions.

"Q. Did you see any light of any kind? A. No, sir, nothing only a street light maybe, is all I could see.

"Q. You had been over that highway before and knew that there was a track across the highway there? A. Yes, sir. * * *"

On further cross-examination he testified:

"Q. You knew at that time that you couldn't see more than 60 feet ahead of you in the light of your own headlights, didn't you? A. I could see the tail lights of the car in front of me.

"Q. * * * You knew that from the lights of your own headlights you could not see more than 60 feet ahead of you, didn't you? A. I don't know how to answer that, your Honor.

"The Court: Well, just take your time and think it over.

"The Witness: I have answered it in the way that I would answer it. * * *

"Mr. Dunne: I will put another question, Your Honor.

"Q. On that road, on that night, at the time you ran over those white lines on the surfce of the highway, how far ahead of you would your lights show up an object the size of a man on the highway? A. 50 to 60 feet.

"Q. And that had been the condition substantially since you left Manteca, had it not? A. No, it was spotty. I mean, it was what I have heard, the expression, truck drivers call 'leopard fog,' or whatever you might say.

"Q. What was the condition at this point, heavier or lighter than it had been at other spots from Manteca? A. All I know, it was very dark, very gloomy."

So much for respondent Lloyd's testimony.

Appellants say that Lloyd "was blindly following the tail lights of an automobile ahead of him, according to his own story." This might well have been the case. However this may be, there is nothing in the record to show what became of that car after it swerved to the right and went off the road in what must have been an extremely narrow escape from collision with the tender.

Another feature of this collision should be noted in order to round out the facts. Lloyd's car was being followed at a distance of 700 feet or more by another car, the driver of which was one of plaintiffs' witnesses. He testified that as he neared the scene of the accident, driving at 40 or 45 miles per hour, "It was dark, and * * * was raining in spots," and the visibility was very poor. He heard no bells and saw no headlight. He heard the crash when he was about 300 feet north of the "RRX" lines painted on the highway. Although he heard the crash he continued driving without putting on his brakes. He said "I didn't see no immediate danger to myself, so I didn't stop; I kept coming. I noticed these tail lights." When asked "And how close would you say you got to the train before you could see there was a train there?" he answered "Well, I pulled out in the left-hand lane and I started to pass these tail lights, and I got within two car [automobile] lengths of the train before I noticed there was a train there." Thus he steered to the left, shifted into second gear, got into Coldwell Road (the same intersection as that in which the tracks are laid) and cleared the wreck, apparently with not too much time or space to spare. Appellants argue that if this witness could have so maneuvered safely to the left, Lloyd could have done so if he had been at all alert and had his car under any kind of control.

[1] The crossing was not attended (or supposed to be) by a flagman nor was it equipped with a wigwag or other moving or automatic warning signal. It was therefore not a "guarded crossing" as illustrated by numerous cases, among them Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848 and Spendlove v. Pacific Elec. Ry. Co., 30 Cal.2d 632, 634, 184 P.2d 873, which show that guarded crossings are in a class by themselves. The same authorities hold that even at such crossings, where a driver is encouraged to relax his vigilance he cannot place blind reliance on the signals but must still exercise ordinary care.

[2] The question now presented is whether Lloyd was guilty of contributory negligence as a matter of law. In Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 467, 137 P. 34, 35, the court said:

> "Ordinarily, of course, the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence. [citations] 'It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury. '* * *' Seller v. Market St. Ry. Co., 139 Cal. 268, 271, 72 P. 1006."

[3] In Koch v. Southern California Ry. Co., 148 Cal. 677, 84 P. 176, 177, 4 L.R.A., N.S., 521 the crossing was equipped with gates which at the time of the accident were open when they should have been closed. The trial court directed a verdict for defendant because of plaintiff's contributory negligence in driving heedlessly through them. In affirming the judgment the court said: "Of course, in any case such as this, *where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury.* But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury." (Emphasis added). The statement that Koch had "exercised no care whatsoever" indicates that the earlier language, which we have emphasized, was not necessary to the decision. See remarks of Mr. Justice Schauer in his dissent in the Spendlove case, 30 Cal.2d 641, 184 P.2d 876.

However, in the Spendlove case, supra, 30 Cal.2d at page 636, 184 P.2d at page 876, in reversing judgments of nonsuit the court said: "Here the jury could have found that the driver relaxed his vigilance in reliance upon the wigwag, and we cannot say as a matter of law that he was negligent in failing to look to the north sooner than he did. He took more precautions for his safety and that of his passengers than did the driver in the Startup case, [Startup v. Pacific Electric R. Co.] and we held there that 'where it is shown that a [driver] has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury.' 29 Cal.2d 866, 871, 180 P.2d 896, 899; Koch v. Southern Cal. Ry. Co., 148 Cal. 677, 680, 84 P. 176, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795."

[4] The Spendlove case had first been before the District Court of Appeal, 177 P.2d 27, where the judgments of nonsuit were affirmed and where four cases were cited by the court in support of its holding that the driver was guilty of contributory negligence as a matter of law under the look and listen rule. All of them are now relied on by these appellants. Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788; Heroux v. Atchison T. & S. F. Ry. Co., 28 Cal.App.2d 401, 82 P.2d 620; Guyer v. Pacific Electric Ry. Co., 24 Cal. App.2d 499, 75 P.2d 550 and Jones v. Southern Pacific Co., 34 Cal.App. 629, 168 P.

586. The Supreme Court, however, in reversing the judgments of nonsuit, distinguished those cases. It thus appears that that court has now adopted or restated the rule of the Koch case, and we of course are bound to follow it if there is any evidence in this record that Lloyd exercised *some* care—whatever the quantum thereof. He testified that when he saw the "RRX" sign on the surface of the highway he took his foot off the accelerator and looked in both directions. Under the rule of the Spendlove case this seems to be sufficient to make the question one for the jury. The same rule was followed in the Startup case, supra, 29 Cal.2d 866, 180 P.2d 896, and by this court in Correa v. Davis, 69 Cal. App. 180, 182, 230 P. 984. In Andre v. Allynn, 84 Cal.App.2d 347, 354, 190 P.2d 949, 953, the court in speaking of the Spendlove case says: "This last decision illustrates the fact that in the last few years the tendency of the Supreme Court has been away from the stricter view of preceding years, where frequently contributory negligence was established as a matter of law, to the present situation in which such cases 'are rare.' See Anthony v. Hobbie, supra, 25 Cal.2d 814, 818, 155 P. 2d 826."

For these reasons there is no need to discuss the numerous authorities relied on by both sides on contributory negligence and on the look-and-listen rule, dealing, as they do, with as many different factual situations as there are cases.

[5, 6] Appellants contend that there was prejudicial error in the refusal of the following instructions: "Sometimes accidents happen and persons are injured when there is no fault on the part of any party involved in the accident. Such accidents are called inevitable or unavoidable accidents. If you find that the accident out of which this case arises was an unavoidable accident, then plaintiffs are not entitled to recover anything, and your verdict must be against the plaintiffs and in favor of defendants."

Respondents cite the familiar rule (24 Cal.Jur. pp. 806–810) that it is not error to refuse an instruction if the subject matter thereof is substantially incorporated in those given, and point to the following instructions which were given:

> "Negligence is not based upon the possibility of avoiding an accident. The defendants cannot be held liable for negligence merely because they might have avoided the accident had they acted differently. If the defendants did all that ordinarily prudent persons would have done in the same or similar circumstances to avoid the accident in question, the defendants are not chargeable with negligence and may not be held liable in the present case."
>
> "You may not return a verdict against defendant[s] * * * merely because an accident happened and injury and death resulted from it.
>
> "You must not assume or find, merely because it is undisputed that an accident happened, that there was negligence on the part of any defendant or that any defendant is legally responsible for the happening of the accident or for the result of the accident."

Recent decisions have served to clarify this subject. The case of Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51 contains a lengthy discussion of the question, which the Supreme Court commends in Polk v. City of Los Angeles, 26 Cal.2d 519, 542–543, 159 P.2d 931, 943. In the Polk case it is said that "the so-called defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury. It is not an affirmative defense and the burden of proof rests upon plaintiff to prove negligence and proximate cause by a preponderance of the evidence * * *." and in Parker v. Womack, 37 Cal.2d 116, 121, 230 P.2d 823, 826, the court, after quoting the Polk case, said that the defense of inevitable accident "need not be specially pleaded, but is raised by a general denial of negligence [citations]".

In view of these declarations it may be said here as it was in Jaeger v. Chapman, 95 Cal.App.2d 520, 523, 213 P.2d 404, 406, that "while it would not have been error to have given such an instruction, it was not error to refuse to give it where all elements of defendant's liability were covered by other instructions."

The following cases hold definitely that there is no error in refusing such an instruction: Stein v. United Railroads, 159 Cal. 368, 373, 113 P. 663; Groat v. Walkup Drayage etc. Co., 14 Cal.App.2d 350, 355, 58 P.2d 200 (hearing denied); Fraser v. Stellinger, 52 Cal.App.2d 564, 567, 126 P. 2d 653 (hearing denied); Gunter v. Claggett, 65 Cal.App.2d 636, 642, 151 P.2d 271; Guay v. American President Lines, 81 Cal. App.2d 495, 513, 514, 184 P.2d 539 (hearing denied) and Jaeger v. Chapman, supra, 95 Cal.App.2d 520, 523, 213 P.2d 404.

"An unavoidable accident is, of course, one not caused by the fault of any of the parties" Gunter v. Claggett, supra, 65 Cal. App.2d at page 642, 151 P.2d at page 273, and the opinion in Parker v. Womack, supra, 37 Cal.2d at page 121, 230 P.2d at page 826, cites as examples 6 cases involving accidents "proximately caused by circumstances beyond the control of an ordinarily prudent person." What has been said by us herein is limited to the instant case, which is not within that class.

Parker v. Womack, supra, is said by appellants to set this question at rest, but we think not. There an unavoidable accident instruction was given, and the trial judge, having been convinced on a motion for new trial that he had erred in giving it, granted the motion. If it was prejudicial error to give it he was right; if not, he was wrong, since his ruling put the defendant, who had won the first verdict, to a new trial. Parker v. Womack holds that the giving of the instruction was not prejudicial error, hence that the court erred in granting the new trial. But the holding that it was not prejudicial error in that case to *give* the instruction, does not mean that it was prejudicial error in this case to *refuse* it. The question arose in the two cases in altogether different ways.

[7, 8] Several instructions were given with respect to crossing regulations of the Public Utilities Commission. One read as follows: "There is a presumption that the * * * Commission performed its official duty, and accordingly, there is a presumption as to the particular crossing here in question that the * * * Commission, in the exercise of its exclusive power, determined the protection required to be installed at the crossing involved and determined what appliances or devices were necessary, and prescribed what they should be. There is also a presumption in this regard that any railroad using the crossing performed its duty and that there were installed such protective devices and appliances as were prescribed by the * * * Commission. *However, these presumptions to which I have just referred are not conclusive.*" (Emphasis added). Appellants complain that the qualification just emphasized was unwarranted because there was no evidence to controvert the presumptions.

They complain also of the following instruction: "Defendant Southern Pacific Company was free, however, to install warnings at or near the crossing beyond those required by any order of the * * * Commission, and it was its duty so to do if the exercise of reasonable care made such installations necessary."

They complain also of the following: "The fact that defendant Southern Pacific Company was not required by law to provide warnings and other safety devices at the crossing involved other than standard crossing signs, to which I have just referred, did not relieve the defendant railroad company of its obligation to exercise reasonable care for the safety of travelers at the crossing, and if an ordinarily prudent person, in the exercise of ordinary care, would have supplied additional warning and safety devices over those that were present at the time, then in those circumstances Southern Pacific Company would be required to furnish such warning and safety devices."

The basis for all three attacks is that the court in so instructing "usurped the exclusive jurisdiction of the Public Utilities Commission."

It is settled by Peri v. Los Angeles Junction Ry. Co., 22 Cal.2d 111, 126, 137 P.2d 441, and the cases it cites, that regulations such as those under discussion prescribe only the minimum measure of care required and that the jury is free to conclude that the circumstances may require the railroad to do more. The instructions on the whole subject were fair to both sides.

[9] Complaint is made of the failure to give defense instructions 38 and 39 which went into considerable detail with respect to the situation just before the collision. They were refused because the subject had been covered by other instructions. We are satisfied that this was correct, and that the following instruction, in particular, covered the ground:

> "So long as the defendant railroad was not guilty of any negligence, it and its employees who were in charge of the operation of the train, until put on notice to the contrary, had a right to operate the locomotive and cars involved toward and over the crossing, and also to assume and presume that any person driving an automobile toward the crossing would perform the duties which the law imposed upon him and would reasonably exercise all his natural faculties of observation and caution and would not attempt to cross the track in dangerous proximity to an approaching train if the same were so open to view that collision with it could be avoided by exercising reasonable care."

The following instruction was refused: "If, as the plaintiff Harold E. Lloyd drove toward the railroad track and while he was in a position of safety and in a position such that by exercising ordinary care he could have handled his automobile so as to avoid the collision, the locomotive and its headlight were then in plain view and open to his observation, then the locomotive itself, without any other notice or warning, was a warning of danger which the plaintiff Harold E. Lloyd was required to heed and if his negligent failure to do so was the sole proximate cause of the collision, your verdict must be in favor of defendants."

In complaining that this refusal was error appellants say "no citation of authority is necessary for the proposition and when a locomotive and its headlight are in plain view the locomotive, without more, is a warning to an approaching motorist." Counsel's own statement shows that it was nothing but a commonplace instruction. As said in Stein v. United Railroads, 159 Cal. 368, 373, 113 P. 663, 665, "A juror would know that * * * without instruction and it would seem absurd to burden the record with a formal statement of a truth so self-evident."

Moreover, at least eight instructions were given on contributory negligence which, while not as specific or pointed as this tendered instruction, fairly instructed the jury on the subject and rendered it clearly repetitious.

The same may be said with respect to defendants' tendered instruction reading as follows: "If the plaintiffs, in view of the physical facts existing at the scene of the accident, had they exercised ordinary care, must have learned of the approach of the locomotive in time to have avoided collision with it, by using ordinary care, then the very fact that the automobile collided with the engine raises a presumption that they did not take the required precautions and did not look or listen * * * or that, having looked and listened, the driver of the automobile endeavored to cross immediately in front of the approaching locomotive, and in either of such events, if so you find, his conduct would constitute negligence proximately causing the accident."

[10] Defendants requested instructions to the effect that there is no presumption that plaintiffs exercised ordinary care for their own safety. The plaintiffs did not request any instruction that there was a presumption that they *did* exercise such care. It is difficult to see, with the matter thus entirely omitted from the discussion, how there could have been any prejudice suffered by defendants, particularly in view of the numerous and comprehensive instructions on contributory negligence.

[11] The court instructed as follows:

> "If you find from the evidence that during the last 100 feet in his approach to the crossing, plaintiff had a clear and unobstructed view of any *lighted*

> traffic for a distance of 400 feet in both directions along said railroad from said crossing, then I instruct you that said intersection was not obstructed within the meaning of the section." (Emphasis added).

Appellants contend that the court's interpolation of the word "lighted" was prejudicial error.

The instructions on the Vehicle Code's provisions, in their sequence, were as follows:

> "I now pass on * * * to a certain provision of the vehicle code to which I referred earlier, and in consideration of this provision you will have in mind the general principles that I told you were applicable in connection with the consideration of the provisions of the law generally. At the outset we have for your consideration what is called the basic speed law of this State, section 510 of the Vehicle Code, which provides that: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'"

The court then instructed on brakes and stopping distances from 10 to 45 miles per hour and then:

"Section 511 of the Vehicle Code provides that the prima facie lawful speed limit for the operation of automobiles is as follows: [quoting the code] 15 miles per hour 'when traversing a grade crossing of a steam, electric, or street railway, if during the last 100 feet of the approach to such crossing the driver does not have a clear and unobstructed view of such crossing and of any traffic on such railway for a distance of 400 feet in both directions along such railway.' If the driver's view along the railway is impeded by reason of darkness, that darkness may constitute an obstruction to view within the meaning of the statute to which I have just called your attention, and would make applicable the 15 mile an hour provision as the prima facie lawful speed. While a violation of Section 511 does not establish negligence as matter of law and while the determination of whether or not the operation of a vehicle at a speed in excess of the speed specified constitutes negligence is for you to pass upon, the Section mentioned is to be considered in that connection in the light of all the circumstances existing at the time." And *then,* after all those preliminaries the court gave the instruction now under discussion and quoted above.

When these Vehicle Code instructions are read as a whole and in sequence it is clear that the jury could not have possibly misunderstood the instruction. The court's prefatory explanation that "darkness may constitute an obstruction" made the later interpolation of "lighted" readily understandable.

[12] The instructions in this case were unusually clear and comprehensive, and they were fair to both sides. The court at an early stage told the jury that "These instructions are to be regarded by you as a whole. In other words, no instruction is to be considered apart from the context of the balance of the instructions." That rule applies as well in our examination of the instructions in the light of appellants' criticisms of them.

We find no error in the instructions, or elsewhere in the record.

The judgments are affirmed.

NOURSE, P. J., and PATTERSON, J., pro tem., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

111 Cal.App.2d 903

RIBBLE et al. v. COOK.

Civ. 15131.

District Court of Appeal, First District,
Division 1, California.

June 23, 1952.

Rehearing Denied July 23, 1952.

Hearing Denied Aug. 21, 1952.

Rumilda B. Ribble and others sued Josephine Ann Cook to recover for the death of Horace O. Ribble as the result of an intersection collision between his bicycle and defendant's automobile. The Superior Court, Santa Clara County, Leonard R. Avilla, J., rendered judgment on a jury verdict for defendant, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that it had been error not to give a requested instruction.

Reversed.

1. Evidence ⚷555

Opinion of officer trained in investigating accident may be admissible as to point of impact, but such opinion is not admissible unless based on facts observed by officer at scene of accident, and where opinion is based on what witnesses told officer, it is error to admit it over objection.

2. Automobiles ⚷245(16, 50, 82)

In action for death of bicyclist as result of intersection collision with defendant's automobile, questions of negligence, contributory negligence and proximate cause were for jury.

3. Negligence ⚷136(14)

To look and not see what is plainly visible may, under some circumstances, be negligence as matter of law, but question is usually one for jury.

4. Automobiles ⚷171(13)

One entitled by statute to right-of-way at intersection has right to assume that others will obey statutory provision, but such right can be abused, and careless exercise of such right can be negligence. Vehicle Code, § 550.

5. Automobiles ⚷242(8)

In action for death of bicyclist as result of intersection collision with automobile, there was presumption that decedent was exercising due care, and such presumption was evidence.

6. Automobiles ⚷246(9)

In action for death of bicyclist as result of intersection collision with defendant's automobile, it was error to refuse to instruct that a person exercising ordinary care has right to assume that others will perform their duty under the law and that it is not negligence for such person to fail to anticipate "injury" which can come to him only from violation of law or duty by another.

◆

James F. Boccardo, David S. Lull, San Jose (Edward J. Niland, Santa Clara, of counsel), for appellants.

Campbell, Hayes & Custer, San Jose (W. R. Dunn, Burlingame, of counsel), for respondent.

PETERS, Presiding Justice.

An automobile driven by defendant Josephine Cook collided with a bicycle being ridden by Horace O. Ribble. Horace was killed. The surviving wife, Rumilda Ribble, and the two surviving adult children of Horace by a previous marriage, brought this action for damages against Cook. The jury brought in a verdict for the defendant. Plaintiffs appeal.

This accident occurred on December 9, 1948. (It did not go to trial until March 7, 1951.) The accident occurred about 8:45 a.m. on a clear day at the intersection of St. John and Eighth Streets in San Jose. St. John Street, which runs east and west, is thirty-nine feet nine inches wide, and Eighth Street, which runs north and south, is forty-nine feet two inches wide. The view at the intersection in all directions is unobstructed. Defendant, driving a 1937 Chevrolet coupé and accompanied by her five-year old daughter, was proceeding south on Eighth Street, while decedent, riding his bicycle, was going west on St. John Street. Thus, as they approached the intersection, defendant was coming from decedent's right. Decedent was seventy-one years of age and in good health. He had lost his right eye many years before, and wore glasses, but the evidence is that the vision in his remaining eye was good.

No witness testified that he saw both the automobile and the bicycle at the precise moment of impact, and but two witnesses, defendant and Ethel Del Ponte, testified as to the facts immediately surrounding the accident. Ethel Del Ponte was called as a witness by plaintiffs. Just prior to the accident she was driving north on Eighth Street. As she approached the intersection she was compelled to stop because an automobile turned south into Eighth Street in front of her. Before she started up, she observed a small boy jaywalking southwesterly across the intersection. She followed him with her eyes until he had cleared her proposed line of travel. She then saw decedent ten or fifteen feet before he reached the intersection, riding westerly on St. John Street. He was then on his right side of that street close to its center, riding along at a normal rate of speed. The witness watched the decedent cross her line of proposed travel until he had reached the center of the intersection. Until that time he had not turned his bicycle, but was proceeding in a straight line. The witness then started to drive across the intersection in low gear. When she had proceeded some fifteen or twenty feet, which would place her car at about the center of the intersection, or just north of center, she heard a thud, and turned her head to the left. She did not see the impact, but did see the decedent flying through the air over the left front fender of defendant's car. This was the first time she had seen defendant's automobile. The witness stopped her car and went over to where the deceased was lying. Defendant, who had stopped her car and was just descending therefrom, called to decedent, who was lying in the street, "Where did you come from?"

The defendant testified that on the morning in question she was driving her five-year old daughter to school; that as she was driving south on Eighth Street, and approached the intersection, she was on her side of the street; that just before she reached the intersection she slowed down and looked both ways on St. John Street and saw no oncoming traffic; that she then drove slowly, in low gear, into the intersection; that after entering the intersection she saw the small boy referred to by Mrs. Del Ponte jaywalking across the street; that the boy was running (Mrs. Del Ponte had testified that he was walking); that she then brought her car to a full stop, and watched the boy until he reached the curb; that then she looked to her right and to her left; that she did not see any traffic at all on St. John Street, and in particular did not see Ribble on his bicycle; that she then started up and had traveled about four or five feet straight ahead when the accident occurred; that she brought her car to a stop in four or five feet; that no time prior to the accident had she seen Ribble; that she first saw him lying on the pavement. Defendant also testified that she did not see the automobile that turned in front of Mrs. Del Ponte, and apparently did not see the Del Ponte car before the accident. The evidence shows that the bicycle of Ribble hit and damaged the left front fender of defendant's car. Defendant fixed the point of impact directly in the center of St. John Street, but on the west side of Eighth Street.

[1] There is some conflicting opinion evidence based on hearsay as to the point of impact given by officer Haller, called by plaintiffs, who arrived at the scene shortly after the accident. He testified from his accident report, without objection, that he fixed the point of impact at a spot that would place decedent's bicycle five feet across the center line of St. John Street, that is, five feet on the wrong side of the street so far as decedent was concerned. He admitted that he fixed this point of impact from what was told him by defendant and by Mrs. Del Ponte. This opinion is entitled to but little probative value. While the opinion of an officer who is trained in investigating accidents may be admissible as to the point of impact, Zelayeta v. Pacific Greyhound Lines, 104 Cal.App.2d 716, 232 P.2d 572, such opinion is not admissible unless based on facts observed by the officer at the scene of the accident. Where the opinion is based on what witnesses told the officer, at least where objection is made, it is error to admit it. Stuart v. Dotts, 89 Cal.App.2d

683, 201 P.2d 820; see discussion in the Zelayeta case, 104 Cal.App. at page 727, 232 P.2d 572. Here the evidence, adverse to the plaintiffs, was offered by the plaintiffs, and there was no objection by defendant. But the evidence discloses that the opinion lacked the proper foundation in that it was based on what witnesses had told the officer, and not upon facts he had observed. Thus, Haller's testimony depended upon what he remembered others had told him—upon their credibility, not his. The opinion, under such circumstances, is entitled to but scant consideration.

[2–5] Thus, so far as the two key witnesses are concerned, Mrs. Del Ponte did not see the actual impact and did not see defendant's car prior to the accident. She did see the decedent prior to the accident and saw a car make a left turn in front of her. Defendant did not see that car, and did not see decedent or the Del Ponte car prior to the accident. The evidence is thus quite scant on the vital facts upon which liability or non-liability depends. To a certain extent, the solution must depend on inferences and presumptions. It is apparent that the questions of negligence and contributory negligence were very close, were factual, and were therefore for the jury, under proper instructions. Under the evidence and the reasonable inferences therefrom there are at least three possibilities as to the proximate cause of the accident—negligence on the part of defendant, negligence on the part of decedent, or the concurrent negligence of both.

The plaintiffs argue that defendant was negligent as a matter of law in looking but in not seeing decedent, while defendant argues that decedent was contributively negligent as a matter of law, in that the defendant had the right-of-way in that she entered the intersection first, and was coming from decedent's right side. Although the question of defendant being negligent as a matter of law is a close one, we do not think that we can say that either decedent or defendant was guilty of negligence as a matter of law. While to look and not see what is plainly visible may, under some circumstances, be negligence as a matter of law, Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655, that question is usually one of fact for the jury, Leader v. Atkinson, 49 Cal.App.2d 265, 121 P.2d 759; Prato v. Snyder, 12 Cal.App.2d 88, 55 P.2d 255 and it was a fact question here. On the other hand, while one first reaching an intersection, or, when both enter at the same time, the vehicle coming from the other's right, has the right-of-way, Vehicle Code, § 550, and the one entitled has the right to assume that the other will obey this provision, Leblanc v. Coverdale, 213 Cal. 654, 3 P.2d 312, it is equally true that this right can be abused, and that a careless exercise of the right can be negligence. Stevenson v. Fleming, 47 Cal.App.2d 225, 117 P.2d 717; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Green v. Pedigo, 75 Cal.App.2d 300, 170 P.2d 999. Moreover, decedent was entitled to the presumption, which is evidence, that he was exercising due care. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826; Lehmann v. Mitchell, 109 Cal.App.2d 719, 241 P.2d 573. Under the evidence the jury could have found that defendant was guilty of negligence that proximately and solely caused the accident in failing to see decedent, or, if she had the right-of-way, that she abused that privilege. She had stopped in the intersection which could constitute an invitation to decedent to cross in front of her. On the other hand, the jury could have found that the accident was proximately and solely caused by the negligence of decedent in not seeing the defendant's car because of his blind right eye, and in proceeding across the intersection when defendant had the right-of-way. Also, of course, the jury could have found that both were negligent. Which of these solutions was the proper one, was for the jury. Any one of the three finds support in the evidence. The questions of negligence and of proximate cause were for the jury.

[6] From what has been said, it is apparent that the jury's implied findings that the negligence of decedent proximately caused the accident or was a concurrent cause, or that defendant was not negligent, finds support in the record. But the questions of negligence and proximate cause

were very close ones. For that reason, any error in the instructions adverse to plaintiffs may well have been the inducing cause of the defense verdict.

The plaintiffs offered, and the court refused to give, the following instruction: "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty." This is B. A. J. I. instruction number 138. No other instruction was given covering this subject.

This instruction embodies a well-established principle of law. It, or an instruction similar to it, has frequently been approved by the courts. Folger v. Richfield Oil Corp., 80 Cal.App.2d 655, 182 P.2d 337; Fietz v. Hubbard, 59 Cal.App.2d 124, 138 P.2d 315; Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 195 P.2d 416; Florine v. Market St. Ry. Co., 64 Cal.App.2d 581, 149 P.2d 41; Connor v. Pacific Greyhound Lines, 104 Cal.App.2d 746, 232 P.2d 500; Astone v. Oldfield, 67 Cal.App.2d 702, 155 P.2d 398; LaBranch v. Scott, 82 Cal. App.2d 1, 185 P.2d 823; Wysock v. Borchers Bros., 104 Cal.App.2d 571, 232 P.2d 531.

In at least one case it has been held that the failure to give the instruction in a proper case is prejudicial and reversible error—Clark v. State of California, 99 Cal. App.2d 616, 222 P.2d 300. That case was also a wrongful death action, involving the death of a pedestrian hit by a bus that, at dusk, had only its parking lights lit. There, as here, the jury brought in a verdict for defendant. There, as here, the challenged instruction was not given. The court held this to be reversible error. In so holding, the court first discussed the facts of the case, and then stated, 99 Cal.App.2d at page 621, 222 P.2d at page 303: "The burden of proof to show contributory negligence on the part of Mrs. Clark was upon defendants, and we think that plaintiff was entitled to have this requested instruction given to be weighed against the foregoing assumptions upon which respondents rely. There is nothing to show negligence on decedent's part as matter of law. See Dickinson v. Pacific Greyhound Lines, 55 Cal.App.2d 824, 827, 131 P.2d 401. The refusal of the instruction was, we think, under the facts of this case, error of grave import."

This reasoning applies with equal force here. The proffered instruction went to the heart of plaintiffs' case. The evidence shows that defendant came to a complete stop in the intersection at a place where decedent could pass in front of defendant's car. It was the theory of the plaintiffs that, under such circumstances, the decedent (and it must be presumed that he was exercising due care), had the right to assume that defendant had surrendered her right-of-way, if any she had. The proffered instruction told the jury that, if the facts were found as contended, the decedent had the legal right to assume that defendant would surrender the right of way. Without the instruction the jury may well have assumed that, if defendant originally had the right-of-way, she kept it at all times, and that decedent was under a duty to assume that defendant might abuse that privilege. In determining whether decedent was at fault in trying to pass in front of defendant's car, the jury required the guidance of the proffered instruction. Had the requested instruction been given, the jury could have found that inasmuch as defendant admittedly looked toward decedent, she saw him, and would exercise ordinary care not to run him down. Without the guidance of such an instruction, the jury was left in doubt as to one of the basic problems in the case. If it was prejudicial error to refuse the instruction in the Clark case, it certainly was such error in the instant case.

Defendant's main argument in support of the trial court's failure to give the instruction is not that an instruction on the subject involved should not have been given, but that the instruction is discriminatory in that it singles out decedent as the beneficiary of the doctrine, while the rule announced in the proffered instruction should apply to both defendant and decedent. This argument is predicated upon the fact that the instruction uses the word "injury" instead of "accident," so that, so it is contended, it could only apply in favor of decedent. While the word "accident" might have been a more accurate term than "injury," it is quite apparent that the latter term was used in its broad sense, meaning whatever causes loss. Thus, since the evidence shows that the automobile was slightly damaged in the accident, the instruction quite clearly applied to both parties. The instruction, verbatim, has been approved in several of the cases cited above. In the Wysock case, 104 Cal.App.2d 571, 232 P.2d 531, the precise argument here made was rejected. The instruction is not subject to the criticism made.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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111 Cal.App.2d 875

TUCKER v. SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

Civ. 15033.

District Court of Appeal, First District, Division 1, California.

June 23, 1952.

Hearing Denied Aug. 21, 1952.

Proceeding for a writ of mandate by Clara Tucker against the San Francisco Unified School District and other to compel the San Francisco Board of Education to re-employ her as a school teacher, after she had been discharged. The Superior Court for the City and County of San Francisco, Thomas M. Foley, J., denied the application and the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the rule adopted by the board providing for a waiver of hearing by a dismissed probationary employee, by failure to demand such hearing after notice was valid, and the time imposed was reasonable where the employee had at least 12 days to prepare any defense she might have.

Judgment affirmed.

1. Schools and School Districts 🔑141(1)

Under section 13582, probationary teachers generally may be notified by the date specified that their services will not be required for the next year, and their employment is terminated without the necessity of a hearing or a finding of cause, but the section is not applicable to probationary teachers employed by school districts where the average daily attendance is 60,000 or more students, which is governed by section 13583. Education Code, §§ 13581 to 13583.

2. Schools and School Districts 🔑141(1)

Under statute governing the dismissal of probationary school employee in districts having a daily attendance of 60,000 or more pupils, a probationary teacher could be dismissed "for cause only", which implies a hearing and a finding of cause. Education Code §§ 2204(a), 13583.

See publication Words and Phrases, for other judicial constructions and definitions of "For Cause Only".

3. Schools and School Districts 🔑141(1)

The statute respecting the dismissal of probationary school employees in districts having an average daily attendance of 60,000 or more pupils is valid and requires that probationary teachers in such districts can only be dismissed after being afforded an opportunity for a full hearing, but leaves to the respective school boards the matter of waiver of a hearing by failure to demand one. Education Code, §§ 2204 (a), 13583.

4. Administrative Law and Procedure 🔑387
Schools and School Districts 🔑59

The rule making power of a school board does not authorize the board to adopt rules that contravene or are inconsistent with the statute, but the board may adopt rules not inconsistent with the law, and may supplement the statute with rules that tend to make the statute workable. Education Code, §§ 2204(a), 13583.

5. Schools and School Districts ⚷141(5)

Under the statute respecting the dismissal of probationary school employees in districts having an average daily attendance of 60,000 or more pupils and conferring the right to notice and a hearing before a probationary teacher may be discharged, but failing to provide any procedure relative thereto, a school board of such district could provide for a waiver of hearing by failure to demand such hearing after notice. Education Code, §§ 2204(a), 13583.

6. Schools and School Districts ⚷141(5)

Statutory right to a hearing by a dismissed probationary school teacher in districts having a daily attendance of 60,000 or more pupils is personal to the teacher and may be waived by her. Education Code, § 13583.

7. Administrative Law and Procedure ⚷383

In view that whenever a statute grants the right to a dismissed employee to a hearing, where the statute also regulates procedure, it customarily provides for a waiver by failure to demand a hearing after notice, where the statute is silent as to procedure, and the administrative board has rule-making powers, such board may provide for a waiver by failure to demand after notice, and such a regulation is not contrary to the statute, but is supplementary thereto. Government Code, §§ 11501, 11506; Education Code, § 13524.

8. Statutes ⚷219

Under the statute respecting the dismissal of probationary school employees in districts having an average daily attendance of 60,000 or more pupils, the manner in which the board of education of such a district had interpreted the statute was of some importance in the construction thereof. Education Code, § 13583.

9. Schools and School Districts ⚷141(5)

Under statute respecting the dismissal of probationary school employees in districts having an average daily attendance of 60,000 or more pupils, a rule of the board of education promulgated pursuant thereto, granting a probationary teacher seven days in which to decide as to whether he or she desired an adversary public hearing and declaring a failure to demand such a hearing within that time to constitute a waiver thereof, was not unreasonable in view that at the very minimum, the teacher had at least 12 days and usually longer to prepare any defense she might have. Education Code, §§ 2204(a), 13583.

Alexander S. Keenan, Jr., San Francisco, for appellant.

Dion R. Holm, City Atty. of City and County of San Francisco, Walter A. Dold, Chief Deputy City Atty., San Francisco, Irving G. Breyer, San Francisco, of counsel, for respondents.

PETERS, Presiding Justice.

Clara Tucker, a probationary teacher in San Francisco, sought, by writ of mandate, to compel the San Francisco Board of Education to re-employ her as a school teacher after she had been discharged by the Board. The trial court denied the application for a writ, entered its judgment in favor of the Board, and Tucker appeals.

There is no conflict as to the facts. On September 2, 1949, Tucker became a regularly appointed and properly accredited probationary teacher in the elementary division of the San Francisco Unified School District. It is conceded that at all times here relevant that this school district had an average daily attendance of more than 60,000 pupils as defined in section 13583 of the Education Code. On April 10, 1950, the Superintendent of Schools filed written charges of incompetency and unfitness for service with the Board, and recommended the dismissal of Tucker at the conclusion of that school year in the interest of the schools and pupils. The specific charges were failure to hold her classes' interest, lack of discipline, lack of planning, lack of emotional stability, lack of attention to the appearance of her classroom, and failure to secure good teaching results.

On the same date—April 10, 1950—a copy of the charges, a copy of the rules and regulations of the Board relating to the procedure for the dismissal of probationary teachers, and a letter of transmittal, signed by the Superintendent of Schools, were sent to Tucker by registered mail. They were received and signed for by Tucker's agent on April 12, 1950. On April 17, 1950, a copy of the letter, with its enclosures, was personally served upon Tucker.

The letter of the Superintendent of Schools reads as follows:

> "This communication will serve to notify you that the Superintendent of Schools filed with the Board of Education at its meeting of April 10, 1950, charges for your dismissal as a probationary teacher of the San Francisco Unified School District effective as of the close of the school year 1949–50.
>
> "Enclosed you will please find a copy of the charges which were filed together with a copy of the rules and regulations adopted by the Board of Education governing the procedure for dismissal of probationary teachers. You will note that under these regulations an opportunity will be granted to you for a hearing before the Board of Education if you so desire provided that you file a demand for such hearing in conformity with these regulations.
>
> "In this connection, these regulations provide as follows:
>
> "'2. The employee shall be deemed to have waived the right to a hearing before the Board of Education unless within 7 days from the date of receipt of the notice the employee files with the Superintendent a written demand for such hearing; provided, however, that if the said employee is absent from or cannot be found within the City and County of San Francisco for service of notice as aforesaid, then the said period of 7 days shall commence to run from the date of deposit of said notice in the mail.'
>
> "The Superintendent sincerely regrets the necessity of filing these charges, but after reviewing carefully the reports rendered by your administrative superiors concerning your services, he feels that there is no other course to follow under the circumstances.
>
> "Sincerely,
> Herbert C. Clish
> Superintendent of Schools
>
> "HCC:AC
> Encl. A. Copy of Charges
> B. Copy of Resolution"

Appellant at no time requested a hearing as required by the quoted rule, and, as a result, she was not notified of the date, time or place of the meeting at which she was dismissed.

The charges were considered by the Board on the evening of May 10, 1950. At that time the charges and the letter from the Superintendent were read, and the Superintendent testified as a witness. He first identified efficiency reports on appellant prepared by her principal, explained how they were prepared, and discussed their function. He pointed out that one such report was filed at the end of each school year for each of the 1,800 probationary teachers, and that additional reports were filed for those teachers whose work was in question. These reports are not filed or prepared in contemplation of a dismissal proceeding. In reference to appellant, there were three such reports filed by her principal. These reports showed the following: Classroom and supplies disorganized and poorly kept; planning not followed through; inadequate training; danger through lack of proper supervision; lack of emotional stability; intimidates her pupils through force and fear; discipline poor; cannot follow through on lesson procedures, etc., etc. The principal, in the reports, discussed each of these complaints. On a rating scale from 1 to 8, 8 being failure and 7 poor, the principal rated personal characteristics, 5; professional qualifications, 7; clerical work, 6; classroom management, 7; teaching ability, 7. One report gives the opinion of the principal that: "I do not think Miss Tucker has the necessary qualifications for a teacher"; another read: "In spite of effort and goodwill on Miss Tucker's part, she has not had adequate training in college, and it will take much time and effort to give her the help needed to make her an effective teacher"; while still another concluded: "I feel that for the safety of the children in Miss Tucker's class, it is inadvisable to have her continue as a teacher." The Superintendent testified that from an examination of the personnel file, and, as a result of conversations with Miss Tucker's administrative superiors, he had come to the conclusions that Miss Tucker was incompetent as a teacher, and that her retention would not be for the best welfare of the schools or the pupils.

The Board then, by a unanimous vote of the five members present (two members were absent), passed a resolution finding that the charges of incompetency and unfitness for service were true, that appellant's dismissal would be for the best welfare of the schools and the pupils, and appellant was discharged. She was so notified. Thereupon, by writ of mandate in the Superior Court, she sought to be reinstated. The cause was tried on the record and proceedings before the Board. The application for the writ was denied, the trial court concluding that Tucker had waived her right to a hearing and that the dismissal was proper. Tucker appeals.

The basic contention of appellant is that the waiver of the hearing provided for in the rules of the Board is invalid as being in excess of the rule-making powers of the Board. The solution of this problem requires a reference to the pertinent statutes and to the cases interpreting them.

There are several sections of the Education Code to which reference should be made. Division 7, Chapter 11, Article 3, of that code deals with "Dismissal of Probationary Employees". There are three sections in that article. Section 13581 provides that: "Governing boards of school districts shall dismiss probationary employees during the school year for cause only, as in the case of permanent employees." This section is here inapplicable because it applies only to dismissals "during the school year", and the dismissal here was at the close of a school year. Such dismissals are regulated by sections 13582 and 13583. Section 13582 provides:

> "On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year.
>
> "The notice shall be deemed sufficient and complete when delivered in person to the employee by the clerk or secretary of the governing board of the school district or deposited in the United States registered mail with postage prepaid, addressed to the employee at his last known place of address."

[1] Under this section, probationary teachers, generally, may be notified by the date specified that their services will not be required for the next year, and their employment is terminated without the necessity of a hearing or a finding of cause. But this section is not applicable to probationary teachers employed by school districts such as the one here involved where the average daily attendance is 60,000 or more students. Such districts are covered by section 13583, which provides: "Anything in Section 13582 to the contrary notwithstanding, governing boards of school districts having an average daily attendance of 60,000 or more pupils shall dismiss probationary employees for cause only. The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof."

[2] Under this section appellant could be dismissed "for cause only." That, obviously, implies a hearing and a finding of "cause." There is nothing in the statute providing how such cause shall be determined, how the hearing shall be held, for notice of the hearing, or for a waiver of the right to a hearing by failure to make a demand. Such details, in San Francisco, are taken care of by rules and regulations adopted by the Board. Section 2204(a) of the Education Code expressly provides that the governing board of every school district shall have power to: "Prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government, and for the government of the schools under its jurisdiction."

Thus, the precise question presented is whether Rule 2, adopted by the Board and providing for a waiver of a hearing, contravenes or is inconsistent with section 13583 above quoted. The questioned rule is part of a whole series of rules applicable to the dismissal of probationary teachers adopted by the Board on March 28, 1950, after the decision of the Supreme Court in Keenan v. San Francisco Unified School Dist., 34 Cal.2d 708, 214 P.2d 382, 384, decided on February 7, 1950. That case held that section 13583 of the Education Code, in providing for dismissals "'for cause only'", necessarily required that such dismissals be preceded by a hearing at which "cause" could be ascertained.

Immediately after the Keenan decision became final, the Board here involved proceeded to adopt rules and regulations in an attempt to provide for the hearing required by that decision, and to supply the deficiencies of the statute as to procedure. The rules are entitled "Procedure for Dismissal of Probationary Teachers" and are nine in number. Rule 1 requires that when the Superintendent believes cause exists for the dismissal of a probationary teacher he shall prepare written charges specifying the grounds alleged to exist for the dismissal. He shall then file the same with the Board, give notice to the employee, and inform him that he may demand a hearing before the Board "as hereinafter provided." The rule then regulates how the notice shall be served and what it shall contain. Rule 2 is the rule that provides for the demand for and waiver of a hearing. It was quoted in full in the Superintendent's letter to appellant above set forth. It provides that the employee will be deemed to have waived his right to a hearing unless within seven days of the receipt of the notice he files a written demand for such hearing. Rule 3 provides that if such a demand is filed, the Board shall fix a "time for a public hearing of such charges," and at least five days' notice of such hearing must be given to the employee. Rule 4 gives the employee at such a hearing the right to be represented by counsel, to present evidence, to call and cross-examine witnesses. Rule 5 requires the witnesses to testify, at such a hearing, under oath, and to have the proceedings transcribed without cost to the employee. Rule 6 provides that such hearing "need not be conducted according to technical rules relating to evidence and witnesses." Rule 7 requires that no teacher shall be dismissed except upon a majority vote of the entire Board, and that no member may vote who has not either heard or read the testimony. Rule 8 provides when the Board shall announce its decision, while Rule 9 requires, where dismissal is voted, that a notice of dismissal be sent to the employee.

The Keenan case was decided before these rules were adopted, and at a time when the respondent Board customarily dismissed probationary teachers without a hearing. Keenan, a probationary teacher, had been dismissed by the Board, for reasons of poor health, without granting her the right to a hearing. The Supreme Court held that the dismissal "for cause only" requirement of section 13583 implies the necessity for a hearing. The opinion is mainly devoted to disposing of the contentions made in that case that section 13583 was invalid because it applied a different rule to large school districts than was applied to other districts by section 13582, and that such classification was unreasonable. The court upheld the classification. It then held in 34 Cal.2d at page 714, 214 P.2d at page 385, quoting with approval from Bannerman v. Boyle, 160 Cal. 197, 167 P. 732: "'* * * that if by statute an officer or civil service employee may not be removed or discharged except for cause, the clear implication is that there be afforded an opportunity for a full hearing to accomplish his removal; that unless the statute expressly negatives the necessity of a hearing, common fairness and justice compel the inclusion of such a requirement by implication.'"

[3] Thus, the Keenan case determined that section 13583 is valid, and that the section, by necessary implication, requires that probationary teachers in the large school districts, can only be dismissed after being afforded an opportunity for a full hearing. It did not decide, because it did not involve, the question as to whether the

Board could, by rule, provide for a waiver of a hearing by failure to demand one. Neither did the Keenan case, or any of the cases cited therein, determine what is necessary to meet the requirement of notice and a hearing. The statute itself is silent on this problem. Obviously, such matters were left to the repective Boards to be regulated under the rule-making power.

[4] It is, of course, true that under the rule-making power the Board has no power to adopt rules that contravene or are inconsistent with the statute. Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042; Malloy v. Board of Education, 102 Cal. 642, 36 P. 948; Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26. But it is equally true that the Board may adopt, under section 2204(a) of the Education Code, rules and regulations "not inconsistent with law" and may supplement the statute with rules that tend to make the statute workable. Thus, the question is, where the statute confers the right to notice and a hearing before a probationary teacher in certain districts may be discharged, but fails to provide any procedure relating to such hearing, may the Board, by rule, provide for waiver of the hearing by failure to demand such hearing after notice?

[5, 6] No logical reason has been suggested why such a rule as Rule 2 is contrary to or inconsistent with section 13583 or any other provision of law. The nature of the right to the hearing here involved must be considered. Section 13583 expressly or impliedly confers on probationary teachers in districts where the average daily attendance of pupils is 60,000 or more, a limited form of tenure—a tenure, which by statute, may only be terminated for cause after notice and a hearing. But the right of these teachers to such a hearing is not a constitutional right, but is one that is granted and may be denied by statute. In fact, it is denied to all probationary teachers in districts where the average daily attendance is less than 60,000. The statutory right to the hearing is personal to the teacher and may be waived by such teacher. If the statute itself had provided for such waiver, there could be no doubt of the validity of such waiver provision. Reardon v. Daly City, 71 Cal.App. 2d 759, 163 P.2d 462.

It is of considerable significance that when the Legislature, by statute, has granted the right to a hearing, and has then set forth the procedure to be followed in enforcing that right, it has customarily provided for a waiver by failure to demand a hearing after notice. Thus, the Education Code provides that permanent teachers may be dismissed only after notice and a hearing. But section 13524 then provides: "If the employee does not demand a hearing, he may be dismissed at the expiration of the 30-day period."

Equally significant are the provisions of the Administrative Procedure Act. Although the provisions of that statute dealing with administrative adjudications do not apply to local boards of education, see Gov.Code, § 11501, they are helpful as indicating what the Legislature believes are the elements of a fair and carefully thought out system of administrative procedure dealing with administrative hearings. Section 11506 of the Government Code provides:

> "(a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:
>
> "(1) Request a hearing; * * *.
>
> "Within the time specified respondent may file one or more notices of defense upon any or all of these grounds, but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.
>
> "(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. * * *"

[7] Similar provisions for waiver are customarily found in various civil service

statutes and other administrative procedure statutes. In other words, whenever a statute grants the right to a hearing, where the statute also regulates procedure, it customarily provides for a waiver by failure to demand a hearing after notice. That being so, it seems quite clear that where the statute is silent as to procedure, and the administrative board has rule-making powers, that such board may provide for a waiver by failure to demand after notice. Such a regulation is not contrary to or inconsistent with the statute, but is supplementary thereto and consistent therewith.

[8] The manner in which the Board has interpreted section 13583 and Rule 2 is of some importance. It has interpreted them to mean that the probationary teacher who fails to demand a hearing after notice as set forth in Rule 2 has waived her right to an adversary public hearing and has, in legal effect, defaulted. But it has interpreted section 13583 with its "for cause only" provision to require, even where such default has been made, that the Superintendent must still show "cause." Because of the default, the probationer is not entitled to notice of that "hearing," of right, but nevertheless "cause" must still be shown. In the instant case, ample "cause" was shown. In view of the further provision of section 13583 that "The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive," this interpretation seems reasonable. Certainly, such procedure was extremely fair to appellant and afforded her full protection of all of her statutory rights. It must be remembered that it is just as important a matter of public policy that incompetent teachers, for the protection of the students, be removed, as it is that the tenure rights of the teachers not be improperly impaired. The procedure set up by the rules seems admirably designed to protect both interests.

[9] The only other question necessary to decide in this case is whether seven days is a reasonable period in which to require a decision from the teacher as to whether he or she desires an adversary public hearing. The period is admittedly short, but we do not think it wholly unreasonable. The time element in such cases is of considerable importance. The governing board must know by May 15th of each year whether the probationary teacher has been discharged or rehired for the ensuing year. In fairness to the probationary teacher, charges looking toward a dismissal at the close of the school year should not be filed until toward the end of that school year so that the teacher's abilities, for as long a period as possible, can be appraised. After service, the teacher has seven days to determine whether he or she desires to contest the charges. Then the teacher, under Rule 3, is entitled to a further five days' notice of such hearing. Thus, at the very minimum, the teacher has at least twelve days (and usually longer) to prepare any defense he or she may have. In view of the subject matter involved, this period is not unreasonable.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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111 Cal.App.2d 885

FOX v. SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

Civ. 15034.

District Court of Appeal, First District, Division 1, California.

June 23, 1952.

Hearing Denied Aug. 21, 1952.

Proceeding for a writ of mandate to be reinstated as a teacher by Philip L. Fox against the San Francisco Unified School District and others. From a judgment of the Superior Court for the City and County of San Francisco, Thomas M. Foley, J., denying the application, plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the plaintiff effectively waived his right to an adversary public hearing before the board on charges constituting a basis for his dismissal and that certain records were properly admitted.

Judgment affirmed.

1. Administrative Law and Procedure 🔑383
Schools and School Districts 🔑141(5)

Under the statute respecting the dismissal of probationary school employees in districts having an average daily attendance of 60,000 or more pupils, a rule of the board in such a district providing for a waiver of hearing by failure to demand the same within seven days, was valid. Education Code, § 13583.

2. Schools and School Districts 🔑141(5)

Record established that a dismissed probationary school teacher in a district having an average daily attendance of 60,000 or more pupils, waived his right to an adversary public hearing on charges on which dismissal was based. Education Code, § 13583.

3. Administrative Law and Procedure 🔑755
Schools and School Districts 🔑141(5)

Under the statute respecting dismissal of probationary school employees in districts having an average daily attendance of 60,000 or more pupils, probationary teacher can only be dismissed for cause, but the determination of "cause" when there has been waiver of an adversary hearing is left to the discretion of the board of education. Education Code, § 13583.

4. Schools and School Districts 🔑141(5)

Where dismissed probationary teacher elected not to participate in hearing of charges on which dismissal was based and thereby waived his right to a hearing, he could not object on appeal in mandate proceeding that the testimony was hearsay if such testimony was of sufficient probative value to show "cause" for his dismissal. Education Code, § 13583.

5. Administrative Law and Procedure 🔑476
Trial 🔑105(2)

Hearsay, even at common law, if unobjected to when offered, had probative value, and occupies a similar position in an administrative proceeding.

6. Evidence 🔑593

In an adversary hearing, hearsay properly objected to, is insufficient alone to support a finding, if that hearsay would be inadmissible in a civil action. Government Code, § 11513(c).

7. Evidence 🔑333(6), 370(1)

Departmental school records upon which discharge of probationary school teacher was predicated, including principal's reports of inefficiency were admissible as business records in an administrative proceeding where they were regular personnel reports prepared in regular course and were identified by the superintendent. Code Civ.Proc. §§ 1953e, 1953f.

8. Evidence 🔑333(1)

Under the Business Records As Evidence Act government reports are admissible when other elements of the statutes are shown to exist. Code Civ.Proc. §§ 1953e, 1953f.

9. Schools and School Districts 🔑141(4)

Record sustained decision of board of education dismissing probationary school teacher on ground of inefficiency. Education Code, § 13583.

Alexander S. Keenan, Jr., San Francisco, for appellant.

Dion R. Holm, City Atty. of City and County of San Francisco, Walter A. Dold, Chief Deputy City Atty., San Francisco, Irving G. Breyer, San Francisco, of counsel, for respondents.

PETERS, Presiding Justice.

This case involves substantially the same legal questions as were presented in Tucker v. San Francisco Unified School District, Cal.App., 245 P.2d 597. Fox, too, was a probationary teacher who was discharged by the Board. He, too, sought by mandate to be reinstated. His petition was denied by the Superior Court, judgment entered against him, and he appeals.

The uncontradicted facts as to Fox show the following: He was first appointed a probationary teacher in the Junior High School Division of the San Francisco

Unified School District in 1947. He was reelected to teach as a probationary teacher for the school term 1948–49, and for the school term of 1949–50. He was notified of his dismissal, pursuant to section 13583 of the Education Code on or prior to May 15, 1950. Had he not been then discharged, he would have qualified as a permanent teacher. Education Code, § 13081.

Charges, as in the Tucker case, were filed against appellant by the Superintendent on April 10, 1950, and on April 11, 1950, the Superintendent sent to appellant, by registered mail, a copy of the charges, a copy of the rules and regulations, and a letter of transmittal substantially similar to the one quoted in the Tucker case. These were received and receipted for by appellant's agent on April 12, 1950. The listed charges were incompetency, evident unfitness for service, failure to secure and hold the attention of the pupils in class; lack of discipline and control of the pupils; will not follow suggestions for control of classes; promises to carry out suggestions for improvement and to accept responsibility, but does not do so; and poor teaching results.

After receipt of this letter, with its enclosures, appellant apparently requested an interview with the Superintendent. Under date of May 3, 1950, the Superintendent sent the following letter to appellant:

> "Dear Mr. Fox:
>
> "It has been reported to me that you have requested an interview with me. I should be very happy to grant you an interview tomorrow afternoon, Thursday, May 4, at my office at 4 o'clock. I shall invite to be present at the meeting Mr. Breyer, the Legal Adviser to the Board of Education, and Mr. Ernest Cummings, Assistant Superintendent in charge of Secondary Schools.
>
> "Because I am very pressed for time, I shall have to ask that you not review matters you have discussed with me and Mr. Breyer previously over the telephone. I shall be glad to listen to any new material you wish to present. In view of the fact, however, that this matter has been presented to the Board of Education and is now in the hands of the Board there is no action that I can take relative to it. Any new evidence which you wish to present, either you or your attorney can present before the Board of Education on May 10.
>
> "I would suggest, however, that if you wish to present any evidence that you extend to the Board of Education the courtesy of requesting in writing a hearing before the Board.
>
> "Sincerely,
> "Herbert C. Clish,
> "Superintendent of Schools"

Appellant, under date of May 4, 1950, sent the following telegram to the Superintendent:

> "In view of your letter May 3rd no interview necessary. Your letter has me puzzled as I have no knowledge of any Board meeting May Tenth. What takes place on that date. Please advise.
>
> "Philip Fox"

The Superintendent on the same day—May 4, 1950—sent to appellant a registered letter, receipted for by appellant's agent on May 8, 1950. The letter reads as follows:

> "Dear Mr. Fox:
>
> "This will serve to acknowledge your telegram of May 4 which reads as follows: [Quoted.]
>
> "My letter of May 3 was sent as a result of information that I had received to the effect that you desired an interview with the Superintendent.
>
> "In answer to your inquiry as to the meeting of the Board of Education on May 10, may I advise you that the Board of Education on that date will take action on the charges heretofore filed against you and certain other probationary teachers. A communication was previously sent to you informing you of the charges, enclosing a copy thereof, together with the rules and regulations of the Board of Education governing the procedure for the dismissal of probationary teachers. As the letter pointed out, if you desired to have a hearing of the charges before the

> Board of Education, you were required to file a written demand with the Superintendent within the period prescribed by the regulations. Also as you may recall, when you telephoned the Superintendent concerning this matter after you received the communication, he pointed out to you the requirement that you request a hearing of the charges if you decided to have such a hearing. Neither the Superintendent nor the Board of Education received a request for a hearing.
>
> "Sincerely,
> "Herbert C. Clish,
> "Superintendent of Schools"

Appellant at no time requested a hearing as provided in Rule 2. On May 10, 1950, the Board met. This was the same meeting at which Tucker was dismissed. Appellant did not personally appear, but a lawyer appeared and made a "special appearance" on his behalf. The lawyer conceded that no demand for a hearing had been filed, but objected to the Board proceeding on the ground that appellant had not been informed of the May 10th hearing until May 8th, that two days' notice was inadequate, and, in legal effect, no notice at all, and for that reason the Board had no jurisdiction to proceed. The Board reserved its ruling on this objection until after counsel for the Board had introduced all the communications above quoted. Then the president of the Board asked the lawyer whether he desired to demand a hearing on behalf of appellant. Counsel replied that such a step was not up to him, that he was appearing specially to object to the jurisdiction of the Board and not to demand a hearing, and that under the law a hearing was mandatory regardless of a demand. One of the Board members, with the consent of the president of the Board, then asked the lawyer if he could prepare appellant's defense if the Board granted a continuance for two more days. The lawyer refused to speak for the record, and the president, quite properly, refused to hear him otherwise. The objection to the jurisdiction of the Board was then overruled.

The Superintendent was then called as a witness and identified some six efficiency reports on appellant as the regularly kept personnel records prepared for all probationary teachers. In addition to the foundation given in the Tucker case, the Superintendent testified that supervision over probationary teachers such as appellant, who was teaching in a secondary school, is carried on by the administrative staff of the school, assisted by the co-ordinator of a special department, if such is involved, and by the co-ordinator of secondary education and the assistant superintendent in charge of secondary schools. Reports are regularly prepared at the end of each school term, and, where necessary, special reports are filed. These are official reports of the department prepared in regular course. The six reports on appellant covered a period from September 3, 1947, to March 29, 1950.

These reports are too lengthy to refer to in detail. They show ratings on the 1 to 8 scale as to the characteristics referred to in the Tucker case of 5, 6 and 7. They also demonstrate that the administrative superiors of appellant made many efforts to help him, but that his teaching work and technique grew progressively worse. Generally speaking, these reports stated that appellant was lacking in industry, dependability, initiative and resourcefulness; that he failed to cooperate with the students, and failed to assume proper responsibilities; that he presented little material to his classes, and failed to use the materials available; that he had little contact with his classes; that his teaching results were poor; that his main interest was in extra curricular activities and not in his school work; that his school clerical work was poor; that he failed to maintain discipline in his classes and they were frequently disorderly; that he was careless in following instructions; that his preparation for his classes was very poor; that his cooperation with the administrative staff was poor; that he showed little interest in improving his methods; that his teaching methods were poor, and that his fundamental training was deficient. These reports were filed by several different principals of the several schools where appellant had taught during the period here involved. Several principals recommended against his retention in their schools, but there were some favorable recommendations and ratings. Several reports referred to appellant's great interest in school administration and recommended his retention.

The Superintendent then testified that, before filing these charges against appellant, he considered all of these reports and conferred with each of the principals reporting, and then called a conference of all such principals to discuss appellant's work. It was on all this information thus gained that the charges were predicated. It was the Superintendent's opinion that appellant was not a competent teacher, and that his retention would not be for the best welfare of the schools or the pupils. The Board then, by the unanimous vote of the five members present (two members being absent), passed a resolution finding that the charges of incompetency and unfitness for service were true, that appellant's dismissal would be for the best welfare of the schools and the pupils, and appellant was discharged. He was so notified. Thereupon, he, by writ of mandate, sought to be reinstated, and certified as a permanent teacher. The case was tried in the Superior Court on the record and proceedings before the Board. As in the Tucker case, the trial court found that the dismissal was proper, concluded that appellant had waived his right to a hearing, and denied the application for the writ. This appeal was then taken.

[1,2] Appellant's main contention, as in the Tucker case, is that the requirement for an adversary public hearing is mandatory; that appellant is entitled to notice of the hearing regardless of a demand; and that Rule 2 is invalid in providing for a waiver by non-action. These contentions are without merit. They have all been considered and decided adversely to appellant in the Tucker case. The additional circumstances here present—the communications of May 3rd and 4th, and the "special appearance" on May 10th—in no way change the rule. Appellant had personal knowledge that the charges had been filed as early as April 12, 1950. He then was informed that under Rule 2 he had the right to demand a hearing to challenge the charges if he filed his request within seven days. This, he voluntarily elected not to do. Even after his waiver, the Board was quite willing to waive his default and to listen to any defense. Nevertheless, through his counsel, appellant refused to present a defense, electing to rely on the technical objection that he was entitled to notice of the May 10th meeting. Of course, he then knew that under the provisions of section 13583 of the Education Code that the Board had to act by May 15th, and was undoubtedly hoping to stall the proceedings beyond that date. For the reasons given in, and on the authority of, the Tucker case, it is held that Rule 2 is valid, and that appellant voluntarily and effectively waived his right to an adversary public hearing.

[3,4] This appellant raises one other point not raised in the Tucker case, and that is, that all the departmental reports upon which the discharge was predicated, and the testimony of the Superintendent, were hearsay, and that the Board was without authority to dismiss him on such evidence. The point requires but scant consideration. As already pointed out, appellant effectively waived his right to an adversary public hearing by his failure to demand such hearing. The Board, of course, under section 13583 of the Education Code, can only dismiss for "cause." How it is to determine "cause," when there has been a waiver of an adversary hearing, is left to the discretion of the Board. It elected to ascertain whether such cause existed at a meeting of the Board at which evidence was produced. Even if the evidence were all hearsay that could have been objected to in an adversary hearing, having elected not to participate in the hearing and having waived his right to a hearing, he is in no position to now object on appeal that the testimony was hearsay, if that hearsay was of sufficient probative value to show "cause" for his dismissal. That it was of such probative value is obvious. Hearsay, even at common law, if unobjected to when offered, can be of pro-

bative value, and certainly occupies a similar position in an administrative proceeding such as this.

[5–7] Moreover, while it is true that in an adversary hearing, hearsay, properly objected to, is insufficient alone to support a finding, if that hearsay would be inadmissible in a civil action, Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383; Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816; see, also, Government Code, § 11513 (c), that rule does not apply to admissible hearsay. Even if the principal's reports were entirely hearsay, they would have been admissible even had this hearing been an adversary hearing. Under the provisions of the Uniform Business Records as Evidence Act these records were admissible as business records. They were not records prepared after the charges had been made and in preparation for this proceeding. They were regular personnel reports prepared in regular course. They were identified by the Superintendent who testified as to the mode of their preparation. Under such circumstances, they were admissible as business records.

Section 1953e of the Code of Civil Procedure provides: "The term 'business' as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

Section 1953f of that code provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

[8, 9] These sections include government reports when the other elements of the section are shown to exist. Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569; Brown v. County of Los Angeles, 77 Cal.App.2d 814, 176 P.2d 753; Holder v. Key System, 88 Cal.App.2d 925, 200 P.2d 98; Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271; 35 Cal.L.Rev. 434. Under these sections, even had this been an adversary hearing, and had the reports been objected to, they would have been admissible. They amply support the judgment.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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111 Cal.App.2d 861

JUD WHITEHEAD HEATER CO. v. OBLER et al.

WHITEHEAD v. OBLER et al.

Civ. 15030.

District Court of Appeal, First District, Division 1, California.

June 23, 1952.

Rehearing Denied July 23, 1952.

Action by corporation and its predecessor to impress constructive trusts on certain real and personal property alleged to have been acquired by former employee and his wife with moneys embezzled from respective plaintiffs, and for an accounting. The Superior Court, County of Alameda, O. D. Hamlin, Jr., J., entered judgment impressing a trust upon such property in favor of plaintiffs, and denying employee's cross-action based upon alleged loan to one plaintiff, and defendants appealed. The District Court of Appeal, Bray, J., held, inter alia, that the record failed to support the finding that such loan had not been made, and that the amount of such loan and interest thereon would be offset against the embezzled moneys.

Amended and affirmed.

1. Trusts 🔑110

In action by former employers to impress constructive trusts on certain real and personal property alleged to have been acquired by former employee with moneys embezzled from employers, wherein employee admitted taking the money, but contended that it was done with employers' permission, evidence supported trial court's determination that the money had been wrongfully taken.

2. Action 🔑56

Appeal and Error 🔑964

The trial court is vested with discretion to consolidate actions, and the exercise of such discretion will not be reviewed except in a case of palpable abuse. Code Civ.Proc. § 1048.

3. Appeal and Error 🔑1046(1)

Consolidation of actions by corporation and its predecessor against former employee to impress trust upon different property because of alleged misappropriations of money from both employers was not prejudicial to former employee. Code Civ.Proc. § 1048.

4. Action 🔑57(1, 2)

Fact that evidence in one case might not have been admissible in other case does not bar a consolidation; nor does the fact that all the parties are not the same. Code Civ.Proc. § 1048.

5. Action 🔑57(1)

Fact that consolidation of actions to impress trust upon defendant's property because of alleged misappropriations from corporation and its predecessor made it easier to trace stolen moneys than it would have been had the actions been separately tried was cogent reason for upholding consolidation order.

6. Action 🔑57(1)

Fact that former employee of corporation and its predecessor was in prison did not prevent consolidation of action by corporation to impress trust upon certain property of former employee because of alleged embezzlements with action by corporation's predecessor to impress trust upon other property because of embezzlement. Code Civ.Proc. § 1048.

7. Pleading 🔑237(6)

In action by corporation against its former employee and his wife to impress trust upon property allegedly purchased with embezzled moneys, wherein former employee admitted taking the money, but contended that it was done with corporation's consent, although complaint did not allege that certain jewelry had been bought with embezzled money, evidence of such fact would have been admissible to show the transactions between the parties as bearing on question of whether moneys had been stolen, and therefore amendment of complaint to conform to proof admitted in consolidated action was proper.

8. Pleading 🔑395

Variance between proof showing certain jewelry to have been purchased in part with embezzled funds of corporation and amendment to conform to proof alleging entire purchase price was the corporation's moneys was immaterial.

9. Pleading 🔑237(6)

Fact that court gave corporation lien on jewelry, which had been bought by former corporation employee with embezzled funds, whereas amendment to conform to proof alleged that corporation had title, did not make allowance of amendment improper.

10. Pleading 🔑237(6)

Fact that former corporation employee in action to impress trust upon property bought with alleged embezzled money of corporation was in prison and corporation had not originally urged that jewelry had been bought in whole or in part with its money did not make allowance of amendment to conform to proof improper on ground that such employee and his wife were not prepared on the subject, in view of fact that they had stipulated as to purchase of jewelry and particular checks used in payment thereof, and especially in view of fact that they had been put on notice by complaint in consolidated action by corporation's predecessor that the matter was in issue.

11. Pleading 🔑237(3)

The trial court may permit an amendment to conform to proof at any stage of trial even after submission of cause unless amendment introduces new and independent cause of action.

12. Limitation of Actions 🔑37(2)

The statute of limitations applicable to action to impress trust upon property allegedly acquired with embezzled funds was the statute requiring action to be brought within three years of discovery of facts constituting the fraud. Code Civ.Proc. § 338, subd. 4.

13. Limitation of Actions 🔑189

Where employer testified that he had not discovered embezzlement until certain date, which was within three year statute of limitations from time of amendment to conform to proof so as to impress trust upon certain jewelry bought with embezzled funds, allowance of such amendment was not improper, though money had been embezzled during period more than three years prior to such amendment. Code Civ.Proc. § 338, subd. 4.

14. Trusts 🔑375(1)

Where judgment against former employee, who had embezzled funds and used them to purchase property, and his wife, who had not known of the embezzlement, declared lien on certain property for amount which went into purchase price, but was amended so as to provide that there should not be any deficiency judgment against the wife, the judgment was not a personal judgment against the wife.

15. Trusts 🔑375(1)

Judgment against former employee, which adjudged property wholly purchased with embezzled funds to belong to former employers and which gave former employers liens on property purchased only in part with embezzled funds, in effect gave employers money judgment only in event there was deficiency after lien was foreclosed, and such judgment was not objectionable on ground that employers could not have personal judgment for amount stolen and also obtain property purchased with such moneys.

16. Trusts 🔑356(1)

Although wife did not know that jewelry which her husband had given her had been bought with embezzled funds, where liens were impressed upon such jewelry for amount of money stolen plus interest, wife's equity was chargeable with interest.

17. Liens 🔑15

Where property subject to equitable lien is transferred to third person who has notice of equitable lien or who does not give value, such lien can be enforced against the property in the hands of the third person.

18. Trusts 🔑372(1)

Where proof established that certain property upon which former employers sought to impress trust had been bought on open accounts and paid for later with embezzled moneys in part, it was the duty of the embezzler and his wife, to whom the property had been given, to segregate their funds that went into the accounts.

19. Trusts 🔑372(3)

Where property had been purchased on open accounts and paid for later with embezzled moneys, at least in part, the whole of such property in hands of embezzler and his wife, who had given no consideration for property transferred to her, would be impressed with a trust, in absence of proof showing amount of untainted money which had been used in paying the accounts.

20. Trial 🔑140(1)

The credibility of witnesses is a matter entirely in hands of trial court.

21. Master and Servant 🔑80(9)

In cross-action by former employee against his employer wherein employee alleged that as part of his employment and in consideration of his services in promotion of certain heater, he had been promised an interest in the business, evidence supported finding that there had been no such agreement.

22. Appeal and Error 🔑1122(3)
Money Lent 🔑7(3)

In action by corporation against its former employee and his wife to impress trust upon property bought with embezzled moneys, wherein employee cross-complained contending he had made certain loan to corporation, evidence did not support finding that such loan had not been made, and District Court of Appeal would amend findings so as to show that such loan had been made. Code Civ.Proc. § 956a.

23. Account 🔑20(3)

Where moneys misappropriated by corporation employee over and above sums which were traceable into real property purchased by employee exceeded the amount of employee's loan to corporation, plus interest, and corporation sought accounting, the amount of the loan and interest would be offset against the embezzled moneys in excess of that traceable into property.

◆

Francis T. Cornish, Cornish & Cornish, Howard W. Wayne, Berkeley, for appellants.

Charles M. Stark, Paul W. McComish, Fredrik S. Waiss, San Francisco, for respondents.

BRAY, Justice.

These two actions, which were consolidated for trial, sought an accounting and to impress constructive trusts on certain real and personal property alleged to have been acquired by defendant Louis Obler * and his wife, defendant Bernice Obler, with moneys embezzled by him from the respective plaintiffs. From an amended judgment impressing such trusts, defendants appeal.

Questions Presented.

1. Sufficiency of evidence to show wrongful taking.
2. Were the cases improperly consolidated?
3. Alleged error in allowing amendment of complaint to conform to proofs.
4. Was a part of plaintiffs' claim barred by the statute of limitations?
5. Effect of judgment against defendant Bernice.
6. Effect of judgment against defendant.
7. Are plaintiffs entitled to interest on the embezzled moneys?
8. Can items purchased on open account be impressed with a trust?
9. Were the findings concerning defendant's claimed ownership in Electric Kitchen Appliance Company supported?
10. Did defendant lend the corporation $10,000?

Facts and Judgment.

The complaint in the case of Whitehead as an individual sought to recover alleged misappropriations up to the date of the incorporation, and in the corporation case to recover misappropriations subsequent thereto. Defendants answered, claiming that the withdrawals by defendant of plaintiffs' moneys were with their consent, and setting up an alleged contract under which defendant was to have an interest in plaintiffs' businesses, and alleging a loan by defendant to the corporation of $10,000, which loan had not been repaid. In view of defendant's admissions in his answer and his stipulations, it is not necessary to detail the methods by which defendant obtained the moneys, nor all the facts, merely those relating to the points raised on appeal. From 1940 Whitehead operated the "Jud Whitehead Heater Company" which sold hot water heaters. This continued until August, 1946, when the "Jud Whitehead Heater Company, a corporation," was formed which succeeded to the assets of the first business. Defendant was Whitehead's first employee, became general manager of Whitehead's and was the general manager, vice-president and a director of the corporation. In February, 1948, it was discovered that defendant had systematically taken funds from both businesses by drawing checks on them respectively and by cashing customers' checks. Defendant was convicted of grand theft relating to the obtaining of certain moneys from the Bank of America on fictitious invoices of the company. Defendant Bernice did not know of these appropriations. With the moneys so obtained defendant made part payments on a home, title to which is in the names of both defendants, and purchased many articles of furniture, clothing and jewelry. Defendant stipulated that a total of $105,434.32 was taken by defendant; that specific amounts totaling said sum were paid to specific creditors; that defendant purchased from said creditors certain articles of personal property consisting generally of furniture, jewelry and clothing, and that certain of those articles are now in the possession of defendant Bernice. The court, in its findings and judgment, found that of the total sum taken $20,092.34 went into the purchase price of the home and impressed a lien thereon for said sum and interest. It fur-

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* Herein referred to as "defendant."

ther found that certain sums went into partial payment of the purchase price of certain jewelry, furniture, and other personal property in defendant Bernice's possession, and impressed liens thereon totaling $10,564.81. It also found that certain articles of personal property had been paid for in full from said moneys; that the title to said personal property in possession of defendant Bernice was in the particular plaintiff from whom said money came. It also found that certain other personal property claimed by plaintiffs was not purchased in whole or in part with stolen moneys and held that defendants were the owners thereof, and that certain moneys claimed by plaintiffs belonged solely to defendant Bernice. The judgment further provided that no deficiency judgment could be had against defendant Bernice.

It is not contended, and could not be in the face of the stipulation, that the evidence did not support the court's conclusion that the stolen moneys went into the purchase of the property in question. However, the stipulation did not of course admit that the moneys were stolen. Also, as will be discussed later, defendant did not stipulate away his contention that where articles were purchased on an open account the court could not impress a lien on those articles nor require defendants to hold them in trust for plaintiffs for the amounts paid on said open account.

1. Sufficiency of Evidence to Show Wrongful Taking.

[1] The stipulations admit that defendant took certain funds, paid them to stores such as Gump's, Sloane's, and Magnin's, on personal merchandise accounts. But, contend defendants, Whitehead knew and authorized every withdrawal and authorized defendant to cash checks payable to the company. Defendant so testified in his deposition. Whitehead denied any such authorization and any knowledge of defendant's actions until February, 1948, when the Bank of America notified him of shortages in his account. Without detailing the evidence on this subject it is sufficient to say that at most, it is conflicting and to a great extent dependent upon the credibility of Whitehead or defendant. Defendant argues at length that Whitehead's testimony was not frank and that his testimony was conflicting, while that of Obler is clear and convincing. Such a situation, if it exists, was for the trial court to resolve. The trial court believed Whitehead, and resolved the conflict in his favor. There is ample evidence to support such conclusion.

2. Consolidation.

[2–6] The complaint in the case of Whitehead as an individual charges misappropriations prior to August 9, 1946. The corporation case covered those made thereafter. Defendants contend that as the plaintiffs and the dates of misappropriation were different the cases could not be consolidated, pointing out that they were consolidated not merely for trial purposes but into one action. "An action may be severed and actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right." Code Civ.Proc. § 1048. "* * * the trial court is vested with a discretion to consolidate * * * the exercise of such discretion will not be reviewed except in a case of palpable abuse." Realty etc. Mfg. Co. v. Superior Court, 165 Cal. 543, 547, 132 P. 1048, 1049. We can see no prejudice to defendants' substantial rights in the consolidation of the two actions. Practically all of the contentions made by defendants have been answered adversely by the decisions. The fact that evidence in the one case might not have been admissible in the other does not bar a consolidation. See Johnson v. Western Air Exp. Corp., 45 Cal.App.2d 614, 114 P.2d 688. Nor does the fact that all the parties are not the same. See Aufdemkamp v. Pierce, 4 Cal.App.2d 276, 40 P.2d 599; People v. Ocean Shore R. R., 22 Cal.App.2d 657, 72 P.2d 167. In McClure v. Donovan, 33 Cal. 2d 717, 205 P.2d 17, the consolidation was upheld of an action brought by a sister for the annulment of her brother's marriage with a proceeding to have the brother declared incompetent and a guardian of his person and estate appointed. Here the Whitehead action was brought to follow the misappropriations from him into certain property, while the corporation action was brought to follow other misappropriations into other property. Both causes of action arose out of one series of transactions, namely, defendant's embezzlement from the corporation and its predecessor. One of the reasons that defendants objected to the consolidation is that thereby it was made easier for the plaintiffs to trace the stolen moneys than it would have been had the actions been separately tried. That very fact is a cogent one for upholding the action of the trial court. The consolidation eliminated the necessity of two trials instead of one. The fact that defendant was in San Quentin, urged by defendants as a reason the consolidation should not have been made, has no bearing on the subject. Defendants would have been equally handicapped by his absence from court whether the cases were tried singly or consolidated.

3. Amendment of Complaint.

[7-11] In Whitehead's complaint he alleged that on July 15, 1946, defendant, with moneys stolen from plaintiffs, purchased a pair of diamond earrings and a pair of diamond clips from a certain jeweler in New York for sums totaling $6900. The proof showed that while these articles were purchased in 1946 when the business was that of Whitehead as an individual, $6500 of the $6900 purchase price was paid in 1947 after the formation of the corporation and from its funds. The trial court permitted the corporation to amend its complaint to allege that the purchase moneys belonged to the corporation. The court impressed a lien on the articles in favor of plaintiff corporation for $6500 and interest. Defendants contend that the trial court abused its discretion in allowing the amendment. Their position is that had the cases not been consolidated and the Whitehead case been tried alone, judgment would have been rendered in favor of defendants because the moneys came from the corporation. Had the corporation case been tried alone, the evidence would not have been admissible as not being within the then issues. Therefore, say they, the court should not have permitted the amendment. Although in the corporation case, the matter was not pleaded, the evidence would have been admissible to show the transactions between the parties as bearing on the question of whether the moneys pleaded were stolen. The court on discovering the true facts would have had the authority to permit an amendment of the complaint to conform to the facts. Thus, the main objection to the amendment is that had it not been granted defendants would have escaped liability for moneys which the evidence shows defendant had stolen. We are not impressed with this argument. The amendment alleges the entire purchase price of $6900 was the corporation's moneys and the proof shows that of that sum $6500 only belonged to it. That variance was immaterial. Again in the amendment, plaintiff corporation alleges that the jewelry having been purchased with its money, the jewelry belongs to it. The court, however, instead of finding the title to the jewelry to be in the corporation, gave a lien on it for the $6500. The fact that the relief did not equal the claim in the complaint did not make the allowance of the amendment improper. The greater includes the less. Defendants urge that as defendant was in San Quentin and the corporation had not originally urged that the purchase of the jewelry was in whole or in part with its money, defendants were not prepared on the subject. This is a rather peculiar contention to make in view of the fact that defendants stipulated at the trial as to the purchase of the jewelry and the particular checks used by defendant in payment of the account. Moreover, defendants were put on notice by Whitehead's complaint that the matter was in issue. "The law is settled that the trial court may permit an amendment to a complaint to conform to the proof at any stage of the trial even after submission of the cause unless the amendment introduces a new and independent cause of action." Sandvold v. Perrot, 74 Cal.App.2d 344, 348, 168 P.2d 995, 997.

4. Statute of Limitations.

[12, 13] As a part of their contention of error in allowing the amendment, defendants claim that the statute of limitations had run against this claim, as the jewelry was purchased approximately four

and a half years, and the money taken over three and a half years, before the amendment. These were actions based on defendant's fraud in misappropriating the moneys of the plaintiffs. The applicable statute of limitations is section 338, subdivision 4, Code of Civil Procedure, which requires the action to be brought within three years of the discovery by the aggrieved party of the "facts constituting the fraud * * *." See Dabney v. Philleo, 38 Cal.2d 60, 237 P.2d 648. While the exact date of the discovery does not appear in the evidence, Whitehead testified that prior to February 1, 1948, he had no knowledge that defendant was using his or corporation funds for his own purposes. The amendment was made within three years of that time. Therefore the contention that the amendment should not have been allowed because the statute of limitations had run is not well founded.

5. Effect of Judgment Against Defendant Bernice.

[14] As to the articles of personal property which the court found were paid for in part only with stolen funds, the court gave judgment against both defendants for the amount of the stolen funds and then declared a lien on the particular article or articles for the amount which went into the purchase price, with interest. For example, the court found that of the purchase price of a certain piano the sum of $1509.43 was moneys embezzled from the corporation, and that said piano is now in the possession of defendant Bernice. It gave judgment in favor of the corporation for that sum against both defendants and declared a lien on the piano for that sum and interest. As to the real property, it found that it was paid for partially with stolen moneys and declared a lien thereon for those moneys. By an amended judgment the court declared that in no event should there be any deficiency judgment against Bernice. Defendants contend that there could be no money judgment against her because the evidence shows that she knew nothing of the embezzlements, nor was any money judgment asked against her in the complaints. While the form of the judgment is artificial and could have been better drawn, the judgment actually does not give any money judgment against Bernice. It, in effect, merely gives plaintiffs a lien upon the particular articles for the amounts declared to have gone into their purchase price. Under the judgment no writ of execution could issue to collect any sums from defendant Bernice and no deficiency can be obtained from her in the event that the foreclosure of the particular lien fails to produce the entire amount due. The court, in effect, impressed a trust in favor of plaintiffs upon the articles to the extent to which plaintiffs' moneys went into them. Defendant Bernice is in the position of holding certain property which was purchased mainly with stolen money and is therefore holding said articles in trust for plaintiffs to the value of their money therein. Therefore, cases cited by defendants concerning debt actions do not apply. In effect, there was no personal judgment against Bernice.

6. Effect of Judgment Against Defendant.

[15] Defendant contends that no personal judgment could be obtained against him. Of course, plaintiffs could not have a judgment for the amounts stolen and also obtain the property purchased by those moneys. Defendant apparently believes such to be the effect of the judgment here. But it does not do so, and hence cases like Title Ins. and Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360, and Hilborn v. Bonner, 28 Cal.App. 789, 154 P. 26, which hold that the person wronged cannot be awarded both the property impressed with the trust and the moneys which purchased it, are not applicable. The court found that the entire purchase price of certain personal property was paid for with stolen moneys. As to those properties the court adjudged that they belonged to the particular plaintiff from whom the money was taken, and did not give judgment against either defendant for the stolen moneys which purchased them. As to the real property and the other articles of personal property which were paid for with stolen moneys in part only, it gave

plaintiffs liens thereon. The effect of the judgment as to defendant is that the money judgment is only in the event there is a deficiency after the lien is foreclosed. While this is not the exact language of the judgment it is the obvious effect thereof. Plaintiffs sued to impress a trust upon the property paid for with stolen money and also for an accounting. Under the complaint the court could have impressed such trust upon the properties to which the stolen moneys could be traced. It also could have given a personal judgment against defendant for the other moneys stolen by him as shown in the accounting. It did not do the latter, confining itself to doing the former. There is here no requirement of election. Plaintiffs sought and received, first, the property which the stolen moneys paid for in full (and no money judgment as to those moneys); second, a lien on the property not paid for in full by stolen moneys, for the amount which the stolen moneys contributed to the purchase price. If the foreclosure of the particular lien does not return the full amount stolen with interest, then the particular plaintiff is entitled to a judgment against defendant alone, for the deficiency.

7. Interest.

[16] Defendant Bernice contends that as she had no knowledge of the fact that the properties given her were paid for with stolen moneys, interest should not be chargeable against her equity in the properties on which liens were impressed. This contention is answered in Brown v. New York Life Ins. Co., 9 Cir., 152 F.2d 246, 250: "Appellant paid nothing for the insurance policies and as to her they were a gratuity. She is innocent of fraud perpetrated by herself, but as the lower court pointed out, even the widow of a trustee ex maleficio who has paid no consideration for the property purchased with misappropriated funds, or for their fruits, may not hold such property, or the fruits thereof, against the cestui que trust, who is the real owner. A third person, unless he or she has in good faith acquired for value without notice a subsequent interest, seeking any benefit resulting from the misappropriation, becomes a particeps criminis however innocent of the fraud in the beginning."

In re Estate of McLellan, 8 Cal.2d 49, at pages 54, 55, 63 P.2d 1120, at page 1123, where the trustees commingled trust funds with their own, the court said, "Conceding that this transaction may have been actuated by the utmost good faith and that the trustees considered that they were complying with the terms of the will, it amounted to an unauthorized use of the trust fund. * * * The court properly charged the trustees with interest at the statutory rate * * *."

Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861, is not in point as there interest was held improper merely because no claim for it had been presented to the estate. Nor is Title Ins. and Trust Co. v. Ingersoll, supra, 158 Cal. 474, at page 489, 111 P. at page 366, applicable for the reason. "When the trustee, notwithstanding his failure to keep the trust funds separate from his own, is able to show that the mingled fund was well managed and wisely invested and what the profits are, or that the profits actually made do not exceed a certain amount, all the reasons for imposing a charge of interest exceeding such profits are wanting, and justice requires that the charge be limited to the equivalent of the gains actually made. It is conceded in this case that the defendant was economical, prudent, energetic, and thrifty in the management and investment of these funds and his own in common."

8. Items Purchased on Open Account.

[17–19] Defendants contend that items purchased on open accounts and not paid for at time of purchase, but paid for later with stolen moneys, could not be impressed with a trust. It was defendant's practice to purchase rugs, furniture, jewelry and clothing from certain firms on open accounts running over a considerable period. Payments thereon were made by moneys which he admitted came from plaintiffs, plus moneys of his own. For example, his purchases at Sloane's ran to over $20,000, of which over $15,000 admittedly came from plaintiffs. The balance he paid out of his own money. There the payments from plaintiffs' money could be traced as equaling the purchase price of certain articles, thereby indicating that although the articles were ordered at a different time than the moneys were paid, the moneys were actually for their purchase price. The court held that such articles belonged to plaintiffs. Where the moneys could be traced as partially paying for specified articles the court impressed a lien for them on the articles. In addition, the court found that certain articles claimed by plaintiffs but to which plaintiffs' money could not be clearly traced were the property of defendant Bernice. Defendants contend that in purchasing the articles on an open account they were purchased on defendants' personal credit and the title thereto passed immediately to defendant Bernice, and no trust can be impressed upon them. Defendants cite Lincoln v. Chamberlain, 61 Cal.App. 399, 214 P. 1013, and other resulting trust cases in support of their contention. They are not in point for the principle applicable here is that set forth in Restatement, Restitution, § 161, pp. 650, 651, 652: "Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises. * * * If one person misappropriates money of another and with it purchases property, the other can at his option either enforce an equitable lien upon the property so acquired, holding the wrongdoer personally liable for the balance, if any, or enforce a constructive trust of the property. * * * d. Enforcement against transferee. If property which is subject to an equitable lien is tranferred to a third person who has notice of the equitable lien *or who does not give value,* the equitable lien can be enforced against the property in the hands of the third person." (Emphasis added; see Dabney v. Philleo, supra, 38 Cal.2d 60, 237 P.2d 648. Payments were made on the articles selected by the court with defendants' own funds, but most of the payments were made with stolen money. For example, over $11,166 of embezzled funds found their way into one of the accounts in the years 1946 and 1947. It was defendants' duty to segregate, if they could, their funds that went into this account. They did not even try. "Appellant claims that the deposits of the embezzler from which the premiums on the insurance policies were paid were in large part made up of the monthly salaries paid by the banking corporation for services rendered while Edward N. Brown was engaged in his embezzlement activities. But at the very moment any month's salary was about to be paid, he, as an officer or trust employee of the Bank, should have advised the Bank of his embezzlements. Failing in such duty, the salary moneys paid him were infected by a trust of the whole thereof to the paying bank. The transaction might otherwise be described as the receipt by Edward N. Brown of moneys not due him, obtained under false pretenses of his performance of his trust obligations to his employer." Brown v. New York Life Ins. Co., supra, 9 Cir., 152 F.2d 246, 250. " 'It is quite true that the burden of proof was upon plaintiff to establish the trust but, when proof of the fiduciary relationship of the parties was made, the betrayal of the trust, the probable amount of the embezzlements shown, a *prima facie* case was presented, and the burden was then on Meyers to show, if he could, that his money, and not that of the plaintiff, paid for the properties in whole or in part. * * *' " Tretheway v. Tretheway, 16 Cal.2d 133, 140, 104 P.2d 1033, 1037.

Brodie v. Barnes, 56 Cal.App.2d 315, 132 P.2d 595, is distinguishable from our case for the reason that there the defendants met the burden of showing what portion of the insurance policy had been paid for with legitimate funds.

It would be a strange rule of law that would hold, as contended for by defendants, that a person embezzling funds to purchase certain properties, could first purchase them on credit, give them to his wife, and then pay for them with the stolen funds and thereby preclude the wronged party from having a trust or lien impressed on the articles purchased with the stolen money.

9. Electric Kitchen Appliance Company.

[20, 21] In his cross-complaint against Whitehead defendant alleged that as part of his employment and in consideration of his services in promotion of the Whitehead

heater, Whitehead had promised defendant a one-fourth interest in Electric Kitchen Appliance Company. The court found against such claim. Defendant contends this finding is not supported. Whitehead denied that there was any such agreement. Defendant makes a rather involved argument based on certain checks admittedly signed by Whitehead having to do with payments of income tax which defendant contends were for tax evasion purposes, and his contention that the court should have disbelieved Whitehead's testimony and believed defendant's. The credibility of the witnesses is a matter entirely in the hands of the trial court.

10. The $10,000 Loan.

[22, 23] In his cross-complaint defendant contended he loaned the corporation $10,000. The court found against him on this issue. In the corporation minutes of April 12, 1948, appears a statement that on or about February 17, 1948, the corporation had received certain loans from certain persons, including $10,000 from defendant, and that the company would repay these loans on the same pro rata basis as it would pay its general creditors. In view of the fact that defendant's misappropriations had been discovered prior to this time, it is a bit difficult to understand this loan. There is no explanation in the record. In their brief plaintiffs content themselves with saying that the amounts of defendant's embezzlements over those for which the court impressed trusts on the real and personal property, more than offset the amount of this loan and interest. In view of the record the finding is wrong. The trial court should have found that such loan was made. Inasmuch as plaintiffs asked for an accounting of all sums misappropriated and the evidence shows clearly that the amounts misappropriated over and above the sums which were traced into the real and personal property exceed $20,000, there need be no change in the judgment. Defendant admitted that $16,607.50 of plaintiffs' money went to I. Magnin alone, and no articles purchased from that store are included in the judgment. The $10,000 and interest thereon can be offset pro tanto against the additional embezzled moneys. As we have the power to make findings, Code Civ.Proc. § 956a, it will not be necessary to remand the case. The findings are amended to conform with our views herein expressed.

The amended judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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112 Cal.App.2d 1

BONDE et ux. v. BISHOP et al.

Civ. 15163.

District Court of Appeal, First District,
Division 1, California.
June 25, 1952.

Action by G. T. Bonde and another against Wilbur A. Bishop and others for declaration that defendants' tree overhanging plaintiffs' premises was a nuisance. The Superior Court, County of San Mateo, W. A. Deans, J., rendered judgment ordering defendants to abate the nuisance and awarding damages and defendants appealed. The District Court of Appeal, Bray, J., held that the evidence sustained the finding that the branches constituted a nuisance, but that plaintiffs' failure to plead special damages made an award of such damages improper.

Reversed as to damages; affirmed in all other respects.

1. Declaratory Judgment 🔑345

In action for declaration that defendants' tree overhanging plaintiffs' property was a nuisance, evidence sustained finding of a nuisance, in that leaves and branches continually fell on plaintiffs' property and clogged gutter pipes and cluttered the yard, and that tree was of no value or use to plaintiffs.

2. Nuisance 🔑50(1)

In absence of statute, attorney's fees are not a proper element of damages in actions for injuries suffered as a result of nuisance.

3. Judgment ⚷252(1)

In action for declaratory relief and to declare tree overhanging plaintiffs' property a nuisance, court, on proper evidence, could have given general damages in absence of an allegation therefor and in absence of a special demurrer, but damages for cleaning plaintiffs' yard and gutter pipes were special and on failure to plead them, an award therefor was improper.

4. Adjoining Landowners ⚷5

To the extent that limbs or roots of a tree extend upon adjoining landowner's property the latter may remove them, but only to the boundary line.

5. Adjoining Landowners ⚷5

The owner of a tree, branches of which overhang premises of adjoining landowner, is liable for damages caused by overhanging branches without regard to extent of damage resulting therefrom, the insignificance of injury going to extent of recovery and not to the right of action, but no landowner has a cause of action from mere fact that branches overhang his premises, his right to cut off overhanging branches being a sufficient remedy.

6. Adjoining Landowners ⚷5
Nuisance ⚷33

While a landowner has absolute right to cut off overhanging branches of a neighbor's tree, relief of compelling owner of tree to remove the encroachment can be obtained only under nuisance statutes and hence a nuisance must be proved. Code Civ.Proc. § 731; Civ.Code, § 3479.

◆

Aaronson & Cohn, Michael Aaronson, Melvin E. Cohn, San Carlos, for appellants.

Marvin J. Colangelo, San Francisco, for respondent.

BRAY, Justice.

Action for declaratory relief and to declare defendants' tree which overhangs plaintiffs' premises a nuisance. Defendants appeal from a judgment ordering defendants to abate the nuisance and awarding $200 damages.

Questions Presented.

1. The law concerning encroaching trees.

2. Sufficiency of the evidence to prove (a) a nuisance and (b) damages.

2. Evidence (a) Nuisance.

[1] There is substantial evidence to support the court's finding that the branches of the tree overhanging plaintiffs' property constitutes a nuisance and an ever present danger to plaintiffs' premises. On defendants' property, approximately 20 feet from the line between the properties of the parties, there is a white oak tree 50 or 60 feet tall, the trunk of which is approximately 4 feet in circumference. Three of its main limbs extend approximately 25 feet over and about 40 feet above plaintiffs' property, one over the driveway area, one over the den area and one over the patio area. In the main part of the tree about 14 feet above the base is a large hole. About 5 o'clock on the morning of September 2, 1950, a large limb broke loose from the tree, smashed through plaintiffs' garage and smashed a section of the fence. Defendant Bishop when asked what he was going to do about the damage stated that it was not his responsibility. This damage was paid for by insurance held by plaintiffs. There is a continual dropping of smaller branches on the roof, driveway and patio. One small branch almost hit plaintiff while he was standing in the middle of his driveway. It is almost a daily chore to clean the debris from the tree. The noise of the dropping of the smaller branches on the roof constantly reminds plaintiffs of the danger. During the rainy season it is a two-hour job every Sunday to clear the gutters and the drain spouts of the debris from the tree. Plaintiffs are afraid of the overhanging limbs and because of them are afraid to leave their baby out in the patio. The debris requires plaintiffs to sweep the patio and driveway daily and rake the lawn before mowing it. Finally, plaintiff put screens on the gutters so he would not be required to clean them. When defendant Bishop was told by Mrs. Bonde that plain-

tiffs desired the tree cut back to their line, he not only refused but warned her that if plaintiffs had it cut back and damaged the tree in any way, defendants would sue plaintiffs. After the limb fell defendants had the foliage thinned out, removing two loads of brush and a considerable quantity of wood.

Defendants rely mainly on the testimony of their only witness, a tree expert, who gave it as his opinion that for safety is is not necessary to cut down the tree. (The court did not order the *tree* cut down, merely ordered the nuisance to be abated. This requires only the removal of the overhanging limbs.) The parties and the court concluded from the witness' testimony that he also meant that the overhanging limbs were safe, although he did not say so. He did testify that he had thinned the tree to lighten it for safety, and that the tree "would continue to stand until such time as the tree would leaf out and again get heavy." On cross-examination when asked if he was willing to state that the overhanging branches would not fall at any time, he answered in the negative, saying that a tree is not static and conditions do change and are constantly changing. He also testified that the hole probably extends down the tree. He assumed that there was decay there which might lessen the strength of the tree.

The above testimony is amply sufficient to demonstrate that the overhanging branches are a nuisance. Apparently this is one of those rows between neighbors in which the defendants are standing on what they erroneously believe to be their strict legal rights to the exclusion of any consideration of the fair, decent, neighborly and legal thing to do.

The fact that an overhanging branch did fall, the age of the oak tree, the evidence of some decay, indicates that there is danger of the overhanging limbs falling. But assuming as claimed by defendants that the tree is safe in that respect, there is still ample evidence that its limbs constitute a nuisance as to plaintiffs. The constant dropping of small branches on the roof and in the yard, the inability to leave their baby in the patio because of that fact, the constant work required to keep their premises clean, alone establish the nuisance.

In its findings the court found that the overhanging limbs were of no value or use to plaintiffs. Defendants contend that there is no evidence to support this. There is no evidence that the overhanging limbs were of value or use to plaintiffs. The finding is supported.

(b) Damages.

[2, 3] The only actual pecuniary expense incurred by plaintiffs (other than the repairing of the damage, for the cost of which plaintiffs were reimbursed by the insurance company) was the screening of the gutters which was done by plaintiff himself (no cost of this is given; apparently he used old screen), and the attorney's fees in connection with this suit. "In the absence of statute, attorney's fees are not a proper element of damages in actions for injuries suffered as a result of a nuisance.". 66 C.J.S., Nuisances, § 170, p. 975. There is no such statute in California.

The only allegations in the complaint concerning damages are that "said tree has caused considerable damage to the land and property of plaintiffs"; "That by reason of the aforesaid wrongful acts and because of the ever-present danger of falling branches, plaintiffs have and are suffering irreparable damage, and the portions of the tree overhanging plaintiffs' property * * * are a permanent and irreparable damage to plaintiffs." In the prayer plaintiffs ask for $300 "compensatory damages." The court found the allegations in the charging portion of the complaint true, and concluded that plaintiffs were entitled to damages in the sum of $200. Plaintiff Bonde testified that it was almost a daily chore to clean his lawn and patio because of the dropping leaves. Before he screened the gutters it was a two hour job every Sunday during the rainy season to clean the leaves out of his gutters. Defendants demurred to the complaint on the special grounds that it was unintelligible and uncertain in not stating how plaintiffs had been damaged in the sum of $300. The demurrer was overruled. No objection was offered to the plaintiff's testimony as to his being required to clean the lawn, patio and gutters. However, this testimony was, of course, admissible to prove the nuisance. The court made no finding as to what the award of $200 was based on other than its finding that the beforementioned allegations were true. There is nothing in those allegations to support an award of special damages. An allowance to plaintiffs for their time in cleaning up the debris constitutes special rather than general damage. Special damages must be specially pleaded. Shook v. Pearson, 99 Cal.App.2d 348, 221 P.2d 757. Gallagher v. California Pacific T. & T. Co., 13 Cal.App.2d 482, 57 P.2d 195, is not in point. It holds an insufficient allegation of damages is good where there is no special demurrer. Here there was such special demurrer. Nor is Warfield v. Basso, 62 Cal.App. 47, 216 P. 48, where on appeal from an order sustaining a demurrer in an action on a contract, it was held that as against a general demurrer it is not a fatal error that the pleader has mistaken the rule by which damages should be determined. While the court under the allegations of the complaint and its equity powers could have awarded plaintiffs general damages if there were evidence to support such an award, see Brickner Woolen-Mills Co. v. Henry, 73 Wis. 229, 40 N.W. 809, the court did not do so. In view of the lack of averment of special damages in the complaint, lack of evidence and of findings of special damages, the allowance of $200 was improper.

1. Encroaching Trees.

[4] The weight of authority is that *to the extent* that limbs or roots extend upon an adjoining landowner's property the latter *may remove* them, but only to the boundary line. (1 Am.Jur. p. 537.) California follows this rule. Grandona v. Lovdal, 78 Cal. 611, 21 P. 366; Stevens v. Moon, 54 Cal.App. 737, 202 P. 961.

[5] As to *damages*, according to 1 Am. Jur. p. 538, the general rule is as follows: "The owner of a tree the branches of which overhang the premises of an adjoining landowner is liable for damages caused by the overhanging branches. And this is so without regard to the extent of the damage resulting therefrom, the insignificance of the injury going to the extent of the recovery, and not to the right of action. * * * But it has been held that no landowner has a cause of action from the mere fact that the brances of an innoxious tree, belonging to an adjoining landowner, overhang his premises, his right to cut off the overhanging branches being considered a sufficient remedy." The last statement apparently is the California rule, for no damages were given in the Grandona case. Other cases in California which have given damages have more than mere encroachment; there was damage to crops, etc.

[6] While it is the absolute right of a landowner to remove those portions of trees which encroach on his land whether they cause damage or not, it is rather anomalous that to obtain court help in the matter he must first prove that the encroachment constitutes a nuisance. In other words, the landowner, merely because he does not desire a neighbor's tree to overhang his premises, can, in a sense, take the law in his own hands and cut off the encroachment, but to act in what is probably a more orderly manner and apply to the court for an injunction restraining the tree owner from allowing the tree to so encroach, he apparently has to prove that the encroachment constitutes a nuisance. At least, the authorities on this question are not as clear cut as on the other. 1 Am.Jur. p. 538 points out that a few decisions have recognized the right of a landowner to compel the owner of the encroaching tree to remove the encroachment merely because the landowner wants it removed, but that most of the decisions hold that the landowner's relief in this respect can be obtained only under the nuisance statutes and hence a nuisance must be proved. This probably is the rule in California. Most of the cases dealing with the subject have been nuisance cases. Thus in Stevens v. Moon, supra, 54 Cal.App. 737, 202 P. 961, where damage and a nuisance were shown by the evidence, the trial court followed the defendant's contention that an action would not lie for the reason that plaintiff had the right personally to cut off the offending roots. The reviewing court, however, pointed out that the evidence showed that the roots were noxious because they ruined the plaintiff's soil and under the

authority of section 3479, Civil Code, defining a nuisance, and section 731, Code of Civil Procedure, permitting a party to bring an action to abate a private nuisance, ordered the trial court to grant an injunction and damages. Grandona v. Lovdal, 70 Cal. 161, 11 P. 623, held that a complaint alleging that an encroaching tree constituted a nuisance and was causing damage, stated a cause of action in a private action for the abatement of the encroachment, saying, 70 Cal. at page 162, 11 P. at page 624: " 'Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they *are* nuisances, and the person over whose land they extend may cut them off, or have his action for damages and an abatement of the nuisance against the owner or occupant of the land on which they grow; but he may not cut down the *tree*, neither can he cut the branches thereof beyond the extent to which they overhang his soil.' Wood, Nuis. § 112, citing Com. v. Blaisdell, 107 Mass. 234; Com. v. McDonald, 16 Serg. & R. [Pa.] 390. So, it would seem, he may have abated the roots projecting into his soil, *at least if he has suffered actual damage thereby*." (Last emphasis added.) See also Fick v. Nilson, 98 Cal.App.2d 683, 220 P.2d 752. Parsons v. Luhr, 205 Cal. 193, 270 P. 443, holds that if overhanging limbs are a nuisance (such as a menace) an action for abatement will lie. The language of that case is appropriate here (although the actual damage there was greater than here): "The finding that the tree in question was a constant menace to the property of the defendants is sustained by the testimony to the effect that in the past large branches had fallen on the roof and porch of defendants' house, one of such branches tearing a hole in the roof; that the leaves filled the gutters, and littered the porch and lawn. Clearly, under the testimony appearing in the record here and the findings of the trial court, this tree was 'an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.' Sec. 3479, Civ.Code." 205 Cal. at page 197, 270 P. at page 444.

In Grandona v. Lovdal, supra, 78 Cal. 611, 21 P. 366, principally relied on by defendants, an injunction was denied on the ground that the evidence failed to show that plaintiff's land was injuriously affected by the overhanging trees. His land was used for agricultural purposes only and plaintiff complained that the overhanging limbs *might* interfere with his growing fruit trees. The court, after pointing out that plaintiff had never planted any fruit trees anywhere near the line of trees in controversy or even proposed or intended to do so, said: " * * * we are unable to see how it can be said that land is injuriously affected, or that its owner's personal enjoyment is lessened, because he cannot use it for a purpose which he has never attempted or wished to use it for." 78 Cal. at page 617, 21 P. at page 368. It further told the plaintiff that if he did not like the overhangings he could cut them off. In Rothaermel v. Amerige, 55 Cal.App. 273, 203 P. 833, where defendant built his foundation one and a half inches on plaintiff's property, defendant relinquished all claim to the one and a half inches of land. The court denied an injunction because of the impossibility of removing the encroachment and the waiver of any claim of right by defendant based on the rule of *de minimus*. Obviously the case is not in point.

The portion of the judgment awarding plaintiffs damages in the sum of $200 is reversed. In all other respects the judgment is affirmed. Plaintiffs are awarded costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

111 Cal.App.2d 957

PACIFIC ATLANTIC WINE, Inc. v. DUCCINI et al.

Civ. 15024.

District Court of Appeal, First District, Division 1, California.

June 25, 1952.

Action by the Pacific Atlantic Wine, Inc., a corporation, against Gaetano Duccini and another for an accounting of royalties and profits under a joint adventure agreement for the development and exploitation of a patented apparatus. From a judgment in the Superior Court in and for the City and County of San Francisco, I. L. Harris, J., the plaintiff appeals. The District Court of Appeal, Fred B. Wood, J., held that agreement created a joint adventure between the parties, that the provision with respect to organization of a corporation for exploitation of the apparatus had been waived and that plaintiff's revivor by payment of delinquent franchise taxes was effectual to enable it to proceed in the action.

Judgment reversed.

Appeal from order denying new trial dismissed.

1. Joint adventures 🔑1.11

A contract concerning an apparatus for the production of specified surfaces which defendant had invented and for which defendant agreed to obtain patent rights and to assign such rights in exchange for stock of the corporation to be formed and to transfer to plaintiff a percentage of such shares created the relationship of joint adventurers.

2. Joint Adventures 🔑4(1)

A joint adventurer undertaking to purchase property for joint account of himself and associates occupies a fiduciary relation to them as respects such property and may not conceal his interest or his profits from his associates in the enterprise and no one will be allowed to obtain by secret agreement any advantage over the other.

3. Joint Adventures 🔑4(1)

Partnership 🔑70

When persons execute contract having legal effect of constituting them partners or joint adventurers, they acquire rights and subject themselves to duties growing out of a fiduciary relationship which they thus create.

4. Partnership 🔑94

Silence upon the part of one partner may constitute the acceptance of an offer made to him by another partner.

5. Joint Adventures 🔑5(2)

Where contract providing for development of an apparatus and the exploitation thereof constituted the parties joint adventurers, record established that there was a waiver by the parties by their conduct of the use of a corporation as a means for the conduct of the joint adventure.

6. Joint Adventures 🔑5(2)

In action for accounting of royalties and profits under a joint adventure for the development and exploitation of an apparatus, record established that the parties were entitled to a due proportion of five per cent of the royalties under a licensing agreement of the apparatus, and that their respective shares should be measured upon the basis of 60 per cent to the defendants and 40 per cent to the plaintiffs as provided in the agreement for division between the parties of the stock of the proposed corporation.

7. Appeal and Error 🔑996

The inference to be drawn from facts is the function for the trier of facts.

8. Pleading 🔑388

A variance between allegations of a pleading and proof is not material unless it actually misled adverse party to his prejudice in maintaining his action or defense on the merits and the variance may be disregarded where the action has been as fully and fairly tried on the merits as though the variance had not existed.

9. Pleading 🔑237(6)

In action for accounting of royalties and profits under a joint adventure for the exploitation of a patented apparatus where the facts bearing upon issue of waiver of a portion of the joint adventure agreement were fully developed during the examination and cross-examination of plaintiff's witnesses, plaintiff's request for permission to amend to conform to the proof should have been granted.

10. Corporations ⚷615½

Where plaintiff corporation discontinued its business but had not been dissolved, nor gone through bankruptcy and it was suspended on the State records for failure to pay the minimum franchise tax, and such taxes were paid prior to trial in the court below, plaintiff's revivor was effectual to enable it to proceed in the action. Revenue and Taxation Code, §§ 23301–23305a.

◆

Joseph L. Alioto, San Francisco, Marvin J. Colangelo, San Carlos, Robert J. Drewes, San Francisco, for appellant.

Elios P. Anderlini, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff has appealed from a judgment of nonsuit and from an order denying its motion for a new trial. The appeal from the order must be dismissed, for the order is nonappealable.

The appeal from the judgment involves, primarily, the sufficiency of the evidence tending to prove plaintiff's case, disregarding all evidence in conflict therewith.

In April, 1935, plaintiff as first party and defendants Gaetano Duccini and Primo E. Caredio as second parties executed a written contract concerning a certain "apparatus for the production of Vitreous and/or Metallic Surfaces," a process which defendants had invented for liquefying glass and applying it to a metal surface by means of a spray gun.

Defendants agreed, with due diligence and at their own expense, to obtain patent rights to this apparatus and, with reasonable effort, to patent all improvements made thereon; to assign the patent rights, as soon as obtained, in exchange for shares of stock of a corporation to be formed and transfer to plaintiff 40% of those shares; and to devote their best efforts to perfect and demonstrate the workability of the apparatus so as to place it on a commercial basis at the earliest possible time.

Plaintiff agreed to pay defendants $1500 upon execution of this contract, receipt of which was acknowledged; to advance the cost of incorporation, not exceeding $250; to pay to defendants, one year from date, the further sum of $2000 if defendants had by then organized the corporation, assigned the patent rights, transferred 40% of the stock to plaintiff, and if defendants or the corporation had by then completed for other parties two satisfactory jobs by the use of this apparatus. If these conditions were not fulfilled within one year, payment of the $2000 would be suspended until fulfillment thereof by defendants, defendants to use their best efforts to comply with all of said conditions at the earliest possible time. Plaintiff further agreed to advance not exceeding $1000 to the corporation, to assist the corporation to undertake the manufacture of a "Vitreous receptacle."

The parties agreed to place the stock of the corporation under a voting trust for ten years, the trustees to be two persons named by plaintiff and two named by the defendants.

March 18, 1948, plaintiff filed this action against Duccini and Caredio, pleading the 1935 contract, alleging that plaintiff had performed all of its obligations thereunder except the advancement of the cost of the proposed incorporation; that defendants waived the incorporation and the parties agreed that no corporation would be formed and that their interest in the royalties would be 60 per cent for the defendants and 40 per cent for plaintiff; that plaintiff spent in excess of $5000 and assigned a number of its employees to perfect and demonstrate the workability of the patent and product, and placed it on a commercial basis; that about 1940 plaintiff secured Pacific Pumice Materials Company as a licensee under the patent and as a direct result of plaintiff's activities in securing said licensee defendants had realized in excess of $40,000; that plaintiff has demanded that defendants account to plaintiff for 40 per cent of said royalties but defendants have refused to do so; and prayed for an accounting of all royalties and profits received by defendants, a money judgment for the amount disclosed by the accounting as due plaintiff, and for general relief. The complaint was twice amended pursuant to orders sustaining demurrers thereto. As last amended, the complaint is substantially the same as first filed except it alleges that defendants "orally" waived incorporation and the parties "orally" agreed that no corporation be formed and that their interest in the royalties would be 60 per cent and 40 per cent respectively.

At the commencement of the trial there was discussion of the question whether the provision for incorporation was of such a nature that its nonperformance by plaintiff would entitle defendants to declare a forfeiture; also, plaintiff's counsel stated he would prove substantial performance of all the conditions of the contract except the formation of the corporation and that incorporation was impliedly rather than orally waived, a waiver implied from the acts of the parties.

Plaintiff then put on its case. When plaintiff rested, defendants moved for a nonsuit, upon the ground that the evidence failed to show any express oral agreement to waive incorporation and allocate to plaintiff 40 per cent of the royalties. Plaintiff's counsel admitted there was no evidence of an express oral executed agreement and requested permission to amend the complaint to conform to the proof, claiming he had proved facts showing that defendants waived the condition with respect to the $250 and that a corporation be formed. The court denied permission to amend, stating that such permission could not be granted without a finding that the condition for incorporation had been waived; that a prima facie case of a waiver would be insufficient for the granting of the requested amendment; and that a written agreement can not be modified except by another written agreement or by an oral executed agreement.

[1] Our examination of the record convinces us there was evidence of substantial performance by the plaintiff and of a waiver by the conduct of the parties, of the provision for incorporation, especially under a contract such as this which creates the relationship of joint adventurers.

Paul Aglietti, a stockholder and the secretary of the plaintiff corporation since its formation in 1934, testified that in pursuance of the April 1935 contract plaintiff employed the defendants, paying them salaries, to develop and work on the patents, furnished them materials and equipment therefor, and rent-free space in plaintiff's winery building where the defendants carried on their work of development; that plaintiff expended $2,988.80 therefor until February, 1937, when plaintiff ran out of funds and terminated its winery business, liquidating its personal property assets to pay off its creditors.

Duccini then took the equipment to his place, but Aglietti continued, on behalf of plaintiff, to work with the defendants in the development and commercial exploitation of the glass lining apparatus, for which a patent had been issued in October 1936. He did this by soliciting other persons and corporations to finance the improvement and perfection of the apparatus, and by working with Duccini in the experimental work at the shop. Before the winery closed, Aglietti contacted a representative of a paint company, who investigated but did not invest. He negotiated with the Pacific Gas and Electric Company for a period of time without success. In September, 1936, a contract was executed between one Ingold and the plaintiff and the defendants for commercial exploitation of the device, a contract which expired in one year without bearing fruit. With the knowledge and cooperation of the defendants Aglietti negotiated with a number of other people, including Brown Brothers, the Lang Company of Salt Lake City, National Welding Equipment Company, Michael Ruck, the Pfaudler Company of Rochester, William E. Schlink, and Pacific Pumice Materials Company.

January 20, 1937, defendants made written demand upon plaintiff to advance the $250 for incorporation costs, failing which defendants would deem the 1935 contract at an end and plaintiff's rights thereunder terminated. Aglietti was then negotiating with National Welding Equipment Company, which resulted March 31, 1937, in a written agreement between that company and the defendants, approved by plaintiff, giving the company the exclusive right to manufacture this apparatus and the duty at its own expense to develop and improve it to commercial perfection within six months. This agreement recited that defendants owned the patent subject to plaintiff's equitable interest therein. This agreement was canceled by the parties thereto on March 28, 1938. At the trial, defendants' counsel stated that the cancellation notice of January 20, 1937, to plaintiff was waived by defendants.

Next, Aglietti negotiated with Michael Ruck. May 16, 1938, a contract was executed by defendants as first parties, plaintiff as second party, and Ruck as third party, for the development and perfection of the apparatus by Ruck, his costs to be paid by the three parties in equal shares, no charge to be made by any of them for labor or time expended for personal services of any of them; if within six months Ruck had perfected the apparatus to a commercially successful state, the net profits of the venture would be divided upon the basis of one-third to each of the three parties; if such perfection should not be attained within six months, the contract would terminate. This contract recited that plaintiff had an equitable interest in the patent. Concurrently, defendants wrote plaintiff a letter referring to the Ruck contract and stating that if Ruck's efforts should prove unsuccessful, the relations of plaintiff and defendant relative to the patent would be and remain fixed "as per terms of contract [April, 1935] heretofore and now existing between us." Ruck's efforts proved unsuccessful and the contract with him expired.

Aglietti then negotiated with the Pfaudler Company of Rochester. Negotiations looked very favorable at the beginning. Duccini went to Rochester, with expenses paid, and demonstrated the invention. Upon his return defendants' attorney wrote plaintiff's attorney, January 24, 1939, stating the Pfaudler matter looked very favorable and suggesting that the 1935 contract between the parties be revised "to meet the present conditions." January 31, 1939, he again wrote, stating he had just received an unfavorable letter from the Pfaudler Company and indicating there was, therefore, no need to revise the 1935 contract.

In April or May, 1939, Aglietti met William E. Schlink and interested him in the invention. The negotiations extended over a period of two years. May 23, 1939, defendants gave Schlink a thirty-day option to buy the invention for $250,000. The option expired and negotiations with Schlink continued. In July, 1941, defendants executed a contract with Schlink's company, Pacific Pumice Materials Company, giving the company the exclusive right to exploit the patent and to grant subleases or sublicenses for its use, the company to pay defendants a royalty of five per cent.

Meanwhile, defendants twice in writing demanded of plaintiff payment of the $250 for the incorporation mentioned in their 1935 contract. In the first demand, May 13, 1939, no intent to rescind was expressed. In the second demand, May 25, 1939, they said that if compliance were not made by June 20, 1939, they would consider the default a breach of the 1935 contract. Aglietti said that he was in frequent contact with the defendants and their attorney; the subject of those demands was never mentioned; that nothing was ever said about termintion of the 1935 contract during the entire two-year period of negotiations with Schlink. During the thirty-day period of Schlink's option there was discussion between Aglietti and the defendants concerning modification of the 1935 contract, but modification was abandoned after the option expired.

Schlink testified that during the two-year period of his negotiations he asked Aglietti and Duccini what Aglietti's interest was and Duccini assured Schlink that the defendants had an agreement with Aglietti and that Aglietti was taken care of in the deal. Upon the occasion of the signing of the July 1941 agreement, Schlink, observing that the proposed agreement did not provide for signature by plaintiff, asked defendants' attorney what protection Schlink would have if plaintiff or Aglietti were not a signatory, and the attorney replied that Schlink did not have anything to worry about, that they had an agreement with Mr. Caredio and Mr. Duccini and under the terms of that agreement it would not be necessary for the Pacific Wine Company to sign. Schlink then turned to Duccini and Caredio, each of whom nodded his assent. He then turned to his own attorney and asked him. His attorney replied it was all right, that Schlink had nothing to worry about, that the signatures of the defendants would be sufficient. Schlink and the defendants then signed the agreement. Aglietti corroborated this testimony of Schlink, adding that he asked plaintiff's attorney and he said it was okay. It appears that all the persons mentioned were present in the office of defendant's counsel upon that occasion.

Schlink further testified: Upon execution of the 1941 agreement we began work on perfection of the invention. Later my company assigned the agreement to me and I subsequently issued several sublicenses. It was not until 1944 that we got our first substantial job, through the Navy. Meanwhile, we employed both Duccini and Aglietti, experimenting and developing new techniques and improving the equipment necessary for the spray. I paid Duccini $50 a week for four or five years, not continuously; Aglietti (at less pay) intermittently for about three years. Aglietti testified that he was also working two hours a day for Caredio at the latter's restaurant and in 1944 had to leave for the country on account of his health. Schlink stated that after he got the job for the Navy he told Duccini he hoped Aglietti's interest was taken care of and Duccini said: That is all taken care of; you don't have to worry about that at all. Schlink also testified that whenever he referred to Aglietti or his interest he was referring to the plaintiff because he knew they were the ones who furnished the money to proceed in this thing. The first substantial royalties became payable in May, 1945. Before that the jobs were small.

A few months after Aglietti left for the country, he returned to the shop and asked Duccini how the money was. Duccini said they had not got much and that they had a lot of expenses. Shortly after that he asked Schlink and was informed he had paid some royalties on small jobs, nothing yet on the big jobs. In 1946 Aglietti heard that substantial royalties had been paid the defendants. He inquired of Duccini and was told they only made $3000 or $4000 and after they paid the attorneys it would be only $1000 or $2000. He asked Caredio and received the same reply. He later made inquiry of officials of the Glass Spray Process Company, one of the sublicensees, and was told the defendants had been paid a big sum of money in royalties. He then went to his attorney and this law suit followed.

[2] It is clear that the main purpose of the April, 1935, contract between the plaintiff and the defendants was to provide for the development of the glass spray apparatus to the point of its effective use and operation and then to exploit it commercially by manufacturing and selling it or licensing others to manufacture and sell it. That constituted the parties joint adventurers. The provision for the formation of a corporation and the apportionment of its shares between them, 40 per cent to the plaintiff and 60 per cent to the defendants, was essentially a means or device which the parties as joint adventurers deemed at the time a convenient method for pooling their interests and working together. This situation is similar to that which obtained in Morris v. Whittier Amusement Co., 123 Cal.App. 121, 10 P.2d 1017, 1018. It appeared from the complaint in the action that certain persons associated themselves together for the purpose of purchasing a certain theater building, agreeing to form a corporation to take title; that the corporation was formed and did take title; and that one of the associates made a secret profit in the transaction. The plaintiffs claimed that these secret profits belonged to the joint adventurers, not to the corporation. Holding that the complaint stated a cause of action the court said "The rights and liabilities of the parties who thus associate themselves for the purpose of acquiring the property, and afterward forming the corporation, are governed by the same principles as those applying to joint adventures. [Citations.]" and that "A joint adventurer who undertakes to purchase property for the joint account of himself and his associates occupies a fiduciary

relation to them as respects such property. 33 C.J., p. 855. In accordance with the principles of good faith and confidence governing the relations of joint adventurers a coadventurer may not conceal his interest or his profits from his associates in the enterprise. None will be allowed to obtain by secret agreement any advantage over the other." 123 Cal.App. at page 123, 10 P.2d at page 1018.

[3] When persons execute a contract which has the legal effect of constituting them partners or joint adventurers, they acquire rights and subject themselves to duties growing out of the fiduciary relationship which they thus create. Silence upon the part of one partner may constitute acceptance of an offer made to him by another partner. Meherin v. Meherin, 93 Cal.App.2d 459, 465–466, 209 P.2d 36, and Wood v. Gunther, 89 Cal.App.2d 718, 729–731, 201 P.2d 874. Even in the landlord-tenant relationship, a party to the lease may by acquiescence, coupled with other circumstances, waive a covenant, condition or stipulation made in his favor. McAulay v. Jones, 110 Cal.App.2d 302, 242 P.2d 650. There have been a number of recent decisions in which the joint adventure agreement has been distinguished from other types of agreement with significantly different legal consequences. Thus, in Claudine v. West, 109 Cal.App.2d 726, 241 P.2d 580, the respective rights of the parties to a joint adventure contract were markedly in contrast to what those rights would have been under an ownerbroker relationship. A similar contrast between the joint adventure and the stock subscription agreement was observed in Polizzi v. Porcaro, 110 Cal.App.2d 395, 242 P.2d 949. In Wold v. Luigi Consentino & Sons, 109 Cal.App.2d 854, 241 P.2d 1032, it appeared that two licensed contracting firms entered into a joint adventure for the construction of a building but failed to procure a contractor's license for the joint adventure. It was held competent, despite the lack of a license, for one of the adventurers to bring suit against the other for an accounting and division of the profits, it appearing that the construction work had been completed and the joint adventure consummated.

A case in which the joint adventurers planned the formation of a corporation and the division of its shares among them but went ahead without organizing the corporation, is Brown v. Lane Cotton Mills Co., 5 Cir., 28 F.2d 911. Brown purchased certain property and then entered into a contract with W. E. Floding and Mary Floding for the operation of the property by a corporation to be organized, 600 shares of the capital stock to be divided in stated amounts between Brown, the Flodings, and one James J. Keily, after payment of a debt of Brown's to Lane Cotton Mills. The business was carried on but the corporation was not formed. Later the property was sold under a judgment in favor of Lane Cotton Mills, bringing more than enough to satisfy the judgment and to pay indebtedness incurred in the operation of the property. The surplus was ordered distributed to the individuals mentioned, in the same proportion as provided in the contract for the division among them of the shares of the proposed corporation. The reviewing court approved this disposition of the surplus, applying the principle that equity regards that as done which should have been done.

[4–6] In the light of these principles it is clear that the trier of the facts could reasonably infer from the evidence adduced upon the trial of the present action that the parties by their conduct had waived the use of a corporation as a means for the conduct of their joint adventure; that the plaintiff and the defendants are respectively entitled to a due proportion of the five per cent royalties accrued and accruing under the licensing agreement with Schlink; and that their respective shares should be measured upon the basis of 60 per cent to defendants and 40 per cent to plaintiff as provided in their joint adventure agreement for the division between them of the capital stock of the proposed corporation. We are not undertaking to say that those are the only inferences which might be drawn. That is the function of the trier of facts. But the legal possibility of the drawing of such inferences by the trier of the facts rendered a nonsuit improper and requires a reversal of the order of nonsuit.

[7–9] Yet, the defendants insist in support of the nonsuit, that there was a fatal variance between pleading and proof; the pleading of an oral waiver and the proof of waiver or of mutual acquiescence, by conduct. Such a contention is highly technical in character, especially in view of the fact that defendants could not have been taken by surprise in preparing for trial or in trying the case. Their demurrers to the complaint and the amended complaints indicate they clearly had this point in mind, and plaintiff's counsel at the very beginning of the trial announced that he expected to prove a waiver implied from the conduct of the parties. Plaintiff then put on its case and this issue and the facts bearing upon it were fully developed during the examination and cross-examination of plaintiff's witnesses. "A variance between the allegations of a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits, and a variance may be disregarded where the action has been as fully and fairly tried on the merits as though the variance had not existed. [Citations.]" Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580, 584. The trial court should have granted plaintiff's request for permission to amend to conform to the proof, see Miller v. Republic Grocery, 110 Cal.App.2d 187, 242 P.2d 396, and McKee v. Mires, 110 Cal.App.2d 517, 242 P.2d 954, where, as here, the asserted defect of pleading was remediable. See Lawless v. Calaway, 24 Cal.2d 81, 92–94, 147 P.2d 604.

[10] Defendants raise a question concerning the capacity of plaintiff to sue. Formed in 1934, the plaintiff corporation discontinued and liquidated its winery business in 1937, paying all of its creditors in full. It has not been dissolved, nor has it gone through bankruptcy. It presently has 18 or 20 stockholders. There is evidence that from 1940 to 1950 it was suspended on the records of the Secretary of State for failure to pay the minimum franchise tax. In 1950, the back taxes were paid for a revivor of the corporation. Upon the advice of its attorney and for the purpose of continuing this action, plaintiff paid those taxes prior to the trial in the court below. Defendants' contention that plaintiff's revivor was ineffectual to enable it to proceed in this action is fully answered by the decision in Hall v. Citizens Nat. Trust & Savings Bank, 53 Cal.App.2d 625, 630–632, 128 P.2d 545. No significant change was made in the applicable provisions of the statute after the corporate revivor in the Hall case (1940) and before the revivor effected in the instant case (1950). Those provisions appeared in sections 32 and 33 of the Bank and Corporation Franchise Tax Act.[1]

The judgment is reversed and the appeal from the order denying a new trial is dismissed.

PETERS, P. J., and BRAY, J., concur.

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[1] Section 32 was amended by Stats.1939, ch. 1050, p. 2934 at p. 2971, and by Stats. 1943, ch. 352, p. 1403 at p. 1463. Section 33 was last amended by Stats.1937, ch. 836, p. 2324, at p. 2348. The provisions of those sections were transferred to the Revenue and Taxation Code, as sections 23301–23305a, by Stats.1949, ch. 557, p. 961 at pp. 970–972, to take effect July 1, 1951, as provided in section 4 of that chapter, p. 1045.

112 Cal.App.2d 70

LOS ANGELES CITY SCHOOL DIST. et al. v. SIMPSON, Superintendent of Public Instruction, et al.

Civ. 18541.

District Court of Appeal, Second District, Division 3, California.

June 27, 1952.

Hearing Denied Aug. 21, 1952.

Mandamus proceeding by the Los Angeles City School District of Los Angeles County and another against Roy E. Simpson, as Superintendent of Public Instruction of the State of California, and another to compel defendants to reimburse plaintiffs for excess cost of transporting physically handicapped pupils. From an adverse judgment of the Superior Court of Los Angeles County, Philip H. Richards, J., defendants appealed. The Court of Appeal, Wood, J., held that the excess cost of transporting such students was not reimbursable under section of Education Code relating to transportation of pupils.

Reversed and peremptory writ of mandate discharged.

1. Statutes ⚿219

In determining intent of legislature with respect to statute relating to education of physically handicapped pupils, consideration should be given to interpretation placed thereon by department of education in carrying out provisions of the section. Education Code, § 7101.

2. Statutes ⚿219

A course of administrative procedure, or an administrative construction of a statute, which has been long continued, will be accorded great respect by courts and will be upheld if not clearly erroneous.

3. Schools and School Districts ⚿159½

The excess cost of transporting physically handicapped pupils is reimbursable under statute relating to education of such pupils, but such excess cost is not allowable under section of Education Code relating to reimbursement for cost of transportation of pupils. Education Code, §§ 7016, 7101.

◆

Edmund G. Brown, Atty. Gen., T. A. Westphal, Jr., Dep. Atty. Gen., and Bayard Rhone, Dep. Atty. Gen., for appellants.

Harold W. Kennedy, County Counsel, George Wakefield, Deputy County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for appellees.

PARKER WOOD, Justice.

In this mandamus proceeding, the superintendent of public instruction and the controller of California appeal from a judgment directing them to apportion and pay to petitioners, Los Angeles City School District and Los Angeles City High School District, the sum of $211,789.91 under the provisions of *article 2*, chapter 15, division 3, of the Education Code, as additional apportionment for the cost of pupil transportation.

The school districts, which are governed by a single governing board and have a single transportation system for the transportation of pupils, filed with the superintendent their report of costs for the fiscal year 1949–1950 and claimed therein state aid for the excess cost of transporting physically handicapped pupils during that year. That claim for $211,789.91 was made under the provisions of article 2, chapter 15, division 3, of the Education Code, sec. 7016, and was disallowed by the superintendent.

The question is whether the cost of transportating physically handicapped pupils, during the fiscal year 1949–1950, is reimbursable under *article 2*, chapter 15, division 3, sec. 7016, of the Education Code, which article was enacted in 1950.

If the provisions of said article 2, relating to computation and allowance of cost for the *transportation of pupils*, are to be construed to include the excess cost of transporting physically handicapped pupils (that is, cost in addition to the cost of transporting normal pupils), the petitioners are entitled to reimbursement of said sum of $211,789.91.

Appellants (superintendent and controller) contend that such cost is reimbursable only under article 11, chapter 15, division 3, sec. 7101 of said code.

Petitioners (school districts) contend that such cost is reimbursable under article 2 of said chapter. They also assert that they may, at their option, seek reimbursement for the excess cost of transporting physically handicapped pupils either under article 2 or article 11 of said chapter.

Article 11, of said chapter 15, pertains to allowances by the state for excess cost of educating "physically handicapped pupils" and "mentally retarded minors." Section 7101 of article 11, as amended in 1949, is as follows: "The Superintendent of Public Instruction shall allow to each school district an amount equal to the *excess cost to such district of educating physically handicapped minor pupils but not in excess of four hundred dollars ($400) for each unit* of average daily attendance of physically handicapped minor pupils in the district during the next preceding fiscal year." (Emphasis added.) It is to be noted that said section 7101 does not mention the cost for transporting physically handicapped pupils, but it does state that the excess cost of educating such pupils shall be allowed to the extent of $400 per unit of average daily attendance.

Excess cost is defined in section 9617 of the Education Code, which section is as follows: "The Superintendent of Public Instruction shall determine the amount of the excess cost incurred by each school district for the education of physically handicapped pupils. 'Excess cost' as employed in this section includes the total current expenditures incurred for remedial classes and for individual instruction of physically handicapped children, plus the excess amount of the current expenditures made for all other physically handicapped pupils instructed in special schools, in special classes, or in regular classes over the amount expended for current expenditures for an equal number of units of average daily attendance of pupils not classified as physically handicapped pupils. 'Remedial classes' as herein employed includes special classes providing remedial instruction for physically handicapped pupils who are excused in small numbers for a portion of a class period from regular classes, without appreciable reduction in the cost of the regular classes." It is to be noted that said section 9617 does not refer to transportation cost in referring to excess cost.

Since 1929 school districts have been required to transport physically handicapped pupils. For many years the state has made provision for reimbursing school districts to a limited extent for excess cost (in excess of cost for normal pupils) for educating physically handicapped pupils in elementary and high schools. From 1933 to 1947 the limit for such excess cost was $200 per unit of average daily attendance. In 1947 the limit was increased to $400 per unit. During the many years since the state began to furnish aid for *educating physically handicapped pupils,* until the enactment of said article 2 in 1950, it appears that the superintendent and the school districts of the state, including the two petitioner districts herein, have considered that the excess costs of transporting physically handicapped pupils were to be included in determining the excess costs of educating physically handicapped pupils. Since the enactment of said article 2, it appears that only the petitioners herein assert that such cost is reimbursable under article 2. During many years the state has apportioned to the school districts, and the districts (including petitioners) have accepted, state aid for such transportation cost on the basis that transportation cost was included in educating physically handicapped pupils.

In 1950 article 2, chapter 15, division 3, of the Education Code, was enacted, Stats. 1950, 1st Ex.Sess., ch. 74. Prior to that enactment another article 2, chapter 15, division 3, of said code was repealed. Section 7016 of said article 2, enacted in 1950, provides in part as follows:

> "He [superintendent of public instruction] shall compute for each group of two or more school districts which have been continuously from a time prior to July 1, 1949 governed by boards of identical personnel during the preceding fiscal year and have maintained a single transportation system for all of such districts which provided for the transportation of *pupils,* an amount which shall be computed as follows:
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> "He shall determine the *total current expenses of the districts for such transportation* during the preceding fiscal

> year, as approved by him, in accordance with such regulations as he shall establish. He shall, * * * then determine what rate of tax levied on each one hundred dollars ($100) of 90 percent of the assessed valuation of the district as shown by the equalized assessment roll of the district for the preceding fiscal year, hereinafter referred to in this section as computed tax rate, would, if levied, produce such amount. If the computed rate of tax is more than three cents ($0.03) he shall allow to the district (a) 50 percent of the amount which would be produced by not more than twelve cents ($0.12) of the computed tax rate less three cents ($0.03) and (b) 100 percent of the amount which would be produced by the computed tax rate in excess of twelve cents ($0.12). * * *
>
> "He shall then allow to each district in the group the same ratio of the total amount computed for the group as the governing boards of the districts in the group certify to him is the ratio the amount expended for such transportation in such district during the preceding fiscal year was of the total expenditures of all districts in the group for such transportation during the preceding fiscal year." (Emphasis added.)

It is to be noted that said section refers to "the transportation of pupils"—but it does not specify that the transportation of pupils includes the excess cost of transporting physically handicapped pupils.

Since the enactment of said section 7016, a part of article 2, the petitioners herein claim that the entire cost of transporting physically handicapped pupils is reimbursable under said section 7016 by reason of the provision for "the transportation of pupils." They now argue in effect that the provision in section 7101, in article 11, under which they have heretofore accepted state aid for excess cost of transporting physically handicapped pupils, does not include transportation as a part of "educating" physically handicapped pupils, but that said provision pertains only to excess costs for instruction. It is to be remembered that said section 7101 limits the amount of state aid for excess cost of educating physically handicapped pupils to $400. If petitioners should include all their costs for transporting physically handicapped pupils in a claim for excess costs under said section 7101 for educating such pupils, the total costs would exceed the limit of $400. It would be to their advantage, therefore, if they could obtain payment of the excess cost for transportation under the new section 7016, in article 2, enacted in 1950. In their brief they state that they have prepared their apportionment claims on a basis which will accord them the maximum benefit authorized by law. Petitioner Los Angeles City High School District claimed $107,385.57 as excess cost for transporting physically handicapped high school pupils under said section 7101 for the year 1949–1950, and it received that amount under the provisions of that section. The claim herein for $211,789.91 (made by both petitioners) was made under the provisions of said section 7016 of said article 2. It appears that said claim is for transportation of physically handicapped elementary school pupils. It thus appears that petitioners seek to apply the provisions of section 7101 of article 11 to high school costs, and to apply the provisions of section 7016 of article 2 to elementary school costs. The reason for such a distinction between costs for physically handicapped high school pupils and physically handicapped elementary school pupils is not clear. It would seem that if excess cost of transporting physically handicapped high school pupils is proper under said section 7101 as an excess cost of educating them, then it would also be proper to include under said section the excess cost of transporting physically handicapped elementary school pupils.

The act of the governing board of petitioners in seeking and obtaining state aid, under section 7101, for transporting high school pupils indicates that the board considered that the Legislature intended that such transportation should be included as a part of the cost "of educating" physically handicapped pupils. Also, the acts of petitioners over a period of many years in seeking and obtaining such aid under that section are further indications of such an interpretation by the petitioners of the legislative intent.

[1, 2] In determining the intent of the Legislature with respect to said section 7101, consideration should be given to the interpretation placed thereon by the department of education in carrying out the provisions of the section. A course of administrative procedure, or an administrative construction of a statute, which has been long continued, will be accorded great respect by the courts and will be upheld if not clearly erroneous. Los Angeles v. Superior Court, 17 Cal.2d 707, 712, 112 P.2d 10. As above stated, during many years commencing in 1933, the state has reimbursed the school districts of the state for the excess cost of transporting physically handicapped pupils as a part of the excess cost of educating such pupils. An illustration of such an interpretation by the department of education is shown by a bulletin issued by it in 1939 (Exhibit A, p. 10) which stated in part as follows: "* * * the authorization to provide *educational services* for the physically handicapped should be construed as authorizing the provision of *transportation* when necessary to the education of the physically handicapped." (Emphasis added.) Also the printed form (No. J–141) furnished by the superintendent for use of the school districts in applying for state aid in transportation of pupils contains a general instruction to the effect that the excess cost for transporting physically handicapped pupils "shall be excluded from this report, since reimbursement for this portion of such cost is secured by Form No. J–22, Report of Excess Cost Educating Exceptional Children." It is clear that the administrative department, in acting under the provisions of said section, interpreted the section to mean that excess cost of transportation was included as a part of the excess cost of educating physically handicapped pupils.

[3] Transportation is a necessary cost in the program of educating physically handicapped pupils. A part of the cost of transportation for such pupils is the same amount as the ordinary or usual cost of transportation for a normal pupil, and such ordinary or usual cost of transportation for such handicapped pupils is reimbursable under section 7016. It is shown by the transportation reports in evidence herein that the cost of transporting such handicapped pupils is far in excess of the ordinary or usual cost of transporting normal pupils. The excess cost of transporting such handicapped pupils is reimbursable under said section 7101, art. 11. It is clear that under section 7101 there is a limit of $400 for the excess cost of educating physically handicapped pupils. If the contention of petitioner is correct, that is, that all cost for transporting such handicapped pupils is reimbursable under the new statute of 1950, sec. 7016, art. 2, then the provision of section 7101 limiting the excess cost of educating physically handicapped pupils to $400 is meaningless. It is to be noted that in 1951 the Legislature added section 7012 to the Education Code, which section provides that the word "Pupils" as used in said article 2 does not include pupils for whom the superintendent determines excess costs under said section 9617. The pupils so referred to in that section are the physically handicapped. In other words, the action of the Legislature in explaining that the word "Pupils" has a meaning contrary to the contention of petitioners herein is significant in determining the intent of the Legislature in enacting said section 7016 of article 2. The excess cost of transporting physically handicapped pupils is not allowable under said article 2, chapter 15, division 3, sec. 7016 of the Education Code.

The judgment is reversed, and the peremptory writ of mandate is discharged.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.

111 Cal.App.2d 650

PEOPLE v. TALLE.

Cr. 2730.

District Court of Appeal, First District,
Division 1, California.
June 16, 1952.

Hearing Denied July 10, 1952.

An accused was convicted in the Superior Court of the State of California in and for the county of Santa Clara, Wm. F. James, J., of murder of the first degree, and he appealed. The District Court of Appeal, Peters, P. J., held that presumption of innocence had been impaired and that defendant's constitutional guarantee against self-incrimination was violated, so as to require reversal of conviction.

Judgment and order denying motion for new trial reversed.

1. Homicide 🔑268

In prosecution of an accused charged with murdering his wife, guilt of accused was for jury under evidence.

2. Criminal Law 🔑316, 561(1)

Fact that Constitution provides that in a criminal case, whether or not defendant testifies, his failure to explain or deny by his testimony any evidence or facts in case against him may be commented upon by court or counsel and may be considered by court or jury, does not deprive a defendant of his right to stand mute, nor does it relieve prosecution of burden of establishing his guilt beyond reasonable doubt and by competent and legal evidence. Const. art. 1, § 13.

3. Criminal Law 🔑317, 721(1)

Under Constitution and statute an accused has right to stand mute, clothed in presumption of innocence, until prosecution, at trial, has made out a prima facie case against accused, and until prima facie case has been made out against accused comment on silence of accused is improper. Pen.Code, §§ 688, 1323; Const. art. 1, § 13.

4. Witnesses 🔑300

Unless an accused requests privilege of testifying he is incompetent as witness and prosecution has no legal right to ask accused to testify. Pen.Code, §§ 688, 1323; Const. art. 1, § 13.

5. Witnesses 🔑293

Statutory provision that an accused shall not be deemed a competent witness except at his own request was not repealed by implication by adoption of Penal Code.

6. Witnesses 🔑300

The purpose of statutory provision that an accused shall not be deemed a competent witness except at his own request was to abrogate, in criminal prosecutions, the common law rule that made accused incompetent witness even on his own behalf.

7. Criminal Law 🔑706, 1171(1)
Witnesses 🔑300

Where district attorney before prima facie case was made stated he wished to call defendant as first witness and trial court required defendant to state whether defendant wished to testify, and on cross-examination of defendant, defendant was repeatedly asked why defendant refused to be first witness and insisted on constitutional rights, and defendant was required to answer over objections, and district attorney was permitted in closing argument to comment on such subject at length, presumption of innocence was impaired and defendant's constitutional guarantee against self-incrimination was violated so as to require reversal of conviction. Pen.Code, §§ 688, 1323; Const. art. 1, § 13.

8. Criminal Law 🔑419(12), 1169(1)

In prosecution of a defendant on charge of murdering his wife, an unsigned typewritten statement prepared by deceased four months prior to her death for use of her attorney in preparing her separate maintenance case, in which statement defendant was charged with past acts of brutality and cruelty and with having made threats against her life, was not admissible in evidence to show state of mind of deceased, or for any other purpose, and its admission in evidence was error prejudicial to defendant under circumstances.

9. Homicide 🔑163(2)

Evidence of character of deceased is admissible in evidence in murder prosecution only when character of deceased is in issue.

10. Criminal Law ⚿407(1)

Prosecution cannot build up a case against an accused by sending various officials to talk to him, or by writing him letters, and then using his silence, based upon advice of counsel, as an admission of guilt. Pen.Code, §§ 688, 1323; Const. art. 1, § 13.

11. Criminal Law ⚿719(3), 723(1), 1171(1, 3)

In murder prosecution, closing argument of district attorney that appealed to passion or prejudice, that requested guilty verdict because of sympathy for deceased, that characterized defendant as "despicable beast," that threw dignity and prestige of district attorney's office behind personal assertion in belief of guilt, that averred defendants had too many rights, etc., was erroneous and prejudicial to defendants.

12. Criminal Law ⚿1171(1)

Actions of prosecuting attorney which deprive accused of a fair trial are prejudicial and require a reversal of conviction where issue of guilt is debatable.

13. Criminal Law ⚿700

Prosecuting attorneys have duty to see to it that those accused of crime are afforded a fair trial.

14. Criminal Law ⚿1186(1)

Conviction should not stand if secured by means not sanctioned by law.

◆

James F. Boccardo, San Jose, George T. Davis, San Francisco, Edwin H. Williams, San Jose, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Dep. Atty. Gen., Winslow Christian, Dep. Atty. Gen., N. J. Menard, Dist. Atty., Louis P. Bergna, Dep. Dist. Atty., San Jose, for respondent.

PETERS, Presiding Justice.

Thomas P. Talle, by indictment, was charged with having murdered his wife, Margaret (Marge) Talle, on December 23, 1949. He pleaded not guilty. In due course he was tried before a jury and found guilty of murder of the first degree with a recommendation of life imprisonment. His motion for a new trial was denied, and judgment was entered. He appeals from the judgment and from the order denying his motion for a new trial.

Because of the comparatively long period (approximately 2½ years) that has expired since the commission of the offense and the determination of this appeal, some explanation of the delay is required. The trial started in April of 1950. Judgment was rendered June 26, 1950. The reporter's transcript (of 3440 pages) was filed December 20, 1950. Appellant's opening brief was filed April 12, 1951. The respondent's brief was filed November 30, 1951. The appellant's closing brief was filed January 11, 1952. The cause was argued before this court on January 30, 1952. At that time appellant was granted ten days to file a supplemental brief, and the respondent ten days to reply. The appellant filed his supplemental brief on February 8, 1952. Respondent did not file its supplemental brief until April 14, 1952. The appeal was submitted that same day.

We have come to the conclusion that the judgment and order appealed from must be reversed. This conclusion is predicated upon the fact that the record demonstrates, for reasons hereafter set forth, that the defendant did not receive a fair trial.

[1] Appellant urges that the evidence is insufficient to sustain the verdict of first degree murder. This contention is without merit. The evidence, although circumstantial and conflicting, is sufficient to sustain the implied finding of the jury that appellant murdered his wife, and that such act was premeditated and intentional.

The following recital of the basic facts is by no means complete, but it is illustrative of the general tenor of the testimony.

In 1935 appellant married a Mary Van Dyke, and in 1936 a daughter was born of this union. In the spring of 1944 appellant, then still married to Mary, met Marge, the deceased, who was then employed in a hotel in Denver as cashier, and the two fell in love. Marge, at that time, was married. Appellant told Mary of his love for Marge, and the two were divorced. Marge secured a divorce from her husband. During the interlocutory period provided by Colorado law, Marge and appellant lived together. After the two divorces became final, and on November 19, 1945, Marge and appellant were married.

There is but little doubt that the married life of the couple was far from happy, largely caused by appellant's excessive drinking. In March, 1947, in Colorado, Marge filed an action for divorce against appellant, but shortly thereafter the two became reconciled, and in the fall of 1947 moved to California where they settled near Los Gatos.

There is evidence that while the Talles lived in Colorado, and also after they moved to California, appellant, on several occasions, threatened the life of Marge. This testimony was given by a Mrs. Shoemaker who testified that she heard appellant make such threats from early 1947 up to October of 1948. Most of these conversations occurred in the Tick Tock Lounge in Denver, apparently operated by Mr. Shoemaker, and where Mrs. Shoemaker also worked in the evenings. Appellant visited this bar frequently from the fall of 1946 until he moved to California late in 1947. Mrs. Shoemaker met Talle at this bar and sometimes drank with him. She testified that about February of 1947 she heard appellant talk about "disposing" of Marge; that at that time appellant offered her and her husband $500 if they would give him the name of some person "that could do the job"; that appellant was drinking at the time, but was not incoherent and appeared to know what he was talking about. Incidentally, Mr. Shoemaker was not called as a witness nor was his deposition taken, he apparently being sick at the time of trial.

Mrs. Shoemaker also testified that in March or April, 1947, while she and her husband were present, Talle stated that he could use his automobile to do the "job" and make it look like an accident. At about the same time he also stated, on several occasions, that he could put diamonds on Marge and make it look like robbery. She also testified that in August of 1947, after the Talles had returned to Denver after a short visit to California, appellant told her that while in California he had "hired the best lawyer in the United States. * * * Mr. Boccardo"; that when the witness asked why he had done this, he replied: "You don't think I am spending all this money because I want to live in California. I will move her out there where she won't have any friends and won't make any friends, and when the job is done, no one will be any the wiser."

This same witness testified that in March of 1947 (at a time the divorce proceeding was pending between appellant and Marge) she was present in a room at the Brown Palace Hotel in Denver with her husband, Talle, and Mary, Talle's divorced wife, and heard Talle try to induce Mary to come back to him; that Mary replied that he was still married to Marge, and would talk with him about that subject when the divorce had been secured; that appellant then stated: "I know how to get rid of Marge without spending any more money."

Another conversation relating to the "job" was had with appellant in August of 1948, when Talle returned to Denver on a visit. The witness testified that Talle then told her that Marge was pregnant (she was not); that all the plans had been made in respect to the "job," and that the witness "would never hear from Marge and never see her again alive"; that the witness then offered to bet appellant $50 that she would see Marge again, and her husband offered to put up the $50, but Talle did not put up any money, although the witness and Talle shook hands on the bet. Mrs. Shoemaker also testified that she did not repeat these conversations to anyone. She also testified as to certain acts of physical injury inflicted on Marge by appellant, in 1947 and 1948, as related to her by both Marge and appellant.

This was very damaging testimony indeed. Appellant, who testified on his own behalf, while admitting that he knew the Shoemakers, and drinking at the Tick Tock Lounge, specifically denied each of the conversations testified to by Mrs. Shoemaker. Of even greater importance, in each instance in which Mrs. Shoemaker had testified that a third person, other than her husband, was present at one of these conversations, that person was called as a witness and unequivocally denied hearing or participating in such a conversation. Thus, Mrs. Shoemaker had testified that one George Adams was present and heard the conversation in the Tick Tock Lounge about putting diamonds on Marge to make the "job" look like a robbery, or using the car to make it look like an accident. Adams testified that in 1947 he knew the Shoemakers well, knew Talle casually, frequently visited the Tick Tock Lounge, and occasionally conversed with the Shoemakers and Talle. He testified that he had never heard Tom Talle make any remarks concerning his wife, or any statement about disposing of or killing his wife, and that, in fact, he did not even know then that Talle had a wife. The testimony of Mrs. Shoemaker was then read to him in which she had stated that, while Adams was present, Talle had made the above referred to statements, and he then testified that "There is absolutely no truth in it," and again, that if Mrs. Shoemaker so testified, such testimony was "definitely a lie."

Mrs. Shoemaker had also testified that a Jo Watkins (now Mrs. William Hott) had been present and participated in one of the conversations in which Talle is supposed to have stated that he was going to load his wife with diamonds so as to make the "job" look like robbery or an accident. Jo testified that she knew the Shoemakers and knew Talle, having occasionally gone out with him after his divorce from Mary. She remembered a conversation at the Tick Tock Lounge between the Shoemakers and Talle at which she was present. She was most positive that Talle said nothing about killing his wife; that any such testimony that he had so stated in her presence was "absolutely a lie"; that the testimony of Mrs. Shoemaker that she was present at, and participated in, any such conversation was not true, "It is the biggest lie I have ever heard."

In reference to the August, 1948, conversation relating to the $50 bet, Mrs. Shoemaker testified that Joe Pollins, a chauffeur for Talle in 1948, was present and heard the conversation. Pollins admitted being in the Tick Tock Lounge with Talle and the Shoemakers several times in 1948, but was most positive that neither then nor at any other time did he ever hear Talle talk about disposing of his wife, or about hurting her in any way.

Mrs. Shoemaker had testified that Mary Talle had been present at the Brown Palace Hotel conversation when Talle is supposed to have talked about becoming reconciled with Mary. Mary admitted being present at that meeting, and testified that the meeting was called by Talle to discuss a settlement of the financial problems arising out of her divorce decree. She most positively denied that Talle had then asked her to return to him, and stated that no such conversation had taken place.

Thus, it is fair to say, that in every particular in which Mrs. Shoemaker could have been corroborated as to these conversations, she was specifically repudiated by the other persons she had stated had participated in these conversations.

As already pointed out, the Talles moved to California in the fall of 1947, and settled near Los Gatos. The relationship between appellant and his wife steadily deteriorated. Talle was drinking a great deal at about this time. In the spring of 1948, Marge filed a separate maintenance action. Appellant, however, affected a reconciliation by promising to go to a sanitarium and taking the liquor cure. Appellant did go to this sanitarium and refrained from drinking for about three months after he returned to Los Gatos. During this period the couple got along fairly well, and took several trips together. However, by June of 1948, appellant was drinking heavily again, they separated, and Marge instituted a second separate maintenance action against him. During this period of separation, appellant visited his first wife and his daughter. In September, 1948, Marge and appellant again became reconciled, and took a trip to Honolulu. Shortly after their return, appellant started to drink heavily again. Talle admitted drinking about one-fifth of whisky a day, plus what he drank in various bars that he visited daily, and testified that his daily consumption increased all during 1949. In January of that year the Talles had started to build a new home in Montecito Heights between Saratoga and Los Gatos. During this entire year they quarreled incessantly.

There is considerable evidence of physical violence between the parties during 1947, 1948 and 1949. On several occasions Marge had to have medical care after these encounters, and at least once Talle had several stitches taken in his head after Marge had hit him with a shoe. Most of this testimony as to Marge's injuries came from doctors or friends, the fact that they were caused by appellant being a reasonable inference. On cross-examination Talle admitted causing some of the injuries, but most of the time he could not remember causing them, and in some cases stated that he did not even know that Marge had been suffering from the described injuries.

The Talles moved into their new Montecito home early in December of 1949. Marge was found dead on the patio of this new home on the night of December 23, 1949. She had been shot twice with a .44, admittedly belonging to Talle. The prosecution fixes the time of death at between 7:45 and 8:30 p. m. of that night.

Talle and Marge had had a disagreement on the night of December 22, 1949, a Thursday. On that day Marge had been shopping with two friends, Sue Rankin and Margaret Wolf. The three women had dinner in town and then drove to the Talle house. Marge asked her friends to come in and see the new house. Talle was then home. While they were looking over the house, Talle asked Marge to come into another room. Then Sue and Margaret heard Talle, in a loud and angry voice, state: "Get your God damn friends out of this house in the middle of the night." There was then a pause and then Talle yelled, "And I'll take care of you later." The two women were scared and ran towards the front of the house, where Marge came to them, and the three then went out to look at the swimming pool. The two women then started to drive away but returned when they saw lights go on in the car port. Marge was there and said "Tommy told me to get the hell out and stay out." Marge then left the premises with her two friends, and spent the night at the home of Margaret Wolf.

We now come to the day of the killing. Marge stayed with Margaret Wolf until about 4 p. m. of December 23, 1949, when she left to catch a bus. While waiting for this bus a friend drove up and offered her a ride. He testified that he picked her up between 4 and 4:30 p. m. and gave her a lift to her home, which was located a substantial distance from the Wolf house. This was the last time that any witness admitted seeing Marge alive. This was between 4:30 and 5 p. m.

What was Talle doing at about this time? He testified that all during the week preceding the killing he was drinking very heavily. He remembers a business conference in an office in Los Gatos on Tuesday, which would have been December 20th, but does not remember ever leaving that office. His activities on Wednesday, Thursday and the fatal Friday, are a complete blank to him—he has no recollection at all.

There seems to be little doubt but that Talle arrived in Los Gatos at about 4 p. m. on December 23, 1949. At that time he showed the effects of having been drinking, but how drunk he was is a matter of dispute. A Mr. Fisk, an employee of the Davenport Electric Company in Los Gatos, and a friend of Talle, testified that Talle came into the store at about 4 p. m., and between then and 7:30 p. m. visited the store some four or five times. During these visits Talle had obviously been drinking. Fisk left the store to go home at about 7:30 p. m. and met Talle near the store. Talle, according to Fisk, asked him to have a Christmas drink. The two proceeded to the Manhattan Bar, located across the street, where they had two drinks. Fisk testified that Talle asked him to drive him home, but the witness refused because he was already late. He told Talle to go home in a taxi. Fisk left Talle about 7:45 or 8 p. m.

The evidence as to the whereabouts of Talle between 7:45 or 8 p. m., and about 8:30 p. m., is not very clear. Bosworth, a defense witness, saw Fisk and Talle in the Manhattan Bar, and then the witness went across the street to Angelo's Bar. He saw Talle there about 8:30 p. m. Talle had one of his automobiles in town parked near these bars. It is about 2½ miles from these bars to the Talle house. At least up until the time Fisk left Talle, the appellant was reasonably jovial and there is no evidence that, by his conduct, he indicated any worry or concern.

The next crucial time is about 8:30 p. m., and the scene now shifts to Falashi's Inn, another bar in Los Gatos. At that time and place, Talle knew that his wife was dead and so stated to several persons. How he knew it, does not appear directly in the evidence. No one saw him or his car leave or come back to Los Gatos. No one saw him in his automobile during the critical period. No one saw him near or about his house after 4 p. m. No one saw him other than in Los Gatos during this period.

Johnson, the bartender at Falashi's, who knew Talle because he was a regular customer, testified that Talle came into the bar at about 9 p. m. The bar was crowded, he was busy, and he was not sure of the time and could have been in error as much as forty-five minutes either way from 9 p. m. Other credible evidence fixes the time at just before 8:30 p. m. Talle sat on the only vacant bar stool and asked for a drink, but Johnson refused to serve him because he thought that Talle had to drive his car and he could see that Talle was drunk. Talle asked Johnson to make a telephone call for him, but the bartender refused to do so, stating that he was too busy. About this time a Mr. and Mrs. West came into the bar. They knew Talle, saw him there, and exchanged hellos with him. West testified that then he heard Talle mumble something about "his wife being dead", but that he did not pay much attention to it because "it appeared to me like he was intoxicated." Johnson also heard this mumbling remark about Mrs. Talle being dead, and at that time, at Talle's request, served him a shot of whisky. A Mr. Todd, another customer in the bar, was sitting several seats away from Talle. He understood Talle to say "something about his wife being shot." West did not hear the word "shot" used. At any rate, Talle then asked West to look up the telephone number of one Van Hecke. West did so, called the number and handed the telephone to Talle. West did not hear Talle's conversation on the telephone.

Van Hecke, who lives in San Jose, had been a close personal and business friend of Talle for fifteen years. He testified that the telephone call came in about 8:30 p. m.; that Talle was agitated and incoherent and asked Van Hecke to come out to Falashi's; that Talle then said something about Margaret being dead. Van Hecke then drove to Falashi's, a distance of about 13½ miles, and found Talle in the bar. He took Talle out of the bar and finally located Talle's automobile. Talle was quite incoherent and had difficulty walking. Van Hecke drove to the Davenport Electric Company, which he had noticed was still open, and where he was known. He did this, he stated, because Talle had again declared that Marge was dead and wanted Van Hecke to telephone to Boccardo, Talle's attorney. Van Hecke went into the electric store, leaving Talle in the automobile. Van Hecke told Davenport more or less what Talle had told him, and then called Boccardo. This call was made at 9:23 p. m. Van Hecke told the attorney that Talle had stated that his wife was dead and asked Boccardo to come out to see what the "deal" was. Boccardo promised to do so.

After the telephone call had been made, Davenport closed up the store and he and one of his employees, Baumgardner by name, both friends of Talle, went over and got in the back seat of Talle's car. Davenport asked Talle what had happened, stating that Van Hecke had said that Marge was dead. Davenport testified that Talle then said: "Yes, Russ, she is laying out there with a .44 in her," and when Baumgardner expressed disbelief, Talle stated: "Well, a .44 makes an awful big hole." Baumgardner corroborated Davenport. Both Davenport and Baumgardner testified that Talle was very drunk when he made these statements. Van Hecke was then in front of the electric store awaiting the arrival of Boccardo.

When Boccardo arrived, Van Hecke and Boccardo got into Talle's car, conversed for a few moments, and then assisted Talle into the lawyer's car. The three then drove to the Talle home. Davenport testified that Boccardo had stated that it was best for Davenport and Baumgardner not to get mixed up in the affair, and they stayed in town.

When Boccardo drove up to the Talle house, it was about 10:30 p. m. and the house was in darkness. The lights of the car revealed the dead body of Marge, face down, on the patio. Boccardo went up to the body, felt it, and determined that Marge was dead. In the meantime, Talle and Van Hecke had gone into the house and lit some lights. Boccardo then went into the house looking for a telephone. The telephone had not yet been installed. While walking through a hallway, Van Hecke called Boccardo's attention to a gun lying on the ledge in the living room. Boccardo then told Van Hecke to go into another room and he talked privately to Talle. Nothing was touched or moved. Boccardo testified that they were in the house for but five to ten minutes. The prosecution contends that it was much longer. The three then drove to the Five Spot Bar in Los Gatos looking for a telephone. Boccardo then telephoned the sheriff's office and asked for deputy Cuffaro, and was told that Cuffaro was at home. Boccardo then telephoned to Cuffaro's home. This call was at 10:53 p. m. Boccardo told Cuffaro that a lady had been shot and that the lady's husband was with him. Cuffaro then came out to the Five Spot. Boccardo walked over to Cuffaro's car and told the deputy sheriff that he had a wealthy client in his car, and that the client's wife was dead at home. Cuffaro asked Boccardo if Talle had done it. Boccardo replied that he did not know, that Talle had been drinking a lot and was incoherent. He told Cuffaro that he had already advised Talle not to talk. The four men then drove out to the Talle house, where Boccardo and Cuffaro entered. Boccardo pointed out to the deputy a lead pellet on the hallway floor and bullet marks on the wall. Cuffaro then noticed the gun, picked it up, and observed that there were two empty cartridges in the gun. Boccardo observed that "we can assume that it is logically his." A holster for the gun was found in the bedroom. Boccardo then asked Cuffaro, who had in the meantime contacted the sheriff's office by radio, whether he wanted to take Talle into custody. Cuffaro told Boccardo for him to keep Talle until he heard from the sheriff's office. Boccardo, Talle and Van Hecke then left. Cuffaro searched the premises and found another gun, a .32 pistol, fully loaded, in a desk drawer.

In the meantime, the lawyer had taken Talle to the Boccardo residence. He immediately called Menard, the district attorney, told him that somebody had been killed or shot, and that he had the husband at his home. By agreement with Menard, Boccardo then took Talle to a hotel, having promised Menard that Talle would be available upon demand. Talle was taken into custody about 2:20 a. m. on December 24, 1949. He then or thereafter, on advice of his attorney, refused to talk to the arresting or any other officer or law enforcement official.

The pistol found in the living room was the death weapon. It was a .44 belonging to Talle, his father having given it to him some fifteen years previously. Talle testified that he had never shot it in all that time. There were no fingerprints on the gun, it being covered with a film of oil that prevented fingerprints from forming. Marge had been shot twice, once in the breast and once in the arm, which shot went into her chest. A criminologist testified that the breast shot was fired at a distance of nineteen to twenty-one inches, while the gun was but nine to eleven inches from the arm when that shot was fired. No tests were made on Talle to ascertain whether he had recently fired a gun, an expert testifying that such a test would have been ineffectual when he first saw Talle.

There were two small blood stains on Talle's trousers, one on the inside of the right leg, and the other near the crease. It was human blood type "O," the same type as that of Marge and of Talle.

This is a rough outline of the evidence. The record shows that the trial was conducted in a highly emotional atmosphere. The prosecuting attorneys attempted to appeal to the passion and prejudice of the jury by constant reference to appellant's wealth, by vilification of defense and adverse witnesses, by vilification of defense counsel, by constant and repeated reference to the fact that one defense counsel had been brought from San Francisco, charging broadly that anyone who would hire this attorney must be guilty, and by constant reference to the fact that Talle had refused to talk to the district attorney, the other law enforcement officers, or to the grand jury, charging that this demonstrated his guilt.

The tone of the trial was set by the prosecution at its inception. After the jury had been selected, the district attorney stated that during the examination of the jurors "there have been a number of statements made concerning the advantage that is gained by the prosecution in the fact of being permitted to proceed, that the defendant is not permitted to present any of his defense until after the prosecution has completed its case. In order to share that advantage, if it is thought to be such, at this time, we wish to call as our witness the defendant, Thomas P. Talle." Counsel for defendant immediately objected, whereupon the Court stated: "I am going to advise him of his rights. Mr. Talle, you don't have to take the stand, regardless of anything, and you don't even have to be sworn, that is your right. Do you want to take the stand? Defendant: I'd rather not be sworn. The Court: Do you want to take the stand? Defendant: No, sir. The Court: You do not? Defendant: No."

This was a direct, deliberate and prejudicial impairment of appellant's fundamental and constitutional rights. The only purpose of this maneuver was, at the inception of the trial, to try to impair the presumption of innocence that clothes all accused until proven guilty, and to violate appellant's constitutional guarantee against self-incrimination. This error was aggravated and compounded when the district attorney, on the cross-examination of Talle, after he had taken the stand in his own defense, was permitted to ask Talle time and time again why he had refused to take the stand as the first witness when called, and why he had then insisted on invoking his constitutional rights. Over the vigorous and proper objections of defense counsel, Talle was compelled to answer these questions and was compelled to state that he had refused to then take the stand on the advice of his attorneys. It is a novel, and certainly unsound, principle of law that a defendant must justify and explain why he has taken advantage of his constitutional rights.

This error became demonstrably prejudicial when the district attorney was permitted, in his closing argument to the jury, to comment on this subject at length. He first stated that, in his opinion, defendants in criminal cases have too many rights, that "I don't think that any defendant should have a right to hire gentlemen with money to come in and help them, even if they come from San Francisco. * * * I do think defendants have too many rights." Having thus implanted in the mind of the jury the thought that defendants have too many rights, a short time later the district attorney was permitted to argue as follows:

> "Who was the first person that we called to the witness stand, who was the first person we asked to tell his story? Why, Thomas P. Talle. You remember that, don't you?
>
> "He stood up, and can't you picture his reaction. 'Ye Gods, here for months I've been told not to talk,—' by his lawyers, by 'the best lawyers in the United States,—not to talk, and now I'm being called to the witness stand to tell my story. Ye Gods, what do I do, what do I say?' What consternation,—what a shock.
>
> "And even the gentleman from San Francisco didn't know what to do or say. Completely flabbergasted. Can't you see the reaction in his mind? 'Ye Gods, here for three days I've been telling those good people on the jury they must withhold their judgment, we don't get to tell our side until after the prosecution is finished, and now they're inviting my client to take the stand, they want him to tell his story. Ye Gods, what do I do now? What do I

> say?'" The district attorney then went on to argue that counsel for appellant in advising Talle not to then testify did so because Talle "doesn't know what to say yet. If he did he wouldn't have a chance. 'We have to wait and see what is on the other side, then after that we will decide whether he is going to take the stand or not.' And so again, Talle refuses to talk even to you."

Thus, the district attorney was permitted to argue that refusing to be sworn as the first witness, was evidence that defendant's defense was manufactured.

Respondent seeks judicial approval of these tactics with the argument that a defendant in a criminal case is a person, and if he is able to observe, recollect and narrate he is competent as a witness just as all other persons are, the only difference between him and other persons being that a defendant does not have to be sworn to take advantage of his constitutional rights while a witness must be sworn.

There can be no doubt but that it was highly improper and prejudicial for the district attorney to cross-examine appellant and to comment upon his failure to testify, before a prima facie case had been established against him by the prosecution.

Article 1, § 13, of the Constitution, so far as pertinent here, reads: "No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

This same thought with the same limitations is expressed in section 1323 of the Penal Code as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

Section 688 of the Penal Code provides: "No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

[2] It will be noted that under these constitutional and statutory provisions the right of the defendant to remain silent is absolute except that the prosecution may comment if the defendant fails "to explain or to deny by his testimony any evidence or facts *in the case against him*". Thus, by express constitutional and statutory limitation comment is allowed only when the prosecution has first made out a case that the accused can or should deny. At the inception of the case, obviously, the prosecution has developed no facts at all that the accused can deny. As was said in People v. Sawaya, 46 Cal.App.2d 466, 471, 115 P.2d 1001, 1003: "The fact that the constitutional provision provides that in a criminal case, whether or not the defendant testifies, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court or counsel and may be considered by the court or the jury, does not deprive a defendant of his right to stand mute, nor does it relieve the prosecution of the burden of establishing his guilt beyond a reasonable doubt, and by competent and legal evidence."

[3] Under a proper interpretation of these quoted provisions, an accused has the right to stand mute, clothed in the presumption of innocence, until the prosecution, at the trial, has made out a prima facie case against him. Until that has been done, it is improper to even comment on his silence.

[4] It is also perfectly clear that, unless a defendant requests the privilege of testifying, he is incompetent as a witness, and that the prosecution has no legal right to ask him to testify. In this state there is an express statute that provides that those ac-

cused of crime are competent as witnesses only at their own request and not otherwise. This statute was first passed in 1865. Stats. of 1865–6, p. 865, Chap. DCXLIV. As then passed, it was in two sections. In 1872, Section 1 was amended. Stats. of 1871–2, p. 319, Chap. CCXLIII. As then amended, and as it now reads, that section provides: "In the trial of or examination upon all indictments, complaints, and other proceedings before any Court, Magistrate, Grand Jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so accused or charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the Magistrate, Grand Jury, or other tribunal before which such testimony may be given."

Section 2 as originally enacted, and as it now reads, provides: "Nothing herein contained shall be construed as compelling any such person to testify."

[5] This statute (not mentioned by the parties to this appeal) is conclusive on the point under discussion. It has never been repealed. It cannot be contended that it was repealed by implication by the adoption of the Penal Code. This is so for two reasons. The Penal Code was approved on February 14, 1872, while the amendment here under consideration was approved on March 11, 1872. That is a relevant factor. In the second place, former Political Code section 4479, also passed in 1872 and now, since 1951, section 23.1 of the Civil Code, provides that laws inconsistent with the codes passed at the 1872 session prevail over the codes. See 23 Cal.Jur. p. 709, § 93.

[6] This type of statute is common to the federal government and to many states. The purpose of such statutes was to abrogate, in criminal cases, the original common law rule that made the accused incompetent as a witness even on his own behalf. 8 Wigmore on Evidence (3rd ed.), p. 392; People v. Tyler, 36 Cal. 522. The statute renders such accused person competent only "at his own request." Thus, there is a specific provision of law making the accused competent only at his own request and necessarily incompetent otherwise. This statutory provision, of course, since it is specific, controls the general competency sections of the Penal Code and the Code of Civil Procedure. Pen.Code, § 1321; Code Civ.Proc. §§ 1879, 1880. It should be noted that these sections were all adopted in 1872, and if there is any inconsistency between them and the statute under consideration then the statute, under section 23.1 of the Civil Code, would control. Section 1321 of the Penal Code and section 1879 of the Code of Civil Procedure have remained unamended since 1872. While section 1880 of the Code of Civil Procedure was amended in 1873 and again in 1880, these amendments did not affect the portions of the section here involved. These amendments, therefore, do not make section 1880, so far as pertinent here, later in point of time to the statute. Government Code, § 9605.

Professor Wigmore interprets statutes such as the 1865–1872 one here involved as forbidding the calling of the accused by the prosecution. He states, Vol. 8, 3rd ed., p. 393: "By the express tenor, in most jurisdictions, of the statute qualifying the accused, he is declared to be a competent witness 'at his own request, but not otherwise'. * * * Whether this form of words was chosen with a view to its present bearing can only be surmised; but its evident effect is to forbid the calling of the accused by the prosecution." See, also, 3 Wharton, Criminal Evidence (11th ed.), p. 1960.

The cases bear out these conclusions. City of Philadelphia v. Cline, 158 Pa. Super. 179, 44 A.2d 610, is directly in point. There, in a tax proceeding, criminal in nature, the defendants were called as witnesses for the state and required to give their names and addresses, further questioning being halted upon the claiming of the privilege. This was held to be reversible error. At page 613 of 44 A.2d the court stated: "In those cases where a defendant has a privilege to refuse to testify, it is error to call upon him to take the stand in the presence of the jury and require him to claim his constitutional safeguards, as the refusal to answer is an eloquent incriminatory act and the spectacle produced, if permitted, would effectually emasculate the time-honored principles extending the haven of silence to one who may by the outcome of litigation be subjected to the imposition of a fine or forfeiture."

There is language in several other cases to the same effect. In United States v. Housing Foundation of America, 3 Cir., 176 F.2d 665, it was held reversible error for one defendant to call another co-defendant to the stand. The trial court, over objection, first permitted the evidence, but later, on motion, it was stricken, and a full and complete cautionary instruction given. Nevertheless, the error was held prejudicial. Judge Goodrich, speaking for the court, 176 F.2d, stated at page 666: "Compelling the defendant Westfield to take the stand and to testify in a criminal prosecution against him is so fundamental an error that the judgment must be reversed and a new trial ordered as to Westfield. The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against him. Both come within the protection of the clause of the 5th Amendment which provides: 'No person * * * shall be compelled in any criminal case to be a witness against himself.' The plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all. We need only say in this case that the accused was required to take the stand and to testify over his objection and in violation of his right protected both by the Constitution and the common law." See, also, People v. Yeager, 194 Cal. 452, 488, 229 P. 40.

In Wolfson v. United States, 5 Cir., 101 F. 430, 436, the Circuit Court, in commenting on a statute that provided that the accused "at his own request, but not otherwise" shall be "a competent witness", stated: "It would clearly be improper for the government, while he was on trial, in the absence of a request on his part, to call him as a witness. The purpose of the law was to make defendants competent witnesses, but at the same time preserve to them the right to remain silent without prejudice." This case was quoted with approval in Brown v. United States, 9 Cir., 56 F.2d 997. See, also, State ex rel. Poach v. Sly, 63 S.D. 162, 257 N.W. 113; State v. Smith, 56 S.D. 238, 228 N.W. 240; Sprague v. State, 203 Ind. 581, 181 N.E. 507; Gillespie v. State, 5 Okl.Cr. 546, 115 P. 620, 35 L.R.A.,N.S., 1171; State v. Hollingsworth, 191 N.C. 595, 132 S.E. 667; Commonwealth v. Valeroso, 273 Pa. 213, 116 A. 828; McKnight v. United States, 6 Cir., 115 F. 972.

[7] These errors in calling the appellant as a witness, in permitting the district attorney to cross-examine appellant as to his reasons for then refusing to testify, and the highly improper argument made to the jury in commenting on this incident, constituted a flagrant, shocking and prejudicial invasion of appellant's constitutional rights. It constituted a calculated and premeditated attempt to create in the minds of the jurors the idea that by refusing to then testify defendant necessarily admitted his guilt, or wanted to manufacture his defense. The presumption of innocence to which appellant was entitled was thus effectually removed from the case.

This error *alone* would require a reversal. However, there were other serious and prejudicial errors committed. One of these involved a typewritten statement prepared by the deceased four months prior to her death which was offered by the prosecution as part of its case in chief, and which was admitted, over the objections of the defense. This got into the record through the testimony of an attorney, Elmer Jensen. Sometime in 1948 Marge consulted Jensen in reference to one of her actions for separate maintenance. In 1949 Jensen asked her to prepare "a statement giving me her story of her life with Tom Talle" to aid him in the preparation of the case. Marge prepared and delivered this statement to Jensen in August, 1949. This statement is typed, is unsigned, consists of seven single-spaced pages, of varying length, and was handed to Jensen in an envelope. According to Jensen, when this statement was delivered to him, Marge directed "In case anything happens to me turn this envelope over to the District Attorney."

This statement was admitted into evidence as part of the prosecution's case in chief. The statement purports to give a history, from Marge's standpoint, of her life with appellant. There are references to several occasions when Marge states that appellant used physical force against her. She charges that he pointed a gun at her; once put her out of their automobile in the rain; offered her $10,000 to give him a divorce. The letter refers to Marge's belief that Talle was in contact with his first wife, Mary, and charges that he asked her, Marge, for a divorce. It charges that Talle accused her of marrying him for his money. It also states that Mrs. Shoemaker had told Marge that Talle had threatened that he was going to kill her. It charges that Talle had told several people that he wanted to divorce Marge so that he could remarry his first wife, Mary. It charges that Talle was tight with his money, etc., etc.

The statement is obviously hearsay, and, in some respects, hearsay on hearsay. No contention is or can be made that it was admissible as a dying declaration, or as evidence of any of the past acts therein referred to. It was the theory of the prosecution that it was admissible for the purpose of showing the state of mind of the deceased. The trial judge admitted it for this limited purpose, and, before it was read to the jury, instructed that it was to be considered for this limited purpose, and repeated this limitation in his final instructions. Thereafter, it was read to the jury, and, in whole or in part, re-read to the jury several times. It was repeatedly referred to in the arguments to the jury. Time and time again the district attorney, in spite of the limitations placed on this evidence by the trial court, used the statement as if it were evidence of the facts recited, and used it as if it were evidence of motive, intent and premeditation.

[8] It is too clear to require extended discussion that the statement was hearsay, and not admissible to show state of mind of the deceased, or for any other purpose. It was, of course, a self-serving document prepared by the deceased purporting to recount past events, and giving her side of the story in reference to her marital difficulties, for the purpose of aiding her in the separate maintenance action then pending. The state of mind of the deceased was never an issue in the case. The defense was that appellant did not commit the crime, and that he was so drunk that he could not remember anything that happened the day that his wife was killed. At the time the evidence was introduced, there was no claim of self-defense or that deceased had quarreled with or provoked Talle. There was no claim of suicide. Respondent points out that some mention of such possible defenses was made on the *voir dire* examination of the jury, but it is obvious that what was then said did not put into issue the state of mind of the deceased four months before she was killed. There is not one word in the transcript that during the trial appellant relied upon self-defense or suicide or provocation.

Respondent also claims that "state of mind" was in issue because the defense introduced into evidence the separate maintenance complaints, and on the cross-examination of Boccardo, was permitted to give the contents of a conversation between Boccardo and Van Hecke while they were waiting in the automobile for Cuffaro. In that conversation, first referred to by the prosecution on its direct examination of Boccardo, Van Hecke is supposed to have told Boccardo that Marge Talle was quarrelsome and a very unpleasant person. This testimony did not put the state of mind of the deceased into issue so as to warrant the introduction of such a document.

A leading case on this subject is Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196. The defendant there was convicted of murdering his wife. There was admitted into evidence a statement made by the wife at a time she was ill but did not know she was dying that "Dr. Shepard has poisoned me." This statement was made on May 22, 1929, and the wife died on June 15, 1929. The statement was admitted as a dying declaration. Mr. Justice Cardozo pointed out that, for many reasons, the statement did not qualify as a dying declaration. The court then discussed the possibility of the statement being admissible on other grounds, the Circuit Court having held that it was admissible to show state of mind. Defendant had introduced declarations of the deceased that she was contemplating suicide. The Supreme Court first pointed out that the evidence was not admitted on such limited ground, but then went on to indicate that it was not admissible even on that limited ground—"the accusatory declaration must have been rejected as evidence of a state of mind, though the purpose thus to limit it had been brought to light upon the trial." 290 U.S. at page 103, 54 S.Ct. at page 25, 78 L.Ed. 196. In the course of its discussion the court stated: "It will not do to say that the jury might accept the declarations for any light that they [may] cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. * * * When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." 290 U.S. at page 104, 54 S.Ct. at page 25, 78 L.Ed. 196. The court then pointed out instances where state of mind may be in issue, and then concluded: "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

"The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury." 290 U.S. at page 105, 54 S.Ct. at page 26, 78 L.Ed. 196.

Everything said in the Shepard case is here applicable. Here was a voice from the grave charging appellant with past acts of brutality and cruelty, and charging that he had made threats against his wife's life. How could the jury possibly disentangle the charges in that letter and treat the letter only as evidence of state of mind, and forget about the substance of the charges? How could the defendant meet such a situation? He could not cross-examine the deceased. Her lips were sealed. Here was a self-serving statement prepared for a partisan purpose against which the accused was powerless to defend. It will not do to say that it was admitted for the limited purpose of showing state of mind of the deceased, and, even if erroneously admitted, could not be prejudicial. To be admissible, even when state of mind is in issue (which it was not), the statement must be made under circumstances so as to make it reasonably certain it was not the result of a partisan premeditated plan to accuse. That did not exist here.

The district attorney referred to this letter of the deceased in his opening statement. He read and re-read the letter to the jury, in whole or in part, several times during the trial. During the arguments to the jury it was read and re-read, in whole or in part, time and time again. Although the district attorney would occasionally state, or the court would state, that the letter was admitted solely on the issue of the state of mind of the deceased, time and again it was argued that the letter corroborated Mrs. Shoemaker, or was evidence of motive, premeditation or intent. If the district attorney could not limit the letter to the limited purpose fixed by the court, how was the jury to accomplish that almost impossible feat?

Nor can it properly be argued that the error in admitting this testimony was nonprejudicial because it was "merely" cumulative. It is argued that some of the damaging statements in the letter were testified to by other witnesses, including the defendant, and that the most damaging threats were testified to by Mrs. Shoemaker. It is true that Mrs. Shoemaker testified as to these threats, but it is equally true, as already pointed out, that Mrs. Shoemaker was contradicted by five witnesses. Her credibility was one of the crucial issues in the case. If the letter of Mrs. Talle was not admissible, and we have held that it was not, the fact that Mrs. Shoemaker testified to some of the matters contained therein would not render its admission non-prejudicial where Mrs. Shoemaker's credibility was involved. It would be a strange doctrine of law to hold that the introduction of such a letter was error but not prejudicial because another witness testified to the same facts, and then argue that this other witness, whose credibility had been attacked, was corroborated by the inadmissible letter. That is not the law.

[9] Somewhat the same situation exists as to ten so-called love letters written by Marge to Talle while he was in the sanitarium taking the liquor cure. These letters professed great love on the part of Marge for Talle at the time they were written, and pictured her home life while Talle was away. They were extremely damaging to the defense. These letters were also admitted on the prosecution's case in chief for the purpose of showing Marge's state of mind, and were read to the jury. It is argued that the letters were admissible to show the character of the deceased. Of course evidence of character is admissible only when the character of the deceased is in issue. People v. Hoffman, 195 Cal. 295, 232 P. 974; People v. Fitch, 28 Cal.App.2d 31, 81 P.2d 1019. The Fitch case well illustrates the extent and limitations on that rule. There the defendant had placed the character of the decedent in reference to peaceableness in issue by a plea of self-defense. That was not this case. These letters were admitted as part of the prosecution's case in chief. Self-defense or suicide were not involved. The testimony of Boccardo giving the balance of the conversation with Van Hecke first referred to on direct, as already pointed out, did not put in issue the character of the deceased. The initial evidence as to this conversation was first brought into the case by the prosecution's own witness on direct examination, and the fact that Boccardo, who was also the attorney for Talle, happened to be this witness, does not change the legal situation.

Many other contentions are made by appellant. It is charged that the prosecution was improperly permitted to impeach its own witnesses under the guise of "refreshing" recollection, see People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180; People v. Flores, 37 Cal.App.2d 282, 99 P.2d 326; People v. Newson, 37 Cal.2d 34, 230 P.2d 618; that such impeaching testimony was thereafter used by the prosecution as substantive evidence of appellant's guilt; that several instructions were erroneous; that the foreman of the jury was guilty of misconduct in that he intimidated a juror, etc., etc. In connection with using impeachment evidence as substantive evidence, the respondent admits that when the district attorney argued that Van Hecke had testified that Talle had admitted that he shot his wife and admitted his guilt, he was in error in that such admissions only appear (and then only in part) in impeaching testimony. It is not necessary to consider all of these claimed errors in this opinion, inasmuch as the errors already mentioned require a reversal.

However, there is one other claimed error that should be discussed. It is urged that in many respects the district attorney was guilty of misconduct and prejudicial error in his final argument to the jury. With this contention we agree. A reading of that argument, which covers nearly 200 pages of the reporter's transcript, demonstrates that it was highly inflammatory and improper in many respects. It cannot be urged that any of these remarks were called forth by the arguments of the defense, because such arguments were not transcribed and are not before us. People v. Hidalgo, 78 Cal.App.2d 926, 179 P.2d 102.

The argument is much too long to refer to in detail, but a few references will serve to show its tone. Time and time again the district attorney broadly implied, and occasionally stated, that he knew that Talle was guilty, and at least once stated: "God knows that Talle is guilty." He told the jury that in the discharge of his official duties he had undertaken the prosecution of Talle "to avenge the cruel death of an innocent girl at the hands of a man whom society now regards not as a man but as a beast"; that the deceased had "put up with a beast like Talle for four years," and referred to the "despicable character of the beast at the bar," and as the "criminal" that was before the court. He spent considerable time in pointing out that his associate deputy was only paid to work forty hours a week, but had voluntarily worked one hundred hours a week for five months in collecting the evidence in this case. He referred to the many extra hours put in by the sheriff's office and by various police officers and other officials and employees in working up the prosecution's case that had, so he said, to meet every conceivable defense that might, he implied, be manufactured. He several times invited the members of the jury to come to his office after the case was over to see the results of this vast amount of work, pointing out that all the jurors saw was what happened in court, but "There is a lot that you didn't see." Then he broadly implied that much evidence had been collected that tended to show appellant's guilt that he would show them when the case was over. This was palpably erroneous and prejudicial.

From the beginning of his argument to its end he constantly referred to the "great" wealth of the defendant, charged that you could not convict a man with money, stated that it was up to the jury to prove that you could convict a man with money, and implied that if a verdict less than murder were brought in that that would demonstrate that a guilty rich man could not be convicted.

A bitter attack was made on attorney Davis, because, apparently, he had been brought in from San Francisco. Time and time again the fact that Davis had been brought in from San Francisco was referred to, and it was stated that if Davis ever came back to Santa Clara County to defend a man accused of crime "there will be three hundred thousand people in our County who will know that we've got another guy just as guilty as Talle, and will know it from no other reason than because Mr. Davis is down here to defend him." Davis was referred to as a "hireling" who would do anything for money, as "just a liar," and as one lacking in "manhood."

An even more bitter attack was made against attorney Boccardo. He was charged with being a hireling for money, a concealer of evidence, as a deceiver of the jury, and as one not fit to practice law. It was charged that he advised Talle not to talk so that he could earn more money in defending the case, that he concealed evidence by telling Talle not to talk, that Boccardo "did wrong, there is no question but what he violated the law," that Talle had confessed to Boccardo that he had shot his wife and that Boccardo concealed that from the jury. At one place the district attorney stated: "Yes, Jim [Boccardo], if Talle and his money hadn't counted so much with you, you would not be in the position of disgrace that you now occupy," and again referred to Boccardo as being "a paid defender of a brutal murderer." The district attorney charged that Boccardo had "forgotten completely the ideals that stand out as glistening standards of conduct for a noble profession, and stooped to conduct no lawyer in the world would even want to admit," and that money had caused Boccardo to stoop to conduct so low. He then stated: "Why Mr. Boccardo ever imported him [Davis] from San Francisco is completely beyond my understanding, unless it should be that not one single lawyer out of two hundred lawyers in Santa Clara County would have anything to do with this case. * * * Certainly, you ought to know the things that have gone on here aren't the conduct of reputable attorneys. * * *"

The district attorney, simply because they gave testimony adverse to the prosecution, bitterly assailed every important defense witness, and some prosecution witnesses, as being "no good" and as having been "corrupted" by Talle's money. He charged that the experts produced by the defense were guilty of fraud, deception and corruption, and were mere "hirelings" brought in to deceive the jury. A virulent attack was made on the prosecution witness Van Hecke. It was charged that his testimony was a "pack of lies," and "I say that man is a despicable character, that man is an insult to American manhood." And again: "I'll tell you, it would be very hard to control yourself with a guy like that. Can't you see the despicable character of the man—just jumping out all over him." Reference has already been made to the fact that respondent concedes that the district attorney was guilty of error in time and again stating as a fact that Talle had stated to Van Hecke that he had shot his wife, thus using material as substantive evidence that appeared only in impeaching testimony. Reference has already been made to the misuse of the Jensen letter, and its use by the district attorney as direct evidence of the facts contained therein when it had been admitted for no such purpose.

The district attorney stated that, had Jensen been that kind of a man, he could have been bribed by Talle or by his attorney to destroy the damaging letter. He stated that, because of his scientific knowledge, he could tell the jury exactly what happened before, during and after the crime. He then purported to tell the jury what had happened at the Talle home on the night of December 23, 1949. He purported to recount the facts, including conversations between Talle and Boccardo, and Talle and Van Hecke. In these conversations he charged, time and time again, that Talle had confessed to Boccardo and Van Hecke. There was no evidence to sustain this fanciful theory.

[10] The basic theme of the argument was that because, on advice of counsel, Talle refused to talk when arrested, refused to talk to the sheriff and his deputies, refused to talk to the district attorney, refused to testify before the grand jury, and refused to testify as a prosecution witness, he was necessarily guilty and the jury should so find, because no innocent man would thus refuse to talk. Talle had a constitutional right to refuse to talk. Under the constitutional amendment, the prosecution, as already pointed out, may comment on the failure of the accused "to explain or to deny by his testimony any evidence or facts in the case against him", but that right is limited to comment after a prima facie case has been established at the trial. Until then the accused has a right to remain silent on the advice of counsel, and such silence cannot be used as an admission of guilt. The prosecution cannot build up a case against an accused by sending various officials to talk to him, or by writing him letters, and then use his silence, based on advice of counsel, as an admission of guilt. Those accused of crime are not required to cooperate with the prosecution. The prosecution has the duty of proving that the accused is guilty beyond a reasonable doubt, and until that is done, the accused may remain silent. It was highly improper and prejudicial to charge that his silence, under the circumstances, constituted an admission of guilt.

That many portions of this argument were improper and prejudicial is too clear to require extended discussion. Most of this argument was made over the prompt and proper objections of the defense. Most of these objections were overruled. On the few occasions that objections were sustained the district attorney, a few moments later, would continue the argument along the same lines. On only a very few occasions was the jury instructed to disregard the improper argument. On most occasions the trial court stated to the defense "you have your exception," or to the district attorney "Proceed."

[11] It hardly needs citation of authority that an argument by the prosecution that appeals to the passion or prejudice of the jury, that asks for a verdict of guilty because of sympathy for the deceased, that repeatedly characterizes the defendant as a "despicable beast," that throws the dignity and prestige of the district attorney's office behind a personal assertion in the belief of the guilt of the accused, that avers that defendants have too many rights, that vilifies, without warrant, defense counsel and defense witnesses, that engages in

fanciful inferences, not warranted by the evidence, and makes them as statements of fact not warranted by the record, that misstates the record, that uses evidence admitted for a limited purpose as substantive evidence of the facts there recited, that broadly implies the prosecution is possessed of much evidence tending to show guilt that has not been introduced, is erroneous and prejudicial. People v. Henderson, 4 Cal.2d 188, 48 P.2d 17; People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867; People v. Podwys, 6 Cal.App.2d 71, 44 P.2d 377; People v. Edgar, 34 Cal.App. 459, 167 P. 891; People v. Hidalgo, 78 Cal.App.2d 926, 179 P.2d 102; People v. Brown, 81 Cal.App. 226, 253 P. 735; People v. Hale, 82 Cal.App.2d 827, 187 P.2d 121; People v. Devine, 95 Cal. 227, 30 P. 378; People v. Braun, 14 Cal.2d 1, 92 P.2d 402; People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873; People v. Freitas, 34 Cal.App.2d 684, 94 P.2d 397; People v. Duvernay, 43 Cal.App.2d 823, 111 P.2d 659; People v. Wynn, 44 Cal.App.2d 723, 112 P.2d 979; People v. Lynch, 60 Cal.App.2d 133, 140 P.2d 418; People v. Williams, 104 Cal.App.2d 323, 231 P.2d 554.

[12] Of course, many of the cases cited above can be distinguished from the instant one on their facts, but they all stand for the fundamental principle that prosecuting attorneys will be restrained if their actions deprive the accused of a fair trial. They all stand for the proposition that such conduct, in a case where the issue of guilt is debatable, is prejudicial and requires a reversal.

[13] The argument of the district attorney, particularly his closing argument, comes from an official representative of the people. As such, it does, and it should, carry great weight. It must, therefore, be reasonably objective. It is no answer to state that defense counsel also used questionable tactics during the trial and therefore the district attorney was entitled to retaliate. Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial. The applicable rule was admirably stated in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314, quoted with approval in Viereck v. United States, 318 U.S. 236, 248, 63 S.Ct. 561, 566, 87 L.Ed. 734: "'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'"

[14] District attorneys are, of course, to be commended for investigating crime and in prosecuting, with vigor, those accused of crime. But prosecutive zeal and honesty in belief of guilt are not a substitute for the orderly, lawful and constitutional processes and guarantees. The law, in its wisdom, has seen fit to surround those accused of crime with certain rights and privileges. Among them are the privilege against self-incrimination, the presumption of innocence, the right of the accused to remain silent on advice of counsel, and the right not to be found guilty except upon a finding of a jury that the offense has been proved beyond a reasonable doubt. Prosecuting officials have no right to weaken these and other protective constitutional devices. No doubt some prosecuting officials feel restive because of the necessity of proceeding step by step in the manner provided by law in the handling of

prosecutions, and seek to substitute their fixed belief in the guilt of the accused for the proof required by law. Prosecuting those accused of crime is often a tedious and tiresome process. But this is the process required by law, and short cuts cannot be tolerated. Constitutional guarantees are not arbitrary pronouncements adopted to protect the guilty, and to make it difficult for sincere hardworking prosecutors. They are the result of hundreds of years of struggle in fighting governmental oppression. They are necessary to protect the innocent. If an accused, even a guilty accused, cannot be convicted except by a violation of these principles, then he should not and cannot be lawfully convicted. It would be a sad day for the administration of justice if this court were to condone the substitution of the personal beliefs of the district attorney that defendants have too many rights, and that the accused should be convicted because the district attorney thinks he should, for what the law guarantees—a fair jury trial. District attorneys are not the arbiters of guilt or innocence. A guilty man, even a wealthy guilty man, is as much entitled to a fair trial as an innocent one. If a conviction is secured by means not sanctioned by law, the conviction cannot and should not stand.

Talle may be guilty. That we do not know. As already pointed out, there was sufficient evidence, if believed, to sustain a conviction. But the case is entirely circumstantial. An innocent verdict would also be supported. Under such circumstances, inasmuch as the record demonstrates, for the many reasons already set forth, that Talle was not afforded a fair trial, and that his constitutional guarantees and rights were trampled upon, and disregarded, it must be held that the errors are of such a nature that Article VI, section 4½, of the Constitution cannot save the conviction.

The judgment and order appealed from are reversed, and a new trial ordered.

BRAY and FRED B. WOOD, JJ., concur.

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112 Cal.App.2d 153

DENBO v. WESTON INV. CO.

Civ. 18851.

District Court of Appeal, Second District, Division 1, California.

July 1, 1952.

Action by George S. Denbo against Western Investment Company to recover broker's commission allegedly due under terms of a written contract. The Superior Court of Los Angeles County, Walter R. Evans, J., rendered a judgment of nonsuit and plaintiff appealed. The District Court of Appeal, White, P. J., held that under commission contract which provided that plaintiff's commission was dependent upon exercise by buyer of various options and that time was of the essence, failure of buyer to exercise options precluded recovery of commissions, notwithstanding fact that defendant granted extension of time and ultimately entered into contract with buyer who was procured by plaintiff.

Affirmed.

1. Evidence ⚷448

Evidence relating to negotiations leading up to execution of a contract is admissible to explain uncertainties or ambiguities in contract.

2. Evidence ⚷441(6)

In broker's action to recover commission allegedly due under written contract, evidence relating to negotiations leading up to execution of contract was inadmissible where contract explicitly provided that for broker to receive additional commissions, buyer must exercise his options in manner and within times specified in option agreement.

3. Appeal and Error ⚷927(3)

On appeal from judgment of nonsuit, the District Court of Appeal should view the evidence most favorably to plaintiff and every legitimate inference should be drawn in plaintiff's favor, and any conflicting evidence should be disregarded.

4. Brokers ⚷39

The right of a broker to recover his commission must be measured primarily by terms of his employment, and by special agreement, broker may make his compensation depend upon a contingency or the happening of a condition precedent, and unless such contingency occurs, broker has no right of recovery.

5. Brokers ⚿84(1)

For a broker to recover upon a commission contract containing contingency upon which payment of commission is dependent, it is incumbent upon broker to show substantial performance by him of contractual terms upon which his compensation depends, and proof of a sale on terms different from those specified in commission agreement is not sufficient.

6. Brokers ⚿57(2)

Ordinarily, price at which a broker is authorized to sell is considered merely an asking price to guide broker in his negotiations and owner cannot deprive broker of his commission by conducting final negotiations and selling at lower figure to purchaser procured by broker, but owner is entitled to make a special contract whereby broker is required to procure a purchaser willing to pay particular price or meet specific conditions imposed by owner and in such case, if owner sells to purchaser procured by broker but on different terms from those stated in contract, broker is not entitled to a commission in absence of bad faith.

7. Brokers ⚿57(2)

Under commission contract which provided that broker's commission was dependent upon exercise by buyer of various options and that time was of the essence, where buyer failed to exercise options and an extention of time was granted by seller who ultimately entered into contract with buyer, broker was not entitled to recover commissions on theory that seller by its conduct waived provisions as to time for exercise of options or that time for exercising options was extended to dates of final acquisition of various parcels of property.

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Vaughan, Brandlin & Wehrle, J. J. Brandlin, Pat B. Trapp, Los Angeles, for appellant.

Guthrie, Darling & Shattuck, Milo V. Olson, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit in an action to recover a real estate broker's commission alleged to be due under the terms of a written contract. Plaintiff alleged that he had fully performed his obligations under the contract, which reads as follows:

"Mr. George S. Denbo
27111 Buckskin Lane
Rolling Hills
Via Lomita
California
Dear Mr. Denbo:

"I enclose herewith a copy of a resolution adopted by the Board of Directors of Weston Investment Company at their meeting held on the 2d day of February 1948, authorizing the payment to you of a commission in the total sum of $35,000.00 under the terms and conditions in said resolution set forth.

"Pursuant to said resolution Weston Investment Company agrees to pay to you as such commission the following:

"The sum of $5,000.00 upon the execution of the agreement between Weston Investment Company as Optionor and K. Sande Senness as Optionee;

"The sum of 6⅔% of all moneys received by the corporation upon the exercise by said K. Sande Senness of his option contained in said agreement to purchase Parcel A as therein set forth, less the sum of $5,000.00 paid upon the execution of said option agreement;

"The sum of 6⅔% of the sum received by Weston Investment Company upon the exercise by K. Sande Senness of his option to purchase Parcels B, C and D as described in said agreement until the total sum of $35,000.00 has been paid *by* you, provided, however, that all sums other than the sum of $5,000.00 paid to you upon the execution of said agreement are to be dependent upon and paid only when, as

> and if said K. Sande Senness exercises the various options in said agreement contained and the payment for each of said options as therein provided are received by Weston Investment Company.
>
> "Payment of the aforesaid percentage shall be made to you immediately upon the exercise by K. Sande Senness of the options for each of said parcels as long as said option agreement is in force and effect. If said K. Sande Senness fails, neglects, or refuses to exercise any or all of said options the total amount to be paid to you hereunder will be the sum of $5,000.00 only provided to be paid upon the execution of said option agreement. In the event said K. Sande Senness exercises less than all of the options in said agreement contained, the percentage to be paid to you will apply only as to such options as are exercised by him.
>
> "Upon the termination of said option agreement no further commissions or sums shall be payable to you hereunder."

* * * * * *

By the option agreement referred to in the commission contract, K. Sande Senness was granted four options on four severally described parcels of land held by Weston Investment Company, known as parcels A, B, C and D, the options on the respective parcels to be exercised on or before July 1, 1948, on Parcel A; December 31, 1948, on Parcel B; July 1, 1949, on Parcel C, and December 31, 1949, on Parcel D. Senness failed to exercise the option on Parcel A within the required time, and defendant extended the option period from July 1, 1948, to October 1, 1948. Senness failed to exercise the option within the extended time, nor did he exercise his options on the remaining parcels. However, early in 1949, he entered into a new and different agreement with defendant and ultimately purchased the entire property.

The issue joined by the pleadings was whether or not plaintiff had performed under the commission contract. The trial court concluded that plaintiff had not so performed, for the reason that the buyer, Senness, failed to exercise any of the options granted him by the option agreement and under the terms of the commission contract no further commissions were payable, other than the $5,000 paid to plaintiff for procuring Senness as an optionee.

Appellant contends that the issue of whether plaintiff had performed under his commission contract should have been submitted to the jury and presents the following propositions in support of his contention:

> "Viewing the evidence adduced in this case in the light of the rule that on an appeal from a judgment of nonsuit every inference of fact and intendment of law must be liberally construed in favor of plaintiff's case, establishes (1) that defendant by its conduct waived the provisions as to time for exercise of the options; or (2) that the time for exercising the options was extended to the dates of final acquisition of the various parcels.
>
> "(a) The conduct of defendant in treating Senness as the legal option owner after expiration of the date for exercising the options amounted to a waiver of the provisions as to time for exercise of the options.
>
> "The conduct of defendant and Senness evidencing that Senness continued to be the legal option owner after October 1, 1948, permits an inference that the time for exercising the options was extended after that date.
>
> "By waiving the provisions with respect to the time in which Senness could exercise the options or by extending the time for exercise of the options defendant in effect prevented performance of a condition of the contract and performance of such condition was therefore excused.
>
> "The trial court erred in refusing to admit testimony as to negotiations prior to execution of the written contract as well as testimony as to services performed by plaintiff which were covered by the contract."

[1, 2] Appellant's last point above quoted is without merit. Evidence relating to

negotiations leading up to the execution of a contract concededly is admissible to explain uncertainties or ambiguities in the contract but no ambiguity or uncertainty exists in the commission contract here under consideration. No problem of interpretation is presented. More explicit language could hardly have been used to provide that for plaintiff to receive his additional commissions the buyer must exercise his options in the manner and within the times specified in the option agreement. Nor was testimony as to plaintiff's services prior to the execution of the commission agreement relevant or material. There was here no dispute as to the existence of a consideration for the making of the commission contract and hence no necessity for proof thereof.

[3] In determining this appeal from a judgment of nonsuit, we must examine the trial court's ruling in the light of the uniform rule that the evidence should be viewed most favorably to the plaintiff and every legitimate inference drawn in his favor and any conflicting evidence disregarded. Milana v. Credit Discount Co., 27 Cal.2d 335, 342, 163 P.2d 869, 165 A.L.R., 621. As stated in Laraway v. First National Bank of La Verne, 39 Cal.App.2d 718, 726, 104 P.2d 95, 99 "every inference of fact and intendment of law must be liberally construed in favor of sustaining the case made by plaintiff, to the end that causes may be determined upon their merits." So viewing the evidence adduced by the plaintiff, we nevertheless conclude that the nonsuit was properly granted.

[4] The right of a broker to recover his commission must be measured primarily by the terms of his employment. Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 893, 894, 202 P.2d 365. The broker may, by special agreement, make his compensation depend upon a contingency or the happening of a condition precedent, and unless such contingency occurs, he has no right of recovery. Peterson v. Montgomery Holding Co., supra; Leventritt v. Cowell, 21 Cal.App. 597, 132 P. 627; McGill v. Fleming, 32 Cal.App.2d 601, 90 P.2d 341; Hirschberg v. Rose, 136 Cal.App. 653, 29 P.2d 785; Edgecomb v. Callahan, 132 Cal.App. 248, 22 P.2d 521; Hollingsworth & Co. v. Haas, 6 Cal.App.2d 519, 45 P.2d 360.

By its agreement Weston Investment Company undertook to and did pay to plaintiff $5,000 for his services in securing Mr. Senness as an "optionee" of the company's property. Further compensation to plaintiff was "dependent upon" and to be paid only "when, as and if" Senness exercised the various options. Further, upon the "termination" of the option agreement no further commissions or sums were to be payable.

[5, 6] In the special contract situation here presented, it is incumbent upon the broker to show substantial performance by him of the contractual terms upon which his compensation depends, and proof of a sale on terms different from those specified in the commission agreement is not sufficient. In Palmtag v. Danielson, 30 Cal.2d 517, 521, 183 P.2d 265, for example, it is stated that ordinarily the price at which a broker is authorized to sell is considered merely an asking price to guide the broker in his negotiations and the owner cannot deprive the broker of his commission by conducting the final negotiations himself and selling at a lower figure to the purchaser procured by the broker. However, it is further stated, an owner is entitled to make a special contract whereby the broker is required to procure a purchaser willing to pay a particular price or meet specific conditions imposed by the owner, and in such a case, if the owner sells to a purchaser procured by the broker but on different terms from those stated in the contract, the broker is not entitled to a commission in the absence of bad faith. The court in the last-cited case referred to Backman v. Guadalupe Realty Co., 78 Cal.App. 347, at page 352, 248 P. 296, at page 298 from which we quote: "Here we have an express contract, obligating the defendant upon certain terms and conditions, specifying them with certainty, and reiterating that the commission is to be paid if the broker shall secure an acceptance of the *above proposition* to exchange the property on the *above terms*. The general rule is that an agent performs his part of such a contract when he produces a pur-

chaser able, ready, and willing to buy upon the terms specified by the owner. Upon a *general* (italics added) contract of employment, certainly, the owner may make concessions to a purchaser without loss of the commission to the broker, but there is a distinction, in fact recognized by the authorities, between a general and special contract of employment in a matter of this kind. It appears that, where the broker has undertaken a *special* (italics added) task by his contract of employment, and fails to perform it, the fact of having first introduced the buyer and seller will not entitle him to recover. * * *"

[7] In the case now before us the broker undertook a special contract—to procure the exercise by Senness of four certain options on four parcels constituting the tract to be sold. None of these options were exercised. The option agreement provided that time was of the essence. Nevertheless an extension of time was granted by the seller. Thereafter the seller offered a further extension upon conditions which Senness failed to meet. The seller continued however, to encourage Senness to purchase the property, and ultimately entered into a contract with him which, we assume, was performed. Nevertheless, Senness never exercised the options, the exercise of which constituted a condition precedent to the right of plaintiff to a commission according to his express contract.

The option agreement which Senness failed to perform and the agreement under which he finally consummated a sale of the property were, it may be conceded, similar in many respects, and further, as above stated and as contended by appellant, Weston Investment Company encouraged Senness in his efforts to consummate the transaction and treated him as a person having an interest in the property; but assuming these facts, we are nevertheless of the view that plaintiff wholly failed to show performance on his part under the express terms of his special contract. Bad faith on the part of the seller does not appear from the evidence, nor is its existence suggested on this appeal. The acts of the seller in encouraging Senness and appearing on his behalf in seeking a zoning variance for part of the property, as well as other acts of similar nature, are insufficient to support an inference that the seller had waived the time provisions of the option agreement as once extended or the specific provisions of the commission agreement. To hold plaintiff's showing sufficient, under the facts here present, would be to nullify any attempt by broker and client to enter into a special contract conditioning the payment of the broker's compensation upon the happening of a specified contingency.

The judgment appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

111 Cal.App.2d 770

COMSTOCK v. CORWIN et al.

Civ. 18960.

District Court of Appeal, Second District,
Division 2, California.
June 19, 1952.

Rehearing Denied July 9, 1952.
Hearing Denied Aug. 14, 1952.

Action by Gailen Stafford Comstock against Ward E. Corwin, individually and as trustee under the last will and testament of Andrew Comstock, deceased, and others to enforce delivery of corpus of testamentary trust to plaintiff and for damages. The Superior Court, Los Angeles County, Stanley H. Barnes, J., entered judgment that plaintiff had only life estate in trust, and that he was not entitled to the corpus, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that trust instrument which directed that real property be sold when there was market and that proceeds be invested in or loaned on good security, and that the interest and proceeds were to go to plaintiff during his lifetime, and after death to the heirs of his body in equal shares, manifested intention by second use of the term, "proceeds", to refer to revenue to be derived from estate created by investment of moneys received from the realty, and did not require delivery to beneficiary of corpus after sale.

Judgment affirmed.

1. Wills ⚷564(1)

Where language of testamentary trust was that real property was to be sold when there was market and proceeds invested in or loaned on good security, and that the interest and proceeds were to go to beneficiary during his lifetime, and after death of beneficiary to heirs of his body in equal shares, if any, word "proceeds" as used the second time, referred to revenues to be derived from estate created by investment of moneys received from the realty, and did not require that upon sale of realty the entire fund be given to beneficiary absolutely.

2. Wills ⚷458

A word or phrase occurring more than once in a will is presumed always to be used in the same sense, but such rule is not applicable where context of will clearly manifests a different meaning.

3. Wills ⚷439, 440

Duty of court when interpreting language of a will is to carry out the intent of the testator as expressed by terms of writing, and not to speculate as to how it existed in the testator's mind. Probate Code, § 101.

4. Wills ⚷706

Where certain construction of will appears reasonable and proper to trial court, and it is consistent with intent of testator, appellate court will not substitute another interpretation even though a contrary construction might also be tenable.

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Gordon J. Aulik, Stockton, for appellant.

Lance D. Smith, Puente, for respondents.

MOORE, Presiding Justice.

Plaintiff Gailen Comstock has appealed from a judgment which determines (1) that he has only a life estate under the terms of a testamentary trust created by his father and (2) that he is not entitled to take from the trustee the properties constituting the corpus of such trust.

The language creating the trust is as follows: "Said real property to be sold when there is a market and the *proceeds* invested in or loaned on good securities. The interest and *proceeds* to go to Gailen Stafford Comstock during his lifetime, and after his death to the heirs of his body in equal shares. Should said Gailen Stafford Comstock die without issue, then this trust estate shall be divided equally between said decedent's other children, or in case of the death of either of them, then the children of such deceased child shall take the portion that their parents would have taken had he survived." By virtue thereof, in December, 1935, the decree of distribution in the Estate of Andrew Comstock distributed to Ward E. Corwin, trustee, the real property to become the corpus of the trust. In 1947 the land was sold and the proceeds of sale were invested in certain corporate securities which subsequently constituted the trust estate.

Thereafter, plaintiff demanded of defendant that he petition the court for an order requiring defendant to deliver to plaintiff the corpus of the trust and on May 25, 1950, he commenced this action to enforce such delivery and for damages. The court below denied all relief to plaintiff and held that by the terms of the will Gailen Comstock is entitled during his lifetime to receive only the revenues derived from the trust estate. The sole question for decision is whether the trial court erred in its construction of the trust provision.

Appellant contends that immediately upon investment of the proceeds from the sale of the realty the trust was to terminate and the corpus was to go to appellant absolutely; that only in the event he should have deceased prior to the investment of such proceeds were the heirs of his body or others to acquire any interest in the trust res. In support of that construction it is argued:

That the word "proceeds" must be given the same meaning in both sentences where used in the declaration; that this meaning in the first instance can only be "everything that is received" from the sale of the realty; that the same definition must be given to its second use; that since the will by its terms gives both appellant and the heirs of his body the same interest in the testator's estate and since it is presumed that the testator intended to dispose of his entire estate, it necessarily follows that appellant is to receive the corpus; that the word "interest" as used in the will means appellant's interest *in* the corpus and has no reference to income earned by the trust assets.

[1, 2] The testator entertained no such intentions. He intended the second use of the term "proceeds" to refer to the revenues to be derived from the estate created by the investment of the moneys received from the realty. Such term is a "word of loose and varying significance", Kidwell v. Ketler, 146 Cal. 12, 21, 79 P. 514, 517, and may have a variety of usages and meanings. For example, Funk and Wagnall's Standard Dictionary defines it in part as "product; return or yield," and in Browning v. Ashbrook's Ex'r, 175 Ky. 755, 195 S.W. 105, 108, where a testator's will gave his wife all the "proceeds" of his estate, the term was held to mean income. It is true that a word or phrase occurring more than once in a will is presumed always to be used in the same sense, In re Estate of Vogt, 154 Cal. 508, 511, 98 P. 265; but this rule is not applicable where the context clearly manifests an entirely different meaning. Ibid.

Therefore, the testator in his first use of the term "proceeds" could have meant only the money received for the realty, while in the second instance he could not have referred to anything other than the interest on, or other fruits of, the investments of the corpus of the trust estate. And from the instruction that the proceeds are to go to plaintiff during his lifetime and upon his death the corpus is to vest in the heirs of his body or the alternative ultimate beneficiaries, he sealed his purpose. Having "proceeds" of a fund to "go to Gailen * * during his lifetime" could signify nothing but the payment of the revenue of the trust to the named beneficiary. Otherwise there would be nothing left for the "heirs of his body."

To adopt appellant's interpretation would render the concluding sentence of the trust provision surplusage and of no effect, for if "proceeds" be deemed to mean the corpus of the trust, and if such corpus be immediately paid over to plaintiff, vesting legal and equitable title in him, there could be nothing but a memory to vest in the remaindermen referred to in the elder Comstock's will. Such construction would be tantamount to creating a new and different testamentary disposition from that manifested by the decedent.

[3, 4] It is the court's task in interpreting the language of a will to carry out the intent of the testator, Probate Code, sec. 101, as expressed by the terms of the writing, but not to speculate as to how it existed in the testator's mind. In re Estate of Watson, 32 Cal.App.2d 594, 598–599, 90 P.2d 349. Therefore the trial court has adopted a reasonable and proper construction of the instrument. Where such reasonableness appears to the trial court and it is consistent with the intent of the testator, the appellate court will not substitute another interpretation even where a contrary construction may also be equally tenable. In re Estate of Bourn, 25 Cal.App.2d 590, 600, 78 P.2d 193; In re Estate of Boyd, 24 Cal.App.2d 287, 290, 74 P.2d 1049.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

112 Cal.App.2d 101

STANDLEY v. FEATHER RIVER PINE MILLS, Inc., et al.

Civ. 8166.

District Court of Appeal, Third District, California.

June 27, 1952.

Rehearing Denied July 23, 1952.
Hearing Denied Aug. 21, 1952.

Action by W. R. Standley against Feather River Pine Mills, Inc., and another for personal injuries sustained, allegedly as result of failure of defendants to keep brakes on their railroad flat car in proper repair. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment for plaintiff after consent to reduction of verdict, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that when evidence beyond issues made by pleadings had been admitted without objection, defendant could not speculate upon favorable verdict and then claim surprise, but right to new trial on ground of surprise was waived when surprise was not made known to court, and no motion was made for mistrial or continuance of the cause.

Judgment affirmed.

1. Appeal and Error ⚿197(1), 204(1)

Objections to evidence may not be made for first time on appeal, and such rule applies to an objection that evidence is not within the issues presented by the pleadings.

2. Appeal and Error ⚿197(5)

Where plaintiff who had suffered injury when he jumped from runaway flat car alleged that defendant had negligently failed to keep brakes on cars in good repair with result that they were insufficient to stop car which was being moved down grade, and testimony concerning overloading of flat cars had been permitted to come into trial without objection on part of defendant, defendants could not thereafter urge that they had suffered surprise by injection into case of evidence on issue of negligence on theory of overloading.

3. New Trial ⚿97

Where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable verdict, but he must act at earliest possible moment, and right to new trial on ground of surprise is waived if, when the surprise is discovered, it is not made known to court, and no motion is made for a mistrial or continuance of a cause.

4. Appeal and Error ⚿977(3, 5)
New Trial ⚿6

The granting or denial of a motion for new trial is discretionary with the trial court, and its determination in this respect will not be disturbed unless that discretion has been abused.

5. New Trial ⚿97

Where plaintiff alleged that negligence of defendants resulting in his injuries was failure to keep brakes on flat car in proper repair with result that same could not be stopped when it was being rolled down grade, and testimony concerning overloading was permitted to come in without any objection that negligence on such theory was not pleaded, trial court did not abuse its discretion in denying new trial requested on ground of surprise.

6. Appeal and Error ⚿1064(1)

In action for personal injuries sustained by plaintiff while preparing to unload steel from flat cars owned and operated by defendants, wherein it appeared that only negligence of defendants complained of by plaintiff was failure to keep brakes on flat car in proper repair, but evidence of overloading had been permitted to come in without objection, instruction which permitted jury to return verdict for plaintiff if they found defendants to have been negligent, and which did not contain language limiting negligence to that alleged, did not constitute prejudicial error when it was a correct statement of the law and there had been no request that language be limited to negligence specifically alleged.

7. Damages ⚿132(2)

Award of $30,000, as reduced by trial court from award of $40,000, for injuries consisting of compound comminuted fracture of leg which had required two operations and which would possibly require a third, and which would result in total temporary disability for a year in the future and would necessitate physiotherapy treatment and might result in permanent stiffening of ankle and forefoot, was not excessive.

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Peters & Peters, Chico, for appellants.

Lewis & Lewis, Sacramento, and Raymond A. Leonard, Oroville, for respondent.

VAN DYKE, Justice.

Plaintiff-respondent brought this action to recover damages for personal injuries sustained by him while preparing to unload steel from flat cars owned and operated by defendants-appellants. The jury returned a verdict in favor of respondent in the sum of $40,000. Upon appellants moving for a new trial it was ordered that the same be granted unless respondent would consent to a reduction in the sum of $10,000. This condition was accepted by respondent, a new trial was denied, and judgment was entered in respondent's favor for $30,000. From this judgment appellants appeal.

The steel which respondent had been preparing to unload had been transported by appellants to an unloading area at Bidwell Bar, some 10 miles from Oroville, California. Five cars had been spotted at this siding on an incline above the unloading area. The first two cars were empty and the remaining three carried the steel. In order to move the loaded cars, as wanted, to the point where they were to be unloaded, the method followed was to release the hand brakes, allowing the car wanted to roll downgrade, meanwhile controlling the speed and stopping the car at the desired point by the use of the hand brakes. The two empty cars were first moved to a location below the unloading point and having done this plaintiff and his helper started to move the first of the loaded cars. They uncoupled the car from the remaining two, released its brakes and as the car began to roll applied pressure on the brakes to control and check its movement. They found they could neither stop the car nor control its speed because the brakes would not hold it. At this moment the remaining cars, though their brakes had not been released, began to move. They picked up speed to a point where they were moving downgrade faster than was the car on which the men were riding. Confronted by this situation, respondent told his helper to jump and immediately thereafter he also jumped from the moving car, sustaining fractures of the bones in his right leg below the knee. Respondent in drafting his complaint specially pleaded the following acts of negligence: He alleged that the negligence which caused the accident consisted in carelessly and negligently failing to keep the brakes on the cars in good repair and in safe and sound condition. He alleged that on the contrary and for a long time prior thereto those cars had been negligently and carelessly used and suffered to be used with brakes that were defective. The complaint contained no general allegations of negligence.

Appellants contend that there was injected into the case a new and independent theory of negligence not embraced in the pleadings, which were not amended, and that ordinary diligence could not have anticipated that such new and independent theory would be injected; that appellants were "surprised" to the extent that, not being able to anticipate the new theory, they were not prepared to meet and defend against it. They say they came into court to meet the issue that the cars had defective brakes, but that during the argument, and without warning, counsel for the respondent argued that the evidence disclosed negligence on the part of appellant in that they had overloaded their cars so that they ran away, thus proximately causing respondent's injuries.

Some testimony touching upon the matter of the loading had come in during the trial without objection on the part of appellants. Respondent's employer, one Borovich, testified that the weight tags obtained when the steel was weighed, after it had been taken away on trucks and delivered to him, showed that there were ten truckloads of steel and that the weight tags totaled 423,770 pounds, which made a load of about 140,000 pounds per car. Also the superintendent of operations of one of the appellants, testifying for them, gave testimony to the following effect upon cross-examination: That the weight load of the cars was 100,000 pounds, that the weight of the steel on the cars had not been ascertained by appellants, but that he estimated it to have been between 40 and 50 tons per car. This testimony was not objected to. It further appears that counsel for the respondent requested an instruction, copy of which was served upon counsel for the appellants, which instruction told the jury that they might find for respondent if they found that appellants were negligent in providing cars with defective brakes or in supplying cars which were overloaded. This instruction the court refused to give. Counsel are in disagreement as to the court's reasons, counsel for the respondent ascribing the refusal to the court's belief that by the way the appellants were mentioned in the instruction it might prove confusing to the jury, whereas counsel for the appellants asserts the court's refusal was based upon the court's construing the instruction as authorizing a recovery, either by reason of defective brakes as alleged in the pleading, or by overloading, a charge of negligence not pleaded. Counsel for the respondent argued to the jury inter alia, that the appellants had been guilty of great negligence in overloading the cars. Counsel for appellants now contends that when this statement was made he was "taken completely by surprise"; he says, "in fact, he was stunned; at no time did he ever consider any issue in the case but 'defective brakes.'" Nevertheless, he made no objection to the argument nor did he then nor thereafter ask the court to instruct the jury that the charge was outside the issues. The first time that any objection was made or relief asked was in connection with appellants' motion for a new trial.

[1–3] It is a well established rule that objections to evidence may not be made for the first time on appeal, and this rule applies to an objection that evidence is not within the issues presented by the pleadings. Dahne v. Dahne, 49 Cal.App. 501, 504, 193 P. 785; Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826. Likewise an objection of variance between allegations and proof cannot be raised for the first time on appeal. Colbert v. Colbert, 28 Cal.2d 276, 281, 169 P.2d 633. When counsel for the respondent argued upon the point of overloading he specifically referred to the testimony of Mr. Borovich and of appellants' superintendent and counsel for appellants then questioned the accuracy of the statements concerning overloading, but did not make the objection he now urges. Under these circumstances we think appellants are in no position to urge injury through surprise, but on the contrary are in the position discussed by the Supreme Court in Kauffman v. De Mutiis, 31 Cal. 2d 429, 432, 189 P.2d 271, 273, wherein that court said:

> "* * * where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable verdict. He must act at the earliest possible moment for the 'right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause.'"

Here, although appellants' counsel says, as noted, that he was surprised, yet he did not indicate to the court that such was the situation or that he considered that the argument was placing him at a disadvantage. Naturally, therefore, the cause moved on to verdict.

[4, 5] When appellants presented these matters to the court on motion for new trial their affidavits in support of their motion attacked the correctness of Borovich's testimony as to the weight of the steel that was on the three cars and this attack was made the subject of conflicting affidavits on the part of respondent in resisting the motion. The entire matter of any disadvantage which appellants may have labored under after the argument had been made as to negligence by overloading was presented to the trial court and that court denied the motion. We cannot disturb that order here except for abuse of discretion. It is well settled that the granting or denial of a motion for new trial

is discretionary with the trial court and that its determination will not be disturbed unless that discretion has been abused. Kauffman v. De Mutiis, supra, 31 Cal.2d at pages 433–434, 189 P.2d 271, and cases cited. When we consider that the testimony concerning any overloading that may have been done came in without objection, that the good faith of counsel for the respondent in urging the additional ground of negligence is well indicated by the request for an instruction upon the point; that notwithstanding surprise occurring immediately upon the making of the argument concerning overloading, no objection was made that the matter was outside the issues and no request was directed to the court for relief; and when we further consider that the trial court in passing upon the motion is, in such a case as this, always in a much more advantageous position to determine whether or not prejudice has in fact been suffered, we cannot hold that the trial court was guilty of an abuse of discretion in denying the motion for new trial.

[6] Appellants further contend that by the instructions given the trial court committed error in that certain instructions "permitted the jury to take into consideration any act which they considered negligent, and did not limit the jury to consideration of the specification of neglect, namely 'defective brakes.'" Specifically, appellants' complaint in respect of instructions is not that the instructions were not correct statements of law but that they told the jury they could bring in a verdict in respondent's favor if they found the appellants to have been negligent, whereas, in view of the special pleading of negligence, this general statement should have been qualified by the addition of the words "as alleged" or other limiting language. But no request was made that such limiting language be placed in the instructions, and since the instructions were correct statements of the law we think the jury were in no wise confused or misled.

[7] Finally, appellants contend that the verdict was excessive. The injuries were quite extensive. Respondent sustained a compound comminuted fracture of the lower third of the right tibia and fibula. His leg was in a cast at the time of the trial, over a year after the accident, and had been immobilized practically all of the intervening time. There was testimony that he had had two operations, one to prevent infection and another to accomplish bone grafting; that there was marked non-union and that a third operation to remove a piece of dead bone would be necessary; that he would suffer total temporary disability for yet another year with the necessity of physiotherapy treatment and would have a permanent stiffening of the ankle and forefoot. The trial court considered the matter of the proper amount of damages and exercised its power to reduce the award, thus indicating that it thought the award as so reduced was reasonable. Under such circumstances we cannot say on appeal that the award as it now stands is excessive.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

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111 Cal.App.2d 800

PEOPLE v. ALBIN.

Cr. 4823.

District Court of Appeal, Second District,
Division 2, California.
June 19, 1952.

Proceeding on motions by a committed person for order to annul and vacate an order under which he was committed to state hospital as a sexual psychopath, and for order directing writ of attachment commanding sheriff to attach the body of the committed person and produce him before the court at the time of the hearing on his motion. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., denied both motions and the committed person appealed. The District Court of Appeal, Moore, P. J., held that in view of fact that the committed person presented no evidence in support of his contentions with regard to the motion to annul and vacate, motion was properly denied.

Orders affirmed.

1. Constitutional Law ⚷46(3)

A petition to annul filed in November 1951 was not proper remedy by which to attack constitutionality of order under which prisoner was committed to state hospital as a sexual psychopath in December 1948. Welfare and Institutions Code, §§ 5500–5506.

2. Constitutional Law ⚷48

A statute will not be hastily applied or construed to render it obnoxious to the constitution if by any reasonable interpretation it may be deemed valid.

3. Constitutional Law ⚷48

In considering constitutionality of 1945 statute providing that state hospital superintendent "may" certify the recovery of a person committed to hospital as sexual psychopath, court would not assume that superintendent would ignore the law or would be activated by caprice. Welfare and Institutions Code, § 5502.5.

4. Statutes ⚷47

In light of every-day common events and of statutory presumption that public officer will do his prescribed duties, section of 1945 statute which provided that superintendent of state hospital "may" certify the recovery of a person committed as a sexual psychopath and "may" parole such person, was neither vague, indefinite, nor uncertain but was in all respects a valid procedural statute. Welfare and Institutions Code, § 5502.5.

5. Insane Persons ⚷86

Only remedy available against superintendent of a state hospital and Director of Mental Hygiene for failure to certify recovery of person committed to hospital as sexual psychopath is by mandamus on grounds that those officials capriciously or arbitrarily refused to form opinions and to make a certification. Welfare and Institutions Code, §§ 5500–5506.

6. Criminal Law ⚷625

Where person committed as sexual psychopath presented no evidence in support of his motion to annul and vacate order under which he was committed, denial of his motion was proper. Welfare and Institutions Code, §§ 5500–5506.

7. Motions ⚷1

A litigant's right to make motions affecting his rights in the progress of a law suit is not inalienable but may be exercised only in accordance with statutory law or rules of court.

8. Criminal Law ⚷625

Proper procedure on motion to annul and vacate order under which petitioner was committed to state hospital as sexual psychopath, was to present affidavits or depositions, and refusal of court to permit petitioner to testify and to present witnesses did not deprive him of an inalienable right. Code Civ.Proc. § 2009; Welfare and Institutions Code, §§ 5500–5506.

◆

Victor Albin in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been accused by information of the district attorney appellant was convicted of three counts of violating section 288 of the Penal Code on his plea of guilty. Thereupon proceedings were suspended and the same official filed his "Petition and Affidavit of Sexual Psychopathy." In such petition it was alleged that appellant was a sexual psychopath who is affected with mental disease and disorder and departures from normal mentality and was predisposed to the commission of sexual offenses in a degree constituting him a menace to the health and safety of others. On November 18, 1948, after a hearing upon the accusation, appellant being represented by counsel, the court adjudged him to be a sexual psychopath; ordered him to be confined in a state hospital, and upon his release to be returned to the court for further proceedings. November 8, 1951, appellant served his notice on the district attorney of his intention to move the court for an order to annul and vacate his commitment. Contemporaneous with the filing of such notice appellant filed his motion with the trial court for an order directing the issuance of a writ of attachment to the sheriff of Santa Barbara county commanding that officer to attach the body of appellant, confined in the state hospital, and produce him before the court at the time of the hearing of the motion to annul and set aside the commitment. His motion was based upon the ground that section 5502.5 of the Welfare and Institutions Code is unconstitutional.

Following the hearing at the time noticed, the court denied the motion for the writ of attachment as well as the motion for an order annuling and setting aside the order of commitment. This appeal is from both orders.

At the time of appellant's commitment in November, 1948, the substance of section 5502.5 was slightly different from the text of that section as it now appears in the code. The full text thereof will be found on the margin below.[1]

The basis of the plea of the invalidity of the order of commitment is that section 5502.5 as it read in November, 1948, was indefinite and void for uncertainty and therefore the order committing him to the state hospital is void. A careful inspection of the statute under attack and the motion discloses that appellant has proceeded before making a serious study of the law governing sexual psychopaths.

It will be observed that the chapter relating to the care of sexual psychopaths includes some 19 sections which provide for the institution of proceedings for the ascertainment of whether or not a person accused of a crime is a sexual psychopath. No section other than 5502.5 in the entire law is under attack. That section is purely procedural in all its provisions. Adjudication of its nullity would prove of no advantage to appellant for the reason that he has already been convicted as a sex psychopath and has been committed pursuant to sections 5501, 5502, 5503, 5504, 5505 and 5506. Therefore even though section 5502.5 were invalid, appellant is already confined to the state hospital by virtue of the valid, final order. However, by reason of appellant's challenge and his desire to have his motion adjudicated his contentions must be explored.

[1] Sections 5500 and 5501 have been expressly held constitutional by this court, In re Keddy, 105 Cal.App.2d 215, 217, 233 P.2d 159, and impliedly so in People v. Hector, 104 Cal.App.2d 392, 231 P.2d 916. Therefore, the area for appellant's exploitation of his thesis is reduced to narrow confines. When the order committing appellant was entered, it was thereby determined that he was a sexual psychopath. In re Stone, 87 Cal.App.2d 777, 784, 197 P.2d 847. The order became final. If the statute is unconstitutional now, it was unconstitutional then and an appeal therefrom was a legal remedy then available. Since it is final, an attack upon it can be made by no remedy other than those provided by law. A petition to annul the order of commitment is not such a remedy.

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[1] Welfare and Institutions Code. Section 5502.5 as it was enacted in 1945 and in force in November, 1948, is as follows: "Whenever a person who is committed to the Department of Institutions and confined in a State hospital as a sexual psychopath recovers from his sexual psychopathy to such an extent that in the opinion of the superintendent of the hospital he is no longer a menace to the health and safety of others, the superintendent may certify said opinion to the committing court. Unless, within 30 days after the receipt of the certification the court shall order the return of the person to await the further action of the court with reference to the criminal charge against him, the superintendent of the hospital in which he is confined may parole the person under such terms and conditions as shall be specified by the superintendent, for a period of not less than five years. If at the end of the five-year period the person has not shown any tendency to revert to his sexual psychopathy, he may be discharged as recovered. The parole shall be on the same general terms and conditions as parole of the insane. When, in the opinion of the superintendent of the hospital the sexual psychopath has not recovered from his sexual psychopathy and will not benefit by further care and treatment in the hospital, the superintendent may return him to the court for further disposition of his case."

[2] It is argued that section 5502.5 as it read when appellant was sent to the state hospital was unconstitutional because it does not impose a duty upon the superintendent of the hospital to form an opinion that appellant is no longer a menace to the health and safety of others which would enable the superintendent to certify. Neither does it require the superintendent to certify his opinion if he should form one or return the psychopath for further proceedings. He bases such contention upon the fact that the section provided that the superintendent "may" certify his opinion to the committing court. Such contention finds no favor in the authorities. It is a general rule of construction that a statute will not be hastily applied or construed to render it obnoxious to the constitution if by any reasonable interpretation of its language it may be deemed valid. People v. Kaufman, 49 Cal.App. 570, 572, 193 P. 953. It is not uncommon that permissive language authorizing official action is held to be mandatory. City of Redding v. County of Shasta, 36 Cal.App. 48, 54, 171 P. 806. In River Farms v. Gibson, 4 Cal.App.2d 731, 749, 42 P.2d 95, it was held that where the rights of a party are dependent upon the exercise of the power conferred, the word "may" is to be interpreted as a mandate. It is reasonable then to say that the word "may", used in section 5502.5 of the statute of 1945 under which appellant was committed, should be construed as "must" if it is necessary to do so in order to avoid holding the statute unconstitutional.

[3, 4] Reading the section in the light of every-day common sense and of the statutory presumptions with respect to a public officer's doing his prescribed duties, it cannot be said that the superintendent of the hospital will act arbitrarily or capriciously and withhold his opinion if requested by a court or by a patient under his care. He knows that the purpose of the confinement of the sexual psychopath is to effect his recovery and to do so in the least time possible. Neither this court nor any other will assume that one who holds so important an office as that of a superintendent of a state hospital will ignore the law or will be activated by caprice. Vaughn v. Board of Police Commissioners, 59 Cal.App.2d 771, 777, 140 P.2d 130. In view of the foregoing, section 5502.5 is neither vague, indefinite nor uncertain, but is in all respects a valid procedural statute.

The design of the legislature in the enactment of the sexual psychopath statute arose from a wise concept and a commendable vision. Its purpose is to sequester such unfortunates away from society so long as they constitute a menace to its health or safety. But along with the provision for their detention is the requirement that they be returned to court for discharge or that they be paroled by the superintendent of the hospital. But neither section 5502.5 as enacted in 1945, nor any subsequent form thereof contemplates otherwise than that the superintendent of the hospital should not be required to hasten a patient back to the committing court in disregard of the necessity for deriving a careful diagnosis and a sound recommendation to that court. Because a learned physician knows the limitations upon therapeutic efforts to heal a mind diseased it is essential, in his estimating the progress of such a patient's recovery, that he be not so restricted by regulations as to cripple his freedom of action.

That the permissive language used in the 1945 edition of section 5502.5 was properly interpreted as mandatory is evidenced by the fact that when in 1949 the Legislature resumed consideration of the section, it renumbered the section 5517 and provided that when (a) the superintendent of the hospital holds the opinion that a sex psychopath in his custody is no longer a menace to the health and safety of others, or (b) believes that by virtue of the extent of the treatment the patient has already received he will not benefit by further care and treatment and is not a menace to the health and safety of others, the superintendent *shall* certify to the committing court such opinion; whereupon such court *shall* forthwith order the return of the patient to that court to await further action with reference to the criminal charge and the court *shall* resume proceedings and may place the accused on probation for not less than five years, if he is eligible for probation. (Stats.1949, Ch. 1325, sec. 7, p. 2313.)

The same section provides also (c) that if the superintendent believes the patient is still a menace to the health and safety of others, the superintendent and the director of Mental Hygiene *shall* certify to the committing court their opinion, including a report, diagnosis and recommendation as to the patient's care, supervision or treatment. The section was reenacted in 1951 in substantially the same mandatory form. (Stats. 1951, Ch. 448.)

[5] It follows that no action lies against the Superintendent and the Director of Mental Hygiene for failure to certify a patient who has been committed under section 5502.5 unless in a mandamus proceeding the court is convinced that those officials have capriciously or arbitrarily refused to form opinions and to make a certification of the patient's recovery or of his unsuccessful treatment or of his not having recovered from his sexual psychopathy. See Phyle v. Duffy, 34 Cal.2d 144, 153, 208 P.2d 668. But no other remedy appears to be available against the superintendent's nonaction.

[6] Appellant contends that he has been denied due process of the laws and the equal protection of the laws (1) because of the superintendent's refusal to certify an opinion that appellant is no longer a menace to the public welfare and (2) because the superintendent had formed an opinion in the heat of passion and prejudice to the effect that appellant has not recovered from his sexual psychopathy and has failed to return appellant to the court for further orders with respect to his confinement notwithstanding such superintendent is of the opinion that appellant will not benefit from further treatment in the hospital. He insists that the superintendent by his refusal to certify deprives appellant of a statutory right to a further hearing in the court of original jurisdiction and of a trial by jury on the issue as to whether he has recovered. But in support of such contention, appellant presented no evidence. The denial of his motion to vacate the order was for that reason correct. See People v. Bailey, 105 Cal.App.2d 150, 152, 232 P.2d 518; People v. Kirk, 98 Cal.App.2d 687, 692, 220 P.2d 976.

The Attachment

[7, 8] Appellant's contention that he had an "inalienable right" to submit a motion and to testify before the court, and to present witnesses in support of his claim is confuted by the practice of presenting affidavits or depositions in support of such a motion. Code of Civ.Proc. sec. 2009; People v. Eastman, 67 Cal.App.2d 357, 359, 154 P.2d 37. A litigant's right to make motions affecting his rights in the progress of a lawsuit is not inalienable but may be exercised only in accordance with statutory law or rules of Court. Having presented no evidence in support of his claim for a writ of attachment, it was properly denied.

The orders are affirmed.

McCOMB and FOX, JJ., concur.

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111 Cal.App.2d 774

MATTOX et al. v. ISLEY et al.

Civ. 18972.

District Court of Appeal, Second District, Division 2, California.

June 19, 1952.

Howard Leland Mattox, a minor, by Odas H. Mattox, his guardian ad litem, brought action against P. R. Isley and others to recover for injuries sustained by the minor when bridge of his nose was cut when he allegedly struck sharp piece of metal protruding from allegedly defective seat in theater of defendants. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Moore, J., held that evidence was sufficient to sustain finding that defendants were negligent in maintenance of defective seat.

Judgment modified and, as modified, affirmed.

1. Theaters and Shows 🔑6(34)

In action against owners of theater to recover for injuries sustained by child when he cut bridge of nose when it apparently came into contact with sharp edge of metal band that improperly protruded from backs of seats behind which child was sitting, evidence sustained finding that owners of theater were negligent in permitting a dangerous and defective condition to exist.

2. Theaters and Shows 🔑6(22)

Presumption of constructive notice to theater owners of defect in theater does not arise from lapse of time only, but evidence that owners have not taken reasonable precautions for safety of invitees, that they did not exercise diligence in seeking to know conditions of every part of premises and of every object with which patron might reasonably be expected to come into contact, and probability that invitees will not discover dangerous hazards, are factors, which will indicate negligence on part of theater's management.

3. Theaters and Shows 🔑6(34)

In action against owners of theater to recover for injuries sustained by child when he cut bridge of nose when it apparently came into contact with sharp edge of metal band that improperly protruded from backs of seats behind which child was sitting, whether dangerous condition existed long enough to have been discovered by owners as reasonably prudent men was for trial court to determine as trier of facts.

4. Appeal and Error 🔑1010(1)

Where finding of trial court is attacked on appeal as being without support, appellate tribunal is bound by trial court's determination if there is any substantial evidence to support such determination.

5. Appeal and Error 🔑996

Where two or more inferences are reasonably deducible from the facts, those drawn by appellate court on appeal may not be substituted for those of the trial court.

6. Pleading 🔑354(2)
Pleading 🔑354(2)

In action by father as guardian ad litem of child of tender years to recover for injuries sustained in theater, court erred in granting motion to strike affirmative defense at commencement of the trial that the father and mother of the child were contributorily negligent, since item of special damages for medical expenses paid by father and mother for benefit of child, was subject to defense of contributory negligence on part of father and mother.

7. Damages 🔑43
Infants 🔑72(2)

When parents of child sue as guardians ad litem to recover for injuries sustained by child and plead such medical expenses as have not been paid, allegation thereof is a waiver of rights of parents, and child may recover such items of special damage unless precluded by contributory negligence of parents.

8. Appeal and Error 🔑302(2)

Defendants did not waive their right to object to order of trial court striking plea of contributory negligence because of their failure to assign it as error on their motion for new trial, since the order was deemed to have been excepted to. Code of Civ.Proc. § 647.

9. Pleading 🔑360(4)

Ruling of trial court in granting or denying a motion to strike a pleading is an action which raises only a question of law, and, if erroneous, can be corrected only by trial court or by appellate court. Code of Civ.Proc. § 647.

10. Appeal and Error 🔑302(2)

Though it is common practice for a dissatisfied litigant to urge errors of law as grounds for a new trial, it is not compulsory that he do so, but he may, instead, present them on appeal as grounds for reversal of judgment.

◆

Moss, Lyon & Dunn, Richard B. Coyle, and Henry F. Walker, Los Angeles, for appellants.

Irwin W. Rainer, North Hollywood, for respondent.

MOORE, Justice.

Howard Mattox, three years and ten months of age, accompanied by his parents attended the theater of appellants on the evening of July 12, 1950. Although the auditorium had been opened at 6:45 p. m., the trio did not arrive until a few minutes after seven o'clock. After entering they hesitated for a few moments at the head of the aisle for an usher to serve them. None appearing, they went forward and chose seats in the 17th row from the rear. The father occupied the fifth chair from the aisle, the mother sat in the fourth, and Howard next to her. The two seats to his right and the one directly in front of the child remained unoccupied throughout the evening.

About an hour after their arrival Howard fell to the floor, cried and screamed loudly. His mother gathered him into her arms and rested his head upon the father's lap. She promptly discovered blood running down her arm and speedily rushed the child to the lobby where, it was found, a gash had been cut across the bridge of his nose. No physician being at once available, the parents transported the child to a nearby emergency hospital where an antitetanus remedy was administered and the cut was sutured with seven stitches. The child was then removed to his home.

Mr. Mattox returned to the theater where, after the programmed films had been completed, he and Mr. Rock, assistant manager, undertook to locate the spot where Howard had fallen in order to determine the instrumentality that had caused the wound. Having failed of his purpose then he and Mrs. Mattox returned to the theater on July 19 to inspect the chairs again but found *no change in their condition.* However, with the advantage of daylight they reexamined the third seat from the aisle in the 18th row and found its wooden back pushed forward out of line and the metal band which had connected it with the adjoining chair protruding into the aisle, so that a sharp edge extended out about 20 inches from the floor. Further inspection disclosed many other seats throughout the theater suffered the same defect. The same observation had been made by Mr. Rock repeatedly after his inspections of the theater.

The protruding band is, normally, bolted to the back of the adjoining seat and at its center is secured to the "seat standard," which is a metal frame between the seats and is anchored to the concrete floor. The seat standard serves as a frame and support for the seat on either side and as the base for the arm rest between the seats.

Respondent predicated his action for damages upon the negligence of appellants in permitting the sharp metal band to continue protruding and contended that he struck his head upon it solely by reason of its having been so negligently maintained. From a judgment awarding respondent damages for his injuries suffered when he fell upon the protruding band, the owners of the theater appeal. They demand a reversal on the grounds of (1) insufficient evidence of negligence, (2) insufficint proof of proximate cause, (3) error in striking the affirmative defense of contributory negligence on the part of Mr. and Mrs. Mattox.

Evidence of Negligence—Sufficient

[1] While it is true that there is no direct evidence that the third seat on the 18th row from the rear was in a dangerous and defective condition on July 12, 1950, the circumstances are so pregnant with proof of negligence as to render inescapable the ultimate fact that on that day it was in such a defective condition as to be perilous to a four-year-old child sitting on the chair behind it. It is a reasonable inference that the condition of the protruding band on July 19 was exactly its condition on July 12. The seats were stationery; they had not been removed and returned in the interim; every chair had the same band connecting it with its neighbor and many had suffered the same impairment. Appellants denied Mr. Mattox permission to photograph the metal band as he found it July 19 and thereafter repaired it. The gash on respondent's nose was, according to the attending physician, cut "about one inch and a quarter long and the edges were rather well cut, rather sharp * * * was caused by something rather sharp." The wound had a clean cut edge without evidences of bruising and contusions which are present when a cut results from a blunt surface such as the rounded

top of the back of the seat in front of Howard.

The nature of the cut and the photographic exhibits and drawings of the theater seats are compelling proofs that the protruding metal band was the only object accessible to the child that could have caused the wound described by the physician. It cannot therefore be said that there was no substantial evidence from which the jury could infer that appellants had negligently maintained a constant peril for the patrons of their theater and especially so for those of very tender ages.

[2, 3] But appellants contend that even though the sharp metal band so protruded on July 12, 1950, as to constitute a peril for patrons, there is no showing that they had either actual or constructive knowledge thereof for such a period of time as would have afforded them opportunity to remove the danger. However, the presumption of constructive notice to theater owners does not arise from a lapse of time only. Evidence that they have not taken reasonable precautions for the safety of all invitees; that they did not exercise diligence in seeking to know the conditions of every part of their premises and of every object in their theater with which a patron might reasonably be expected to come in contact, and the probability that invitees will not discover invisible or concealed though dangerous hazards in the dim light or darkness of an auditorium—these are all factors, the presence of any of which will indicate negligence on the part of a theater's management. Travis v. Metropolitan Theatres Corp., 91 Cal.App.2d 664, 667, 205 P.2d 475. Whether the dangerous condition has existed long enough to have been discovered by a reasonably prudent man is for the trial court to determine. Ibid. The time limitations must be determined from the circumstances of each accident, and whether the sum total of the factors that should alert the proprietor of a theater to a realization of their presence and of their potential harm is likewise for the trier of fact.

That the evidence submitted on the trial of this action is sufficient to justify a finding that appellants so negligently maintained their theater as to constitute it a hazard to its patrons cannot be denied. Many seats throughout the auditorium were found by Mr. Mattox on July 19 to be pushed forward and out of line as was that in front of Howard on July 12. The same condition was found by Mr. Rock as reported in his testimony, although he had never brought the matter to the attention of the manager. On the night of the accident the auditorium was dimly lighted when respondent and his parents arrived. No usher was there to conduct them to a location that was secure from harm and away from protruding sharp-edged metal bands but they had to grope their way to seats without the aid of a flashlight. The seats were antiquated: appellants' building was the only theater in California using the type of seat they had. A person of reasonable intelligence and caution should have anticipated danger to patrons from the protruding one-inch clamp. Appellants contend that they could not have noticed the metal band if it did not protrude before the 15 minutes preceding respondent's occupancy of the chair behind it. However, the bracket was so securely bolted to the adjacent seat that it could not be readily removed. It could have become separated only as a result of continued pressure thereon.

Inasmuch as the court below adopted the testimony of Mr. Mattox that seat No. 3 in the 18th row was defective on July 19, it is binding on appeal. From such evidence coupled with the affirmative proof above recited the inference is reasonable that the peril existed on the 12th day of July, 1950. It was foreseeable that a person occupying a seat behind and near such a sharp edged instrument as the metal band might strike against it and injure his body or his clothing; especially an invitee of such restless enthusiasm as that of a child in the presence of pleasant music and a brilliant spectacle. A child of four is not expected to exercise such amount of caution as is essential to its safety under the circumstances disclosed.

[4, 5] The evidence of negligence is adequate to support the findings and judgment. Under appellate practice it is ele-

mental that when a finding of the trial court is attacked as being without support the appellate tribunal is bound by the determination of the trial court if there is any substantial evidence to support that court's decision. When two or more inferences are reasonably deducible from the facts those drawn by the court on appeal may not be substituted for those of the trial court. Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 429, 45 P.2d 183. By the same token the implied finding that the proximate cause of respondent's injury was the sharp-edged, protruding bracket finds ample support in the testimony of the physician and of Mr. Mattox and in the exhibits.

[6, 7] Appellants assign as error the order of the court striking their affirmative defense. By such plea they alleged contributory negligence of plaintiff's parents in their failure to exercise due care in the control of their child and that such neglect caused his injury. Respondent made the motion to strike such affirmative defense at the commencement of the trial. The order granting the motion was error. A child is entitled to recover special damages for medical expenses paid by his parents for his benefit, but such item is subject to the defense of contributory negligence on the part of the parents. When they sue as guardians ad litem and plead such medical expenses as have not been paid, the allegation thereof is a waiver of the parents' rights, and the child may recover such items of special damage unless precluded by the contributory negligence of the parents. Shriver v. Silva, 65 Cal. App.2d 753, 768, 151 P.2d 528; Bauman v. City and County of San Francisco, 42 Cal. App.2d 144, 162, 108 P.2d 989.

[8–10] Appellants' attack upon the order striking the plea of contributory negligence is not answered by respondent, but he now asserts that appellants have waived their right to object to such order by virtue of their having failed to assign it as error on their motion for a new trial. Respondent's argument is erroneous. The trial court's order striking the plea of contributory negligence was "deemed to have been excepted to." Code Civ.Proc. § 647. Its correctness may therefore be challenged on appeal. The ruling of a court in granting or denying a motion to strike a pleading is an action which raises only a question of law and if erroneous can be corrected only by the erring court or by the court of appeal. Pratt v. Pratt, 141 Cal. 247, 251, 74 P. 742. Although it is common practice for a dissatisfied litigant to urge errors of law as grounds for a new trial it is not compulsory that he do so but he may, instead, present them on appeal as grounds for reversal of the judgment. 2 Cal.Jur. sec. 103, p. 306; Massachusetts Bonding & Insurance Co. v. Los Angeles Ry. Corp., 182 Cal. 781, 785, 190 P. 161.

Cummings v. Cummings, 97 Cal.App. 144, 275 P. 245, does not support respondent's contention. There, the defendant, by declining to oppose plaintiff's motion acquiesced in the court's ruling.

Therefore, since appellants were denied the privilege of pleading their special defense, the award must be reduced in the sum of $1,861.85, the amount of medical expenses established.

It is therefore ordered and adjudged that the judgment be modified by reducing the amount thereof by $1,861.85.

As so modified the judgment is affirmed.

McCOMB and FOX, JJ., concur.

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112 Cal.App.2d 18

TATHAM et al. v. PATTISON et al.

Civ. 18986.

District Court of Appeal, Second District,
Division 1, California.

June 25, 1952.

Hearing Denied Aug. 21, 1952.

Action by purchasers to rescind contract to purchase realty. The Superior Court of Los Angeles County, Orlando R. Rhodes, J., entered judgment against defendant and an order denying his motion for new trial and defendant appealed. The District Court of Appeal, White, P. J., held that the evidence sustained finding that vendor with knowledge of the facts had falsely represented to purchasers that house was not constructed on filled ground.

Attempted appeal from order dismissed and judgment affirmed.

1. Appeal and Error ⚿931(1), 989

Where appeal is taken on ground that the findings are not supported by the evidence, reviewing court has power only to determine whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of facts and, in reviewing the evidence, court must resolve all conflicts in favor of respondent and indulge in all reasonable and legitimate inferences to uphold the judgment rendered if possible.

2. Vendor and Purchaser ⚿44

In action to rescind contract to purchase improved realty, finding that vendor, knowing that a portion of land upon which house was constructed was filled ground, which materially affected its value, failed to disclose such information to purchasers and in fact represented to them that there was no fill under the house was supported by substantial evidence. Civ.Code, §§ 1572, 1710.

3. Vendor and Purchaser ⚿36(1)

Where vendor, knowing that a portion of land upon which house was constructed is filled ground, which materially affects its value, does not disclose such information to purchasers and in fact represents to them that there is no fill under house, purchasers, upon learning the true state of facts, are entitled to rescind contract to purchase the realty. Civ.Code, §§ 1572, 1710.

4. Vendor and Purchaser ⚿44

Evidence sustained finding that vendor, knowing that piles, caissons and support structures under house were not constructed in accordance with city and county building and safety code, suppressed such knowledge from purchasers, so that purchasers were entitled to rescind contract to purchase the realty upon learning the true state of facts. Civ.Code, §§ 1572, 1710.

◆

Krag & Sweet, David T. Sweet and Donald O. Krag, Alhambra, for appellant.

Robert N. Baker, Santa Monica, for respondents.

WHITE, Presiding Justice.

Defendant was the owner of a vacant lot in the Pacific Palisades in Los Angeles County, upon which he constructed a new house. By their complaint, plaintiffs alleged that defendant offered to sell said property to them. That for the purpose of inducing plaintiffs to purchase the same, defendant falsely and fraudulently represented the extent to which said property was filled ground. That by reason of such representations, which defendant allegedly knew to be false, plaintiffs were induced to enter into a contract with defendant to purchase said real property and the house constructed thereon. That subsequently, and promptly upon learning of said allegedly false representations, plaintiffs gave notice of rescission of said contract to purchase the property in question, offered the same to defendant and further offered to return to him everything of value received by them. It was further alleged that "the house was not constructed in accordance with the Building and Safety Code of the City and County of Los Angeles".

By his answer defendant denied any false or fraudulent representation or that he fraudulently concealed any material facts. Defendant also denied plaintiffs' allegation that the house was not constructed in accordance with the aforesaid building and safety code.

Following trial before the court, findings were made that the defendant did falsely and fraudulently represent to plaintiffs that said house was not constructed on filled ground when in fact it was so constructed. That defendant deceitfully and fraudulently concealed from plaintiffs that said house was not constructed in accordance with the Building and Safety Code of the City of and County of Los Angeles.

From the judgment accordingly entered against him and from the order denying his motion for a new trial, defendant prosecutes this appeal.

The record reflects that the mother of two of the respondents, namely, Mrs. Lulu Tatham, a 72-year-old lady, was acting as agent for respondents who were endeavoring to purchase a home for her and her husband. Mrs. Lulu Tatham first saw appellant about the second week in January, 1950. This meeting took place upon the property in question. She again saw appellant prior to the first day of February, at which time she testified she asked him about the fill and that he told her it only extended across the back yard, and that there was no fill under the house. There is in the record testimony from which the court could reasonably conclude that appellant was aware of the fact that there was a fill at least under the porch section of the house, placed there by him, and that he did not disclose this fact to respondents.

[1] Appellant earnestly asserts that there is "an utter lack of any statements concerning the fill or the absence thereof" prior to the execution of the contract which created a mutual obligation on him to sell and upon respondents to purchase the property in question. While it is true there is evidence, which if believed, would sustain this contention, there is also testimony which would support a contrary conclusion. Since appellant's claims amount to an attack upon the judgment on the ground that the findings are not supported by the evidence, we are met with the fundamental and long-established rule that under such circumstances the power of an appellate tribunal begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of facts. When an appeal is taken on the ground just referred to, we must, in reviewing the evidence, resolve all conflicts in favor of the respondent, and indulge in all reasonable and legitimate inferences to uphold the judgment rendered if possible.

[2, 3] Bearing in mind the foregoing rules, it must be held that there is in the record substantial evidence to support a finding that appellant was aware of the fact that a portion of the land upon which the house was constructed was filled ground, which filling materially affected its value. That under the circumstances here present, appellant was under a duty to disclose that information to respondents. That he failed to do so, and in fact represented to respondents that there was no fill under the house. Upon learning the true state of facts, respondents therefore were entitled to rescind the contract. Clauser v. Taylor, 44 Cal.App.2d 453, 454, 112 P.2d 661; Civ.Code, §§ 1572, 1710.

What we have hereinbefore said is equally applicable to appellant's attack upon the finding that the house in question "was not constructed in accordance with the Building and Safety Code of the City and County of Los Angeles".

[4] Upon this issue the testimony was in sharp conflict as to the claimed violation of the building and safety code. As to appellant's knowledge of such a violation, he was asked the question, "Well, do you know what kind of a footing the Building Code of the City of Los Angeles requires on caissons?" to which interrogatory he responded, "Yes, I do". The question of knowledge on the part of appellant as to the provisions of the Building and Safety Code was one of fact and the testimony of appellant just narrated, coupled with other facts and circumstances, was sufficient to support the finding that, "the piles, caissons and support structures under the house were not constructed in accordance with the said Building and Safety Code, sections 2803 and 2804 and 2311 and other applicable sections"; that appellant was aware thereof, and suppressed such knowledge from respondents. Barder v. McClung, 93 Cal.App.2d 692, 696, 209 P.2d 808.

The attempted appeal from the order denying a new trial is dismissed. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

111 Cal.App.2d 940

PEOPLE v. WILSON.

Cr. 2336.

District Court of Appeal, Third District, California.

June 24, 1952.

Defendant was convicted of burglary in the second degree in the Superior Court, Sutter County, Arthur Coats, J., and he appealed. The District Court of Appeal, Adams, P. J., held that where defendant did not take stand in his own behalf or offer any testimony in defense, evidence was sufficient to support verdict and judgment.

Judgment affirmed.

1. Criminal Law ⚷1186(4)

Where defendant, accused of burglary, did not take the stand in his own behalf or offer any testimony in defense, instruction that oral statements of defendant should be viewed with caution, did not result in prejudice, and, if the giving of the instruction was superfluous, its inclusion could be disregarded. Const. art. 6 § 4½.

2. Criminal Law ⚷1169(1)

In prosecution for burglary, admission in evidence of boxes which allegedly had contained the stolen goods, for purposes of establishing that burglaries were committed, did not prejudice defendant in his claim that he had not committed the burglaries.

3. Criminal Law ⚷1088(1)

Where boxes, from which a burglar allegedly took goods, were admitted in evidence, over objection of accused, only for purpose of establishing commission of burglary, request by accused, who claimed only that he had not committed the crime, to have boxes included in record on appeal, was properly refused.

4. Burglary ⚷41(1)

In prosecution for burglary, where defendant did not take stand in his own behalf or offer any testimony in defense, evidence was sufficient to support verdict and judgment.

John T. Kenward, Yuba City, for appellant.

Edmund G. Brown, Atty. Gen., By Gail A. Strader, Deputy, Sacramento, for respondent.

ADAMS, Presiding Justice.

The amended information in this case, in two counts charged defendant with entering Bremer's Hardware Store in Yuba City on July 21, 1951, and July 26, 1951, respectively, with intent to commit theft therein. A jury convicted defendant on both counts, and fixed the degree of the crimes as "Burglary in the Second Degree." A motion for a new trial was denied.

Defendant has appealed from his conviction on both counts, contending that there was reversible error in the giving of one instruction to the jury, in the admission in evidence of two exhibits introduced by the prosecution, and that the evidence produced was insufficient to justify conviction.

Regarding the first of said contentions it is urged that, following the usual instructions that the jury were the sole and exclusive judges of the effect and value of evidence and the credibility of witnesses, that a witness is presumed to speak the truth but that such presumption may be repelled etc., and that a witness wilfully false in one material part of his testimony is to be distrusted in others, the court added: "Oral statements of a defendant should be viewed with caution." It is the latter portion of the instruction to which defendant objects, saying that it is not the law. He says that what the court probably meant was that where testimony has been given that a defendant made oral statements or admissions, such testimony should be received with caution; but he urges that the instruction as given robbed the defendant of the presumption of innocence.

The record shows that the jury was fully instructed on the proposition that the defendant was presumed to be innocent until the contrary was proven, and that in case of a reasonable doubt he was entitled to an acquittal.

[1] Defendant did not take the stand in his own behalf nor did he offer any testimony in defense. There were, therefore, no statements of his during the trial which

the jury could assume were to be received with caution, and our attention is not directed to any. We fail to see how any prejudice did result or could have resulted from this instruction; and if it can be said that the giving of same was superfluous, under the provisions of Article VI, section 4½, of the Constitution, the inclusion of same may be disregarded.

[2, 3] Appellant's second contention is that the trial court erroneously admitted in evidence a metal container and a carton which were not found in defendant's possession. The record shows that the prosecution produced these empty containers during the examination of a witness who testified as to articles taken from the hardware store during the burglaries, the metal case having contained an electric drill, and the carton a gas pistol. How the introduction of these articles could have prejudiced defendant is not pointed out to us. The trial court denied defendant's request to have them included in the record on appeal, stating that they were only introduced to show that the burglaries were committed, which was not disputed by defendant, his claim being that he did not commit them. Defendant now complains that these articles should have been sent up as a part of the record on appeal, and he has requested us to augment the record to include them. If, as defendant contends, they were superfluous in the lower court, they are equally superfluous here; and we cannot see that their introduction resulted in any prejudice to defendant.

Appellant's third contention is, in effect, an attack upon the sufficiency of the evidence to justify the verdict. He says that the only stolen articles with which he was in any way connected were a pair of eyeglasses with one lens, and a pistol. The glasses were identified by the owner of the store and by the maker thereof, and the evidence showed that they had been taken out of their case, from the owner's desk in the store. As for the pistol there was testimony that defendant dropped it in a bar where it was picked up by a woman patron and given to the bartender for safe-keeping, and that defendant requested its return to him, which was refused because he was drinking. In addition to proof that defendant was in possession of these stolen articles there was evidence that footprints found at a water cooler near the place where entrance had been made to the burglarized premises were similar to those which would have been made by shoes worn by defendant at the time of his arrest; and there was also evidence that letters identified as belonging to defendant were found on the roof of the store where certain of the stolen property had been abandoned.

[4] In the absence of any testimony by defendant or any other person in his behalf, the evidence offered by the prosecution is sufficient to support the verdict and judgment.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, J., pro tem., concur.

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112 Cal.App.2d 147

HUME v. LACEY.

Civ. 4274.

District Court of Appeal, Fourth District, California.

June 30, 1952.

Vernal C. Hume brought an action against Sherman Lacey, administrator of the estate of Alfred Erickson, deceased, for injuries which resulted when automobile in which plaintiff was riding as a passenger collided with an automobile driven by defendant's decedent. The Superior Court of San Diego County, Dean Sherry, J., rendered a judgment adverse to the defendant, and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that the cause of action survived death of decedent.

Judgment affirmed as modified.

1. Appeal and Error 🔑882(4)

Judgment for plaintiff in action for injuries arising from collision of automobiles would not be reversed on ground that action was against administrator of estate of decedent individually rather than against defendant as administrator where complaint alleged that defendant had been duly appointed and had qualified as administrator and that claim against estate had been filed and rejected, and answer was filed by defendant as administrator, and action was tried on theory that defendant was defendant in his capacity as administrator, and no one was deceived.

2. Abatement and Revival ⚿54

A cause of action for injuries arising out of automobile collision which occurred in the year 1948, survived death of driver of automobile which collided with automobile in which plaintiff was passenger. Civ. Code, § 956; Probate Code, 574.

3. Damages ⚿60

Amount a plaintiff would receive in pension payments as result of his retirement on pension because of physical disability resulting from automobile collision was not deductible from amount of damages plaintiff was entitled to recover from administrator of estate of motorist who died as result of collision with automobile in which plaintiff was passenger.

James C. Henderson, San Diego, for appellant.

Sweet, Ault & Warner, San Diego, for respondent.

BARNARD, Presiding Justice.

The plaintiff was severely injured in a collision between an automobile in which he was riding as a passenger and another car driven by Alfred Erickson, who died shortly after the collision. The accident happened on November 11, 1948, and this action was filed on November 9, 1949. The court, sitting without a jury, found for the plaintiff and gave him judgment for $32,400. A new trial was denied and the defendant has appealed from the judgment.

It is first contended that the judgment must be reversed since it is against Sherman Lacey individually, and there is neither allegation nor proof which would support any judgment against him as an individual. It is argued that Lacey was not referred to in his representative capacity as administrator of the estate of Erickson in either the complaint, findings or judgment; that since the word "as" does not precede the word "administrator" in these instruments the reference to him as administrator is descriptive only; and that it follows that the action and judgment must be treated as one against him personally. The cases of Ferry v. North Pacific Stages, 112 Cal.App. 348, 296 P. 679; Potts v. Whitson, 52 Cal.App.2d 199, 125 P.2d 947; Scott v. Remley, 119 Cal. App. 384, 6 P.2d 576, are cited in support of this contention.

While it has been frequently held that the use of the word administrator, alone, is merely *descriptio personae,* it has also been held that the body of the complaint and the judgment roll may and should be examined for the purpose of determining whether the action involves a party individually, or in a representative capacity. Burling v. Thompkins, 77 Cal. 257, 19 P. 429; Carr v. Carr, 15 Cal.App. 480, 115 P. 261; Minehan v. Silveria, 131 Cal.App. 317, 21 P.2d 617. In the latter case, it was also pointed out that if any uncertainty exists the judgment must be construed with reference to the pleadings and the parties against whom judgment could have been rendered.

[1] The complaint alleges that at a certain time and place "Alfred Erickson, now deceased, so negligently and carelessly drove and operated" his automobile as to cause this collision; that Lacey had been duly appointed and had qualified as "administrator of said estate"; and that the plaintiff had filed a verified claim against the estate which had been rejected. A copy of this claim against the estate, for loss of earnings as a result of this collision, was made a part of the complaint. The answer was filed by Sherman Lacey "as administrator of the estate of Alfred Erickson, deceased." The action was tried on that theory, and it sufficiently appears that it was one against Lacey in such representative capacity. No one was deceived, and the matter could easily have

been cured by amendment had it been raised in the trial court.

It is next contended by the appellant, and conceded by the respondent, that the judgment erroneously fails to provide for the payment thereof in due course of administration, as required by section 730 of the Probate Code. This should have been done and the error may be corrected by modifying the judgment.

It is next contended that the appellant's cause of action did not survive after the death of Erickson. It is first argued that the supreme court erred in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379, Moffat v. Smith, 33 Cal.2d 905, 206 P.2d 353, and Cort v. Steen, 36 Cal.2d 437, 224 P.2d 723, in holding that such a cause of action survives under section 574 of the Probate Code. It is then argued that if such survival previously existed the right thereto was abolished when section 574 was amended in 1949, which amendment became effective prior to the filing of the complaint in this action. It is conceded that at the same time (1949) the legislature adopted section 956 of the Civil Code, providing in part that an action arising out of a wrong which results in physical injury, or out of a statute imposing liability for such injury, shall not abate by reason of the death of the wrongdoer. It is argued that any cause of action arising out of a wrong resulting in physical injury was abolished by the 1949 amendment to section 574; and that there could be no survival of the action as one arising out of a statute imposing liability, under section 956, since the only such statute (section 574) had been abolished.

[2] This argument is sufficiently answered in Cort v. Steen, 36 Cal.2d 437, 224 P.2d 723, where it is pointed out that the effect of the 1949 amendments was to lift the survival provision from section 574 of the Probate Code and place it in section 956 of the Civil Code; that a survival provision was in effect at all times material to the action; that the law in force at the time of death would apply; and that the doctrine of statutory continuity was applicable. See, also, Chambers v. Davis, 131 Cal.App. 500, 22 P.2d 27, and Estate of Naegely, 31 Cal.App.2d 470, 88 P.2d 715. This cause of action arose when the injury occurred on November 11, 1948, some eleven months before the amendment to section 574 became effective. Smith v. Minnesota Mut. Life Ins. Co., 86 Cal.App.2d 581, 195 P.2d 457. We conclude that appellant's cause of action was not abated for any of the reasons here relied on.

It is next contended that the complaint fails to state a cause of action under 574 of the Probate Code. It is argued that the waste of property referred to in that section must have occurred in the "lifetime" of the deceased; that there could be no action under that section where a person "dies at the wheel and as a result of death operates the vehicle to the left or wrong side of the street so as to collide with an oncoming vehicle," since his death would occur before the collision; and that the complaint is fatally defective because it is not alleged that the deceased was alive at the time of the collision.

The only merit in this argument is its novelty, including the original suggestion of negligent acts committed after death. The allegation that Erickson, "now deceased," negligently operated an automobile necessarily implies that he was alive while he was thus operating the car, and that he has since died. It was not necessary for the complaint to anticipate or negative any such defense. Fay v. Cox, 45 Cal.App. 696, 188 P. 623. It appears, without conflict, that Erickson was unconscious immediately after the accident, and that he did not die until after he reached the hospital. There is nothing to indicate that the appellant was misled in this regard. Grosetti v. Sweasey, 176 Cal. 793, 169 P. 687.

Appellant's final contention is that the court erred in ruling that the damages, loss of earning capacity, should not be reduced by the amounts to be received from a pension. The appellant testified that he was a sergeant in the Marine Corps, his pay being $317.50 per month; that he received this pay until March 31, 1951, when he was retired on pension because of physical disability resulting from this accident; and that under such pension he will receive $220.50 per month. There was evidence that he was 56 years old, and that he would have had to retire on pension at 65. An objection was made to this line of testimony and the court admitted it subject to his ruling thereon at the end of the case. At that time the court held that the pension should be disregarded in fixing the amount of damages, and awarded judgment for $32,400, stating that the appellant would have been permitted to serve in the Marine Corps for another nine years, during which his pay for active duty would have been approximately $3,600 a year.

It is argued that the amount recoverable under section 574 is the damage suffered by "the lessening of their estate", Hunt v. Authier, supra [28 Cal.2d 288, 169 P.2d 918]; that if the appellant had not been injured he would have received $317.50 per month for the next nine years, at which time he would retire; that because of this injury he will receive $220.50 per month pension; and that his estate has actually been lessened only in the amount of $97 per month for the nine-year period. It is further argued that if he had not been injured he would have received a total of $34,200 during the nine years; that under the judgment he will receive $32,400 plus $23,814 pension, or a total of $56,214; and that while his estate has thus been lessened by $10,476 ($97 per month for nine years) the judgment gives him an additional $21,924.

This argument is somewhat plausible from a factual standpoint. While this accident deprived the appellant of his earning capacity, he does not actually lose the full amount as he will get $220.50 per month, which he would otherwise not have received. Under section 574 he may recover only for property damage, which in this case means his earning capacity. If the judgment stands, he will actually receive more than he would have received had he not been injured.

[3] However, another rule of law seems to prevent any reduction of the damages recoverable by offsetting the amount of the pension payments which would be received during the same period. In the respect here in question a similar situation was presented in Bencich v. Market St. Ry. Co., 29 Cal.App.2d 641, 85 P.2d 556, 559. In that case, a city fireman had been retired on pension for a disability resulting from the accident involved. The court held that evidence of the pension payments had been properly excluded and stated that "* * * the better view appears to be that such evidence is inadmissible for the purpose of reducing the amount of damages recoverable by the injured person on account of loss of earning capacity." A hearing in the Supreme Court was denied. In Anheuser-Busch, Inc., v. Starley, 28 Cal.2d 347, 170 P.2d 448, 450, 166 A.L.R. 198, the court said:

> "Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer. (Cases.) The rule has been applied where the independent source is pension systems or charity."

While the cases just cited were general actions for damages, we can see no difference in principle, in this regard, between such an action and one brought under section 574. They both involve the same form of property, the right to support from future earnings, and in each the pension is received during a period when it would not otherwise be payable. So far as earning capacity is concerned, the issue is the same in both classes of cases and if pension payments are excluded from consideration in the one, no good reason appears why they should not be excluded in the other. It may be observed that there is a valid reason for not giving the wrongdoer any benefit from pension rights, with which he had nothing to do. They were previously acquired by the injured party, were paid for by him in some manner, and the fact that he had other property in the nature of a pension right may logically be held immaterial.

The judgment is modified by adding the words "payable in due course of administration" to be inserted after the figure $32,400. As so modified, the judgment is affirmed. The respondent to recover costs.

GRIFFIN and MUSSELL, JJ., concur.

112 Cal.App.2d 32

CARRIER et al. v. ROBBINS et al.

Civ. 4272.

District Court of Appeal, Fourth District, California.

June 25, 1952.

Ralph Carrier and others, on behalf of themselves and certain employees of the County of San Diego, sued James Robbins and the other members of the Board of Supervisors of the County of San Diego, individually, and as such Board, seeking a judgment establishing a rule or yardstick to govern the Board of Supervisors in fixing the salaries of county employees. The Superior Court, San Diego County, C. M. Monroe, J., rendered a judgment of dismissal after a general demurrer had been sustained without leave to amend, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that the complaint failed to state facts sufficient to constitute a cause of action for declaratory relief.

Affirmed.

. Counties 🔑23

Municipal Corporations 🔑63(1)

The fixing of salaries of county and municipal employees is legislative function, and determination of whether rate of compensation for county employees was in accord with generally prevailing rates, in accordance with charter, was within discretion of Board of Supervisors, and court would not interfere with determination unless action taken was fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law.

2. Declaratory Judgment 🔑209

Courts will not, in action for declaratory relief, interfere with Board of Supervisors in exercise of fact-finding function vested in Board by charter, unless it can be shown that there was an abuse of discretion, fraud, bad faith or unreasonable and arbitrary action.

3. Declaratory Judgment 🔑272

Actions for declaratory relief involve matters of practice and procedure only and were not intended in any way to enlarge jurisdiction of courts over parties and subject-matter. Code Civ.Proc. § 1060.

4. Declaratory Judgment 🔑319

In absence of allegations that Board of Supervisors had acted fraudulently, arbitrarily, capriciously, unreasonably or in bad faith, or that there had been an abuse of discretion, county employees' declaratory judgment complaint, by which they sought to obtain judgment of court establishing rule or yardstick to govern Board of Supervisors in fixing salaries of county employees, failed to state facts sufficient to constitute cause of action. Code Civ.Proc. § 1060.

Walter Wencke, San Diego, for appellants.

James Don Keller, Dist. Atty. of San Diego County and Carroll H. Smith and Robert G. Berrey, Deputies Dist. Atty., San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from a judgment of dismissal after a general demurrer was sustained without leave to amend to their second amended complaint.

The complaint, as amended, is for declaratory relief on the construction and interpretation of section 40 of the charter of the county of San Diego, which provides as follows:

> "In fixing compensation, the Board of Supervisors shall at least annually,

> by ordinance, provide in each instance for payment of not less than the prevailing or general current rate of compensation or wages paid by private employers in the County of San Diego for similar quality or quantity of service, in case such prevailing compensation or wages can be ascertained."

Plaintiffs, who are employees of the county of San Diego, allege in the first count of the second amended complaint that the said charter imposes the duty upon the board of supervisors of ascertaining the prevailing rate of pay referred to therein; that in ascertaining the prevailing rate of pay, the supervisors must use only the yardstick of work of "similar quality or quantity" and may not take into consideration such factors as the cost of living or various working conditions; that in the case of county employees who have duties of two or more crafts in private industry, the board of supervisors must look to the several crafts in private industry which have those functions which are performed by the particular class of county employees and weigh the average of the prevailing wages of the crafts in private industry according to the use made of these functions in the county employ; that in making provision for the payment of the rates ascertained, the supervisors may not make deductions for any conditions of employment which exist in county employ and which are not found in private industry; that by using the yardstick "similar quality and quantity" of production rather than using the yardstick of "comparability conditions of employment" or relying upon the cost of living index in ascertaining the prevailing rates of pay in private industry and by making no deductions for any county conditions of employment in payment of that rate, the actual prevailing rates of pay were as set forth in appendix B attached to the complaint; that by using the yardstick of "comparability of conditions" of employment and relying upon the cost of living index rather than using solely the yardstick of the rate of production ("similar quality and quantity of service") in ascertaining the rate, or by making deductions for conditions of employment when providing for the payment of the rate theretofore ascertained, the board of supervisors in an ordinance set the rates of pay enumerated in appendix A incorporated in the complaint; that the defendants dispute: first, the "criteria" to be employed in ascertaining the prevailing rate of pay in private industry for a particular category of county employee; and, second, the contention that in providing for the payment of the rate so ascertained, no deductions for county conditions of work may be made; and that a justiciable controversy exists between the defendants and plaintiffs.

In a second and third count it is alleged that the county ordinance adopted fixing the county salaries contained classifications and rates of pay not subject to the terms of the charter; that the board was under a continuing duty to re-examine and ascertain the prevailing rates after the adoption of the ordinance and until its effective date; that there was an increase in prevailing rates which the board did not take into consideration; that on December 26, 1950, the board of supervisors passed and adopted a salary ordinance granting to all employees of the county of San Diego a five per cent blanket increase in their salaries and wages effective February 1, 1951, for the balance of the fiscal year 1950–1951; that between June 10, 1950, and December 26, 1950, the salaries of plaintiff were by the use of the yardstick of a "similar quality and quantity" as set forth in appendix B of the complaint; that the board maintains it has discretion to grant inter-annual increases without regard to section 40 of the charter and that this, therefore, constitutes a justiciable controversy.

The prayer of the complaint is that the court declare the meaning of section 4 of the charter as contended by plaintiffs.

[1] It is apparent from the record before us that plaintiffs are attempting to obtain a judgment of the court establishing a rule or "yardstick" which must govern the board of supervisors in fixing the salaries of county employees. Plaintiffs argue that only the judiciary has the power to interpret a charter and that the supervisors do not have the power to interpret the extent of their authority and find the facts accordingly. This contention is without

merit. The fixing of salaries of county and municipal employees is a legislative function. Spencer v. City of Alhambra, 44 Cal.App.2d 75, 77, 111 P.2d 910; City and County of San Francisco v. Boyd, 22 Cal.2d 685, 689, 140 P.2d 666. The determination of whether the rate of compensation fixed by the board of supervisors is not less than the prevailing or general current rate of compensation paid by private employers in the county of San Diego is within the discretion of the board and the courts will not interfere with that determination unless the action taken is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. City and County of San Francisco v. Boyd, supra, 22 Cal.2d 690, 140 P.2d 666. There is no allegation in the second amended complaint that the board of supervisors acted fraudulently, arbitrarily, capriciously, unreasonably or in bad faith, or that there was an abuse of discretion.

Counsel for plaintiffs stated in open court that the board had acted in good faith and that he could not show that there was fraud or an abuse of discretion; that the board acted under misinformation furnished it by the civil service commission and that "My main purpose is to clear up that source of misinformation. I would like once and for all to find out what exactly is the power of the board of supervisors under this charter and upon what they must base their finding."

[2, 3] Plaintiffs concede that the board of supervisors pursuant to the terms of the charter have a fact finding function. The courts will not interfere in the exercise of this function in an action for declaratory relief unless it can be shown that there was an abuse of discretion, fraud, bad faith or unreasonable and arbitrary action. As was said in Hoyt v. Board of Civil Service Com'rs., 21 Cal.2d 399, 403, 132 P.2d 804, 806:

> "It has been held repeatedly that actions for declaratory relief involve matters of practice and procedure only and are not intended in any way to enlarge the jurisdiction of courts over parties and subject-matter. Cf. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000; Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 264, 53 S.Ct. 345, 77 L.Ed. 730; Guaranty Trust Co. of New York v. Hannay, [1915] 2 K.B. 536, 563; see Anderson, Declaratory Judgments (1940), p. 206; Borchard, Declaratory Judgments, 2d Ed. 1941, p. 231."

Section 1060 of the Code of Civil Procedure does not confer upon the courts the power to stop or interfere with administrative proceedings by declaratory decree where it would not, under recognized and settled principles, have interfered with or stopped such administrative proceedings under its power to enjoin. Imperial Mut. L. Ins. Co. v. Caminetti, 59 Cal.App.2d 501, 505, 139 P.2d 691.

In Allen v. Bowron, 64 Cal.App.2d 311, 313, 148 P.2d 673, it was held that a public officer may be compelled by mandate proceedings to perform an act which it is his legal duty to perform, but the court in such proceedings may not control the exercise of discretion on the part of the officer and may not substitute its own discretion for the discretion vested in the officer and that a writ of mandate will not issue to force the discretion in a particular manner.

In Banks v. Civil Service Commission, 10 Cal.2d 435, 74 P.2d 741, the action was brought in both mandate and declaratory relief to compel payment of higher salaries for jailers than those fixed by the board of supervisors in their annual salary standardization ordinance on various grounds of alleged violation and disregard of the statutes prescribing how the board and such a service commission should act. It was there said, 10 Cal.2d at page 442, 74 P.2d at page 744:

" 'Plaintiffs complain that there are some fifty-eight other jailers serving in the city and county of San Francisco, all of whom receive a salary of $197 per month, and only the four plaintiffs are limited to a salary of $170 per month. Apparently this is an inequality of which the plaintiffs may well complain, but the power to fix salaries of persons holding positions like or similar to those held by plaintiffs has been lodged by the charter in the Board of Supervisors. Plaintiffs' remedy lies not with the courts but with the authority upon whom the charter has imposed the duty of fixing the salaries of its officers."

[4] In view of the statements of counsel for plaintiffs made to the court, the pleadings and rules heretofore announced, we conclude that the trial court correctly held that the second amended complaint failed to state facts sufficient to constitute a cause of action for declaratory relief.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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112 Cal.App.2d 122

PEOPLE v. ROOT.

Cr. 2818.

District Court of Appeal, First District, Division 2, California.

June 30, 1952.

Defendant was convicted in the Superior Court, Marin County, Jordan L. Martinelli, J., of violating the statute relating to crimes against children, and he appealed. The District Court of Appeal, Dooling, J., held that the evidence sustained the conviction.

Affirmed.

1. Infants 🔑20

Conviction for violation of statute relating to crimes against children were sustained by the evidence. Pen.Code, § 288.

2. Witnesses 🔑40(2)

In prosecution for violating statute relating to crimes against children, trial judge did not abuse his discretion in permitting testimony of five year old prosecutrix to go before jury, where her testimony on elements of particular offense was positive and unshaken, and was substantially corroborated by that of officer who had witnessed offense. Pen.Code, § 288.

3. Criminal Law 🔑866

Fact that poll taken of jurors, who had announced before dinner that they were hopelessly deadlocked and then returned verdict of guilty, on only one of four counts, within 15 minutes after returning from dinner, developed that jurors were not agreed upon verdicts returned, and that 15 minutes later jury returned same verdicts to which, on being again polled, they all assented, did not demonstrate compromise with regard to such verdicts. Pen.Code, § 288.

4. Criminal Law 🔑1144(15)

Presumption is that jury performed their duty with fidelity to their oath, and this presumption can be overthrown only by showing some act of positive misconduct.

5. Criminal Law 🔑866

Fact that jury found defendant guilty on only one count is not evidence that verdict was result of compromise of any juror's convictions.

6. Criminal Law 🔑863(1)

Where poll of properly instructed jury developed that jurors were not agreed upon verdicts first returned, there was no duty upon judge, in absence of request therefor, to instruct jury again that they were not to compromise their convictions to arrive at any verdict.

7. Criminal Law 🔑957(6)

Verdict could not be impeached by jurors' affidavits that they had been persuaded by foreman to change their votes.

8. Criminal Law 🔑854(1)

Error could not be predicated upon temporary separations of jurors, in absence of showing of improper communication to any juror and in face of affirmative showing that there was none. Pen.Code, § 288.

9. Witnesses 🔑355

Testimony of reputation for morality must be of general reputation, and hence witness to such reputation must, at least, be acquainted with prevailing expression in community, as disclosed by actions, conduct, or conversations relating to character in issue, but it is not necessary that witness testifying should know that majority of community have that impression.

10. Criminal Law ⚷1169(2)

In prosecution for violation of statute relating to crimes against children, there was no prejudicial error in admitting testimony, as to defendant's reputation for morality, by witness who admittedly had discussed such morality with only two persons, where other witnesses whose qualifications were not challenged testified that defendant's general reputation for morality was not good. Pen.Code, § 288.

11. Criminal Law ⚷1036(1)

Defendant could not complain that witnesses' testimony on reputation for morality had not been expressly limited in time to period prior to defendant's arrest on pending charges, in absence of objection on that ground. Pen.Code, § 288.

12. Criminal Law ⚷1037(1)

Prosecutor's argument, to effect that defendant's attorney had not dared to cross-examine people's witnesses to defendant's bad reputation for morality to ascertain sources of their knowledge of such reputation, was not of such character that, if misconduct, admonition at time would not have cured it, and therefore error could not be predicated upon such argument where defendant had permitted it to go unchallenged. Pen.Code, § 288.

13. Criminal Law ⚷729

In prosecution for violation of statute relating to crimes against children, error could not be predicated upon prosecutor's argument that prosecutrix had been doing "these things" with defendant for so long that defendant did not have to tell her what to do on the occasion when an officer was concealed at the scene of the offense, where such statement was a reasonable conclusion from the child's testimony on cross-examination that she had engaged in similar conduct "lots of times" with defendant, and where prosecutor withdrew such statement upon objection. Pen.Code, § 288.

14. Criminal Law ⚷730(11)

In prosecution for violation of statute relating to crimes against children, error could not be predicated upon prosecutor's argument that while he could not bring out what children involved had told their mothers, but only fact that they had made complaints, defendant's counsel could have done so on cross-examination but did not dare because it would have been too damaging, where, upon objection, prosecutor asked that such statement be disregarded and court so instructed jury. Pen.Code, § 288.

15. Criminal Law ⚷1037(1)

In prosecution for violating statute relating to crimes against children, prosecutor's argument suggesting that if defendant's conduct with children had been allowed to continue he might develop a fear of discovery and "What would have happened to (these children) if this thing had not been stopped?", was perhaps unduly calculated to inflame jurors' minds, but its effect could have been cured by timely admonition, if attention of trial court had been directed to it, and therefore error could not be predicated upon such argument, in absence of timely objection. Pen. Code, § 288.

16. Criminal Law ⚷1037(1)

Except in very extreme cases, where no admonition to jury could undo damage, counsel waives his right to claim misconduct on appeal by failing to take any action in trial court. Pen.Code, § 288.

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A. E. Bagshaw, San Rafael, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Dep. Atty. Gen., Wallace Colthurst, Dep. Atty. Gen., William O. Weissich, Dep. Dist. Atty. of Marin County, San Rafael, for respondent.

DOOLING, Justice.

Defendant was accused of four violations of Penal Code sec. 288 and was found not guilty on three counts and guilty on one count. Three of such offenses, including the one on which defendant was found guilty, were alleged to have been committed with a little girl between five and six years old. To the other alleged offenses there was no eye-witness except the child involved but in the case of the count on which defendant was found guilty, because of a prior complaint of the little girl to her mother, a police officer, Giampoli, had concealed himself in defendant's basement and the little girl's testimony was corroborated by Giampoli to the extent of his observation of the conduct of the defendant with her.

On that occasion defendant was working in his garden when the little girl entered it and asked defendant for some bubble gum. Giampoli testified that he heard defendant answer her: "I will get you some bubble gum; come with me first." Defendant took the child's hand and led her into the basement while Giampoli was concealing himself behind a water heater. Defendant sat on a barrel in the basement with his back toward Giampoli. He was dressed only in swimming trunks—in which he was accustomed to work in his garden—and shoes. From his place of concealment Giampoli could see defendant from his waist up. The child was facing defendant leaning against one of his legs. Defendant placed his left arm around the child's shoulders "and I heard Mr. Root moaning low, in a low tone, and then the child was wriggling and squirming in his arm, and I heard Mr. Root say as he looked toward the door, 'You won't tell anybody, will you?'" Giampoli could not see the child's hands. He approached defendant from the rear and told him that he was under arrest.

The child testified that she had put her hand under defendant's trunks upon the most intimate part of his body, using a childish word that her mother testified she always used to indicate that part.

The evidence is recited in this detail because appellant urges with great earnestness that it was not sufficient to support the finding of guilt.

[1] The evidence of the child was explicit and, although the officer could see only a portion of the bodies of the actors, what he did observe was significant. The evidence was amply sufficient if believed to support the verdict. That the child in demonstrating the position which she occupied on that occasion sat upon the attorney's knees with her back to him would be a factor for the jury to consider but, in view of the officer's testimony that she was facing the defendant, at most it created a conflict in the evidence for the jury to resolve.

[2] The child gave testimony that reasonably satisfied the trial judge that she appreciated the nature of an oath and was qualified to receive just impressions and relate accurately what had occurred. Her childish conduct and her inability or refusal to answer many questions might well affect the weight to be given to her testimony by the jury which observed it. Their reaction to these observations may have resulted in their verdicts of not guilty on the counts as to which there was no other witness. On the elements of the particular offense her testimony was positive and unshaken, and substantially corroborated by that of the officer. We cannot be unconscious of the dangers inherent in receiving the testimony of a child as young as this one, particularly in a case of this character, but reviewing her entire testimony we are satisfied that the trial judge did not abuse his discretion in permitting her testimony to go before the jury. People v. Arcia, 85 Cal.App.2d 127, 129, 192 P.2d 31; People v. Gibbons, 83 Cal.App.2d 504, 189 P.2d 37; People v. Ash, 70 Cal.App.2d 583, 161 P.2d 415.

[3–5] The jury after deliberating for over an hour and one-half returned into court and reported that they were hopelessly deadlocked. This was about 6:45 p. m. and the judge asked them to deliberate further and sent them out to dinner. They returned from dinner at approximately 8:45 p. m. and in 10 or 15 minutes announced that they had reached a verdict. The verdicts were not guilty on three counts and guilty on the one. On being polled two jurors announced that the verdict of guilty was not their verdict and three announced that the three verdicts of not guilty were not theirs. The attorney for defendant thereupon moved the court to discharge the jury on the ground that it was obvious that the jurors were trying to compromise their verdict. This motion was denied, and fifteen minutes later the jury returned the same verdicts to which on being again polled they all assented.

We cannot agree with appellant that these facts demonstrate that the verdicts were the result of a compromise. "The presumption is that the jury performed their duty with fidelity to their oath * * * and this presumption can be overthrown only by showing some act of positive misconduct." People v. Eggers, 30 Cal.2d 676, 691, 185 P.2d 1, 8. The fact that the jury found the defendant guilty on only one count is not evidence that the verdict was the result of a compromise of any juror's convictions, People v. Stangler, 18 Cal.2d 688, 696, 117 P.2d 321; People v. Taylor, 88 Cal.App.2d 983, 987, 199 P.2d 751; People v. Christensen, 32 Cal.App.2d 380, 89 P.2d 1095 and it is, perhaps, significant that the count on which appellant was found guilty was the only one in which the testimony of the child had the corroboration of another witness.

[6, 7] Appellant argues now that after the poll developed that the jurors were not agreed upon the verdicts returned the judge should have instructed the jury again that they were not to compromise their convictions to arrive at any verdict. He made no such request in the trial court simply commenting when the judge directed the jury to resume its deliberations: "I prefer to let my objection stand."

No complaint is made that the jurors had not been properly instructed as to their duties when the case was given to them and we are not persuaded that any duty rested on the trial judge on his own motion to give them any further instructions.

Affidavits of jurors that those voting not guilty were persuaded by the foreman to change their votes to guilty on one count while jurors voting guilty changed theirs to not guilty on the other three were submitted on motion for new trial. Appellant concedes in his brief on appeal that the verdict could not be impeached by the jurors in this fashion.

At the time the jurors went to dinner one woman juror went to the women's rest room in the eating place and after dinner another did so. In the second instance the bailiff left the other eleven jurors on the sidewalk briefly while he went in search of the absent one. After the jury returned to the court house from dinner one juror separated from the rest long enough to telephone home that he would be delayed. These separations were for brief periods and there is no showing of any improper communication to any juror and affirmative showing that there was none.

[8] Bystanders submitted affidavits that after their return to the court house several jurors at one time were absent but this fact was contradicted by other affidavits. The law requires the jurors to be kept together once their deliberations have commenced and on a showing even suggestive of any improper communication to any juror we might feel it our duty to reverse, but mere casual and temporary separations have frequently been held not prejudicial where there was in fact no improper communication with any juror. People v. Martin, 87 Cal.App.2d 581, 590, 197 P.2d 379; People v. Truesdell, 124 Cal.App. 360, 367, 12 P.2d 476; People v. Calvert, 93 Cal.App. 568, 573, 269 P. 969; People v. Murphy, 92 Cal.App. 729, 268 P. 927; People v. Knight, 63 Cal.App. 63, 68, 218 P. 79.

Defendant introduced evidence of his good reputation for morality. One witness called by the prosecution in rebuttal was permitted to testify that his reputation for morality in the community where he lived was "below average". On his voir dire the witness stated that he had discussed defendant's morality with only two persons. This witness admitted that he told counsel for defendant that he did not know defendant's reputation for that quality and further: "To include a man's general reputation I think I would have to be much more familiar than I am with the people living in San Quentin Village and perhaps get all sides of the picture; I do not have such a complete picture."

[9–11] In the answer just quoted the witness showed a good understanding of the meaning of general reputation. Such testimony must be of the general reputation, "(h)ence the witness to such reputation must at least be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue, although it is not necessary that the witness testifying should know that the majority of the community have that impression." People v. Cord, 157 Cal. 562, 572, 108 P. 511, 515; 5 Wigmore on Evidence, 3d Ed., secs. 1611–1613, pp. 481–484. It has been specifically held in other jurisdictions that conversations with no more than one or two persons on the subject are not enough. Commonwealth v. Rogers, 136 Mass. 158; State ex rel. Seeburger v. Pickett, 202 Iowa 1321, 210 N.W. 782. However other witnesses whose qualifications were not challenged testified that appellant's general reputation for morality was not good and we do not on the whole case believe that the error in admitting the cumulative testimony of this single witness on the collateral issue of the defendant's reputation for morality amounted to prejudicial error. Appellant cannot complain that the testimony of this witness was not expressly limited in time to the period before his arrest on the pending charges since no objection was made on that ground.

[12] Appellant assigns several instances of alleged misconduct in the prosecutor's argument to the jury. 1. A comment of the prosecuting attorney that appellant's attorney did not dare to cross-examine the people's witnesses to appellant's bad reputation for morality to ascertain the sources of their knowledge of such reputation. At the trial counsel for appellant permitted this argument to go unchallenged and it is not of such a character that, if misconduct, an admonition at the time would not have cured it.

[13] 2. A statement that the child had been doing these things with appellant for so long that appellant did not have to tell her what to do on the occasion when the officer was concealed in his basement. Upon objection the prosecutor withdrew this statement, although it was a reasonable conclusion from the child's testimony on cross-examination that she had engaged in similar conduct "lots of times" with appellant before she went to Portland, some months prior to the date of the occurrence in the basement.

[14] 3. A statement that while the people could not bring out what the children involved told their mothers but only the fact that they made complaints appellant's counsel could have done so on cross-examination but he did not dare because they would have been too damaging. Upon objection the prosecutor asked that this statement be disregarded and the court so instructed the jury.

[15, 16] 4. A statement, to which appellant's counsel made no objection at the time, suggesting that if appellant's conduct with the children had been allowed to continue he might develop a fear of discovery and "What would have happened to (these children) if this thing had not been stopped?" This statement was perhaps unduly calculated to inflame the jurors' minds but if so counsel should not have let it pass without objection. Except in very extreme cases, where no admonition to the jury could undo the damage, counsel waives his right to claim misconduct on appeal by failing to take any action in the trial court. People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881. We cannot hold that the effect of the argument now objected to, if improper, could not have been cured by a timely admonition if the attention of the trial court had been directed to it.

The judgment of conviction and the order denying a new trial are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

112 Cal.App.2d 16

In re JACKSON'S ESTATE.

PEIRSON et al. v. BARLOW.

Civ. 15208.

District Court of Appeal, First District,
Division 2, California.
June 25, 1952.

The Superior Court of Alameda County, James R. Agee, J., held that when a man and woman cohabited without marriage, both knowing that legal marriage was impossible, property to which they took title as joint tenants was subject to distribution on death of the woman, who survived the man, as community property, and the woman's heirs appealed. The Court of Appeal, Nourse, P. J., held that there was no putative marriage and no estoppel against the woman's heirs.

Reversed.

1. Husband and Wife 🔑248

Where man and woman cohabit without marriage, both knowing that legal marriage is impossible, property to which they take title as joint tenants, while so living together is not subject to distribution on death of survivor as community property. Probate Code, § 228.

2. Marriage 🔑54

Belief in good faith that valid marriage existed is essential to create a "putative marriage".

See publication Words and Phrases, for other judicial constructions and definitions of "Putative Marriage".

3. Descent and Distribution 🔑11

Joint Tenancy 🔑6

Where man and woman, cohabiting with knowledge that marriage was impossible, took title to property in joint tenancy without agreement that property should be held as community, property vested in woman upon man's death, by right of survivorship rather than inheritance, and hence on woman's death it vested in her heirs exclusive of his heirs.

4. Estoppel 🔑58

Estoppel is based on reliance and injury, and one party must have made representations or done some act which other party has innocently relied on to his injury.

5. Estoppel 🔑92(3)

Husband and Wife 🔑265½

Where man and woman lived together for 14 years, both knowing that marriage was impossible, and there was no showing of misrepresentations or acts of woman relied on by man to his injury, or that man derived less benefit from the relation than woman, there was no estoppel against denying that property taken by them as joint tenants was community property or against woman's heirs asserting woman's title as survivor. Probate Code, § 228.

Dudley H. Nebeker, Andrew P. Costelli, Oakland, for appellants.

Glickman, Orr & Heuring, David I. Wendel, Oakland, for respondent.

NOURSE, Presiding Justice.

[1] The question presented is—when a man and a woman cohabit without marriage, both knowing that a legal marriage is impossible, is the property acquired by them while so living together, title to which is taken as joint tenants, subject to distribution on the death of the survivor as community property under section 228 of the Probate Code. The answer is in the negative.

[2] There was no putative marriage because both parties were fully aware that a marriage was impossible and that their cohabitation was illegal. Belief in good faith that a valid marriage existed is essential to create a putative marriage. Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761.

[3] There is no evidence that when the parties took title to the property in joint tenancy they did not fully understand what they were doing. Nor that there was any agreement between them at the time of title, or subsequently, that the property should be held as community, nor as otherwise than as stated in the document. When Willie Jackson died the property then vested in Hazel by right of survivorship—not by inheritance. For this reason, on the death of Hazel, the property vested in her heirs exclusive of the heirs of Willie

Jackson and it should be distributed as her separate estate.

Section 228 of the Probate Code is confined to the interests of a "spouse", or "predeceased spouse". If there has been no marriage there can be no "spouse", nor a "predeceased spouse".

[4, 5] Respondent relies heavily on the issue of estoppel. The primary elements of an estoppel are not present. Estoppel is based on reliance and injury. It is essential that one of the parties has made representations, or has done some act, which the other party has innocently relied on to his injury. Here it is conceded that both parties knew that the marriage relation was illicit. No misrepresentation and no acts of Hazel were relied on by Willie to his injury. He presumably entered into the relation willingly since the parties lived together for some fourteen years, knowing that they could not contract a legal marriage. There is no evidence, and no reason to infer, that Willie derived less benefit from the relation than Hazel did. But in any event there is a total absence of facts supporting the plea of estoppel. See generally 19 Am.Jur. p. 730; 31 C.J.S., Estoppel, § 59 et seq., p. 236.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

GOODMAN et al. v. HARRIS et al.*

Civ. 15084.

District Court of Appeal, First District,
Division 1, California.

June 16, 1952.

Rehearing Denied July 16, 1952.

Hearing Granted Aug. 14, 1952.

Action by Arthur Ralph Goodman and others against E. L. Harris and others for death of one motel guest and permanent injury to another as a result of excessive carbon monoxide fumes from a defective butane gas heater. The Superior Court in and for the City and County of San Francisco, Alvin E. Weinberger, J., entered a judgment of nonsuit as to defendant Public Gas and Electric Company and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that the evidence established a prima facie case against owner of premises leased for operation of a motel.

Judgment reversed.

1. Trial 🔑159, 165

A motion for nonsuit operates as a demurrer to the evidence and can be properly granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from such evidence, there is no substantial evidence to support a verdict for plaintiff.

2. Landlord and Tenant 🔑164(6), 167(8)

Generally a landlord has no duty to make premises safe for tenants or their invitees or licensees, except as to hidden defects which were known or should have been known to landlord, but where premises are leased for public or semipublic purposes, landlord owes a duty directly to patrons of leased premises to see to it that they are reasonably fit for the purpose for which the property is leased and must exercise reasonable care to inspect and repair premises before possession is transferred so as to prevent unreasonable risk of harm to the public.

3. Landlord and Tenant 🔑167(8)

Premises leased for operation of a motel constituted a "public or semipublic place" within meaning of rule that landlord owes a duty directly to patrons of premises leased for public or semipublic purposes to see to it that they are reasonably fit for such purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Public or Semipublic Place".

4. Landlord and Tenant 🔑167(7)

A landlord is not liable for damages caused by defective personalty brought on leased premises by tenant, where the condition does not amount to a nuisance and landlord does not have actual or constructive knowledge of the condition.

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* Subsequent opinion 253 P.2d 447.

5. Landlord and Tenant ⚷105

Using a cabin equipped with unvented and otherwise defective butane gas heater for sleeping purposes in connection with operation of a motel on leased premises constituted a nuisance within meaning of lease provision prohibiting tenants from maintaining a nuisance on the premises. Health and Safety Code, § 18470.

6. Landlord and Tenant ⚷167(8)

Landlord was under a duty to inspect premises leased for operation of a motel at time lease was executed, though tenants were already in possession under sublease from assignee of prior lease which had been assigned without landlord's consent and terminated by landlord before execution of new lease.

7. Innkeepers ⚷15

Use of an unvented butane gas heater in a motel is unlawful. Health and Safety Code, § 18470.

8. Landlord and Tenant ⚷167(8)

Where cabin which was equipped with unvented butane gas heater and did not comply in other respects with law governing motels was designed for use in connection with operation of a motel on leased premises and, though not used generally for overnight occupancy, was used for sleeping purposes for other guests, landlord was required to anticipate that cabin might be used for activities connected with or in aid of the main business. Health and Safety Code, §§ 18402, 18409, 18410, 18470.

9. Landlord and Tenant ⚷167(8)

A feeder pipe from gas storage tank, which entered cabin on premises leased for operation of a motel through wall opposite to that in which a vent was located, constituted an implied invitation by landlord to tenant to install a gas heater in cabin at a place where it could not reasonably be vented. Health and Safety Code, § 18470.

10. Landlord and Tenant ⚷169(11)

Evidence that landlord at time lease was executed knew or should have known that butane gas heater previously installed by tenants in cabin designed for use in connection with operation of motel on leased premises was unvented and otherwise obviously defective and that such cabin might and probably would be used for sleeping purposes established a prima facie case sufficient to avoid a non-suit in action against landlord for death of one occupant of cabin and permanent injury to another as a result of excessive carbon monoxide fumes from heater. Health and Safety Code, § 18470.

Belli, Ashe & Pinney, Melvin M. Belli, Betsy Fitzgerald Rahn, San Francisco, for appellants.

Robert H. Gerdes, Frederick W. Mielke, Jr., San Francisco, for respondent.

PETERS, Presiding Justice.

The defendants Harris operated a restaurant, garage and tourist court near Emigrant Gap on property owned by and leased from the defendant Pacific Gas & Electric Company. Arthur Ralph Goodman, Jr., and plaintiff Janet McCrum occupied adjoining rooms in a cabin located on that property, and heated by a defective butane gas heater. As a result of excessive carbon monoxide fumes given out by the heater, both were asphyxiated, Goodman dying and Janet McCrum being permanently injured. The heirs at law of Goodman and Janet McCrum brought this action against the Harrises, and the P. G. & E. to recover damages for the death of Goodman, and for the injuries to Janet. At the close of plaintiffs' case, a motion for a nonsuit was granted as to the P. G. & E., and a judgment of nonsuit entered. A settlement was effected between the plaintiffs and the Harrises. Plaintiffs appeal from the judgment of nonsuit entered in favor of the P. G. & E.

[1] A motion for a nonsuit operates, of course, as a demurrer to the evidence. Such a motion can be properly granted only when, disregarding conflicting evidence and giving to plaintiffs' evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, it can be said that there is no substantial evidence to support a verdict for plaintiffs, had such

been rendered. Tested by these standards, we believe that it was error to have granted the motion in the instant case.

The facts, and the reasonable inferences therefrom, most favorable to plaintiffs are as follows:

The premises in question, owned by the P. G. & E., are located near Emigrant Gap in the Sierra Nevada Mountains. In 1939 these premises, then vacant, were leased to one Hinman for a term of ten years at a progressive rental, the lease providing that Hinman could construct improvements, and that any improvements not removed at the expiration of the term should belong to the P. G. & E. In due course, various improvements were constructed on the premises, consisting of a restaurant, a commercial garage, two log siding cabins, three so-called "streetcar" cabins, a house with a prominent sign reading "Cabins $2.50 and Up," a pump house and a water tower. The Hinman lease was assigned to Dahl and Allen who, in turn, assigned to Green. Green sublet the property to the Harrises in December, 1946. The company had not consented to the assignment of the lease to Green. Green attempted to secure a direct lease from the P. G. & E. That company then discovered that the Harrises were in fact operating the property, and had already purchased some of the equipment located on the premises. The company decided to deal directly with the Harrises. On February 10, 1947, it secured a quitclaim of their interest in the lease from Dahl and Allen, such quitclaim being effective as of December 31, 1946. On April 3, 1947, the company executed a written lease to the Harrises to run from March 1, 1947, for a period of one year. Between December, 1946, and March 1, 1947, the Harrises paid rent to Green; thereafter they paid it to the P. G. & E. under this lease. This lease, among other things, prohibited the tenant from conducting a nuisance on the property, gave the lessor a right of entry at all times to inspect, imposed the duty on the tenant to keep in repair all buildings on the premises, and upon termination to surrender them to the lessor in good repair. This lease expired on March 1, 1948, and thereafter the Harrises continued to hold over upon a month-to-month tenancy, pursuant to a hold over clause in the lease. They were so holding on February 2nd and 3rd, 1949, the critical dates here involved. The evidence shows that the P. G. & E. had actual notice that the Harrises were using the premises for motel purposes.

The accident here involved occurred in a two-room streetcar cabin. Just when these cabins were constructed on the property is not very clear. Apparently they were built by Hinman or one of his subsequent assignees. It is perfectly clear that they were constructed before December, 1946, when the Harrises first came on the property as subtenants of Green, and so, of course, were there when the lease to the Harrises was executed on April 3, 1947. Under the terms of the Hinman lease, since these buildings were not removed at the termination of that lease, they became the property of the P. G. & E.

It is an admitted fact that the death of Goodman and the injuries to Janet McCrum occurred by reason of the operation of a butane heater in one of the streetcar cabins. This heater was installed by the Harrises before they leased the property from the P. G. & E. It was in the cabin in question when that lease was executed, and was apparently installed in January, 1947, during the period the Harrises were paying rent to Green. This heater was unvented, and was connected to the premises by a feeder pipe leading from a large butane storage gas tank. The gas tank was installed prior to the time the Harrises took possession of the property. From this storage tank a feeder pipe led to the cabin in question, the feeder pipe leading into the cabin on the wall opposite from that in which a vent was located. The heater in question was not only not vented, but was so constructed that it could not be vented. The heater was defective in that it lacked the fire clay grillwork or radiants designed to heat up and cause complete combustion of the gasses generated during operation.

The accident happened under the following circumstances: Goodman, the decedent, and Janet McCrum, had been skiing in the Sierras. While returning to Oakland, their automobile broke down and they were towed to the Harrises' place at Emigrant Gap. They arrived there during the evening of February 2, 1949. Both were very tired. They had something to eat and fell asleep at the table. They were then told that the automobile could not be repaired until the next morning. Mrs. Harris then asked them if they wanted a cabin. Janet told her that they were not married, and Mrs. Harris replied that the only available space was these adjoining rooms in the streetcar cabin. It was now after midnight. They agreed to take these rooms. Mrs. Harris preceded them to the cabin, lit the butane heater, and turned it on almost full force. The windows and door of the cabin were closed. A snowstorm approaching blizzard proportions was raging. The couple then went to the cabin. The heater was burning in the room assigned to Janet McCrum. She went into her room, took off her ski boots, and lay down on the bed. The decedent came into her room, tried to open the windows, operated like streetcar windows, was unsuccessful, and commented to her upon his inability to open them. Decedent also tried to open the outside door, but the blizzard blew the door open and so he shut it. He then went to bed. The heater was then on, the temperature being about zero. The next morning, February 3, 1949, decedent was found dead in his bed and Janet was found upon the floor, unconscious. She has suffered permanent and serious injuries from this experience.

Some reference should be made to the inspection, or lack thereof, by the P. G. & E. The evidence shows little or no effort exercised by the P. G. & E. to ascertain if the premises were being safely operated. The P. G. & E. knew that they were being used as a motel, although there is no evidence that the P. G. & E. knew that this particular cabin was so used. There is some evidence, or inferences therefrom, that the P. G. & E. inspected the premises when the lease to the Harrises was executed, in order to ascertain if the premises were being properly and safely operated. There was some kind of inspection by company officials in 1948, when the P. G. & E. was engaged in a controversy over boundaries. There is ample evidence that P. G. & E. employees, probably surveyors, were in and out of the premises frequently.

The premises were also inspected by an inspector of the state division of housing in May or June, 1948. The tenants were then told by this inspector that the particular cabin here involved did not comply with the state law applicable to motels, could not be rented for overnight occupancy, but could be rented by the week or the month. Apparently this was predicated on the fact that this streetcar cabin was deficient in cubic foot area as required by law, was not constructed so as to comply with law, the window space was deficient, and there were no drains as required by law. See Health and Safety Code, §§ 18402, 18409, 18410. Apparently the cabins were not thereafter generally used for overnight occupany, but were used by friends of the Harrises and others.

On this evidence the trial court came to the conclusion that the accident happened because of the heater, that the heater was part of the furnishings, that there was no duty upon the landlord to patrons to inspect the personal furnishings of the tenants, and for that reason granted the nonsuit.

[2] There is but little dispute as to the applicable law. The general rule is that the landlord has no duty to make the premises safe for tenants or their invitees or licensees. The rule of *caveat emptor* applies, and except for hidden defects known (or which should have been known) to the landlord he is under no obligation to see to it that the premises are safe. But to this rule there is a well-settled exception. When premises are leased for public or semi-public purposes, the landlord owes a duty directly to the patrons of the leased premises to see to it that they are reasonably fit for the purposes for which the property is leased. This exception to the rule was stated as follows in Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 453, 164 P.2d 897, 899: "A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect

and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter." This rule has been applied to various factual situations. In the Burroughs' case the landlord was held liable to a parking lot patron who fell into an unguarded areaway adjoining the premises. The parking lot, although equipped by the landlord with adequate floodlights, was inadequately lighted at the time of the accident because of a dim out ordinance. This ordinance was passed after the original lease was executed, and was in effect when that lease was renewed. It was held that the landlord owed a direct duty to patrons for the condition of the premises when the lease was renewed, because at that time he had a right of re-entry and a duty to inspect.

In Hayes v. Richfield Oil Corp., 38 Cal. 2d 375, 240 P.2d 580, a parking lot patron fell into an open grease pit located near the parking area. There were adequate lights, but the tenant had turned them off. The landlord was held liable. The unguarded grease pit was a hazard, and the landlord was under a duty to patrons to anticipate that the tenant might not keep the area lighted.

See, also, King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559; Boothby v. Town of Yreka City, 117 Cal. App. 643, 4 P.2d 589; Fletter v. City & County of San Francisco, 110 Cal.App.2d 820, 244 P.2d 59; Rau v. Redwood City Woman's Club, 111 Cal.App.2d 546, 245 P. 2d 12; Annotation, 123 A.L.R. 870; Restatement of Torts, § 359, and comment "e"; 32 Am.Jur., § 666, p. 532 et seq.; 52 C.J.S., Landlord and Tenant, § 422(2), p. 77; Prosser on Torts, p. 653; 50 Harv. L.Rev. p. 740; 62 Harv.L.Rev. 669; 84 Univ. of Pa.L.Rev. 467; 100 Univ. of Pa. L.Rev. 629.

[3] There can be no doubt that, if an ordinary gas station with a small parking place is a public or semipublic place within the meaning of this rule, an establishment such as is here involved is also a public or semipublic place. The P. G. & E. makes no contention to the contrary. It is its position that the injury occurred by reason of the defective heater, that the heater was personalty belonging to the tenant, and that the landlord is not liable for the condition of defective personalty brought on the premises by the tenant. It was on this theory that the trial court granted the nonsuit.

[4–8] Undoubtedly, where the condition does not amount to a nuisance, and the landlord does not know actually or constructively of the condition, he is not liable for damages caused by defective personalty brought on the premises by the tenant. Manning v. Leavitt Co., 90 N.H. 167, 5 A. 2d 667, 122 A.L.R. 249. But this personalty rule cannot be used to exonerate the landlord in the instant case. Under the lease the landlord retained a right of entry for the purpose of inspection. Under the lease the tenants were prohibited from maintaining a nuisance, and the condition here existing certainly constituted a nuisance. The heater was installed without a vent before the lease was executed, and was otherwise defective. The landlord was under a duty to inspect at that time. Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 164 P.2d 897. Even the most casual inspection would have disclosed that this heater was unvented, and not properly equipped with radiants. While this heater was not designed for a vent, it is unlawful to use such a heater in a motel. § 18470, Health and Safety Code. While the Harrises were not using this cabin, generally, for overnight occupancy, the evidence does show that it was used for sleeping purposes for other guests. It was designed for use in connection with the operation of the premises, and even if this was only an incidental use, the landlord is required to anticipate that the premises might be used "for activities connected with or in aid of the main business." Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580, 583. The cabin did not comply with the law in various respects so far as motels are concerned.

[9, 10] There is another factor of great importance. The evidence shows that when the Harrises first came on the property in December of 1946, the butane tank was already installed, and so were the feeder pipes. This installation consisted of a large storage tank with feeder pipes leading to

the various places of use. One such feeder pipe led from the storage tank to the streetcar cabin here involved. It entered that cabin on the wall opposite to where the vent for that room existed. It ended at the point of entrance. The landlord owned, or was responsible for, this equipment. It is a reasonable inference that a pipe obviously intended for gas heat, and so located, constituted an implied invitation by the landlord to the tenant to install a gas heater there, at a spot where it could not reasonably be vented. When this is coupled with the fact that the heater was installed when the lease was executed, that the landlord then knew, or should have known, that it was unvented and otherwise defective, and the landlord knew, or should have known, that the cabin could and probably would be used for sleeping purposes, it seems quite clear that the plaintiffs have established a prima facie case sufficient to avoid a nonsuit. The evidence, and the reasonable inferences therefrom, establish a prima facie case of a duty owed by the P. G. & E. to the plaintiffs, a violation of that duty, and proximate cause. Under such circumstances, it was error to grant the nonsuit.

The judgment appealed from is reversed.

BRAY and GOODELL, JJ., concur.

In re SARGAVAK'S ESTATE.

KURKJIAN et al. v. OHANNESON et al.[*]

Civ. 18869.

District Court of Appeal, Second District,
Division 2, California.
June 19, 1952.

Rehearing Denied July 14, 1952.
Hearing Granted Aug. 14, 1952.

Proceedings in the matter of the estate of Ruby Sargavak, also known as Rebecca Sargavak, deceased, wherein H. Kurkjian and others filed petition for order to determine heirship for purpose of construing the meaning of a codicil which had been admitted to probate. J. G. Ohanneson and Samuel G. Mahdesian filed separate answers and statements of claim. The Superior Court, Los Angeles County, Joseph W. Vickers, J., adjudged that the codicil disposed of testatrix's estate one-half to J. G. Ohanneson and one-half to Samuel G. Mahdesian and petitioners appealed. The District Court of Appeal, McComb, J., held that trial court's decision was in accordance with Supreme Court's decision on a former appeal which was the ruling law of the case.

Affirmed.

1. Appeal and Error 🔑1097(1)

Where questions presented on a subsequent appeal were necessarily involved in a former appeal, and conclusions reached on former appeal could not have been reached without deciding question subsequently urged, decision on former appeal is ruling law of case throughout all subsequent stages.

2. Wills 🔑392

Where Supreme Court, on appeal, affirmed order admitting holographic document to probate as a codicil and in so doing determined that codicil made an unequivocal disposition of decedent's property to two persons named therein, such decision became the law of the case which was properly followed by probate court on subsequent petition for order to determine heirship for purpose of construing meaning of codicil.

3. Wills 🔑488

Holographic instrument addressed "to whom it may concern" and stating that writer was acting of her own free will without urging from anyone and that she "leaves everything she has" to two named persons and that she gives them power of attorney to divide what is left of her belongings "to them" was unambiguous and disclosed testamentary intent so that extrinsic evidence of circumstances surrounding execution of instument could not be considered, notwithstanding that instrument also contained nontestamentary provisions.

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[*] Subsequent opinion 259 P.2d 897.

Cameron & Perkins; William Kinley; Simpson & Wise, Long Beach, by William Kinley and George E. Wise, Long Beach, for appellants.

C. W. Byrer and Charles E. Hobart, Los Angeles, for J. G. Ohanneson.

Robert M. Dulin, Beverly Hills, Spurgeon Avakian, Oakland, and Melvin E. Fink, Los Angeles, for Samuel G. Mahdesian.

McCOMB, Justice.

From an order determining heirship and an interest in the estate of Rebecca Ruby Sargavak, deceased, petitioners appeal.

Facts: Decedent, who died March 22, 1947, left the following holographic will:

> "1566 W–29th St.
> Los Angeles 7, Cal.
> Sep. 29, 1946
> Sunday Evening
>
> To Whom It May Concern:
>
> I the writer—Mrs. Ruby Sargavak wants everyone to know that she is writing these lines of her own free will—no one is putting her ~~of~~ or urging her to do it. She leaves everything she has to her Boy Sam Mahdesian & her layer, J. G. Ohanneson—she gives them power of Attorney to divide what is left of her Belongings to them. She specially advises to give nothing whatsoever to Mrs. Lillian Shooshan —she is no relation nor friend of hers —Mrs. Sargavak has been more than kind to her, just because she begged us to help her for a little time—Mrs. Sargavak would rather help her very own nieces & grand nieces & perfect strangers, who are truly in need of help. God has been good to us, she did not appreciate the goodness of the Lord to her. All honor & glory unto his High and Holy Name.
>
> Mrs. Ruby Sargavak"

The above document was offered for probate as a codicil to a former will executed by decedent on July 9, 1945. The former will had disposed of her property to certain named friends and relatives, and the beneficiaries thereof contested the admission of the codicil to probate on the ground that it was not intended as a testamentary document. The trial court found for the proponent Ohanneson and admitted the instrument to probate as a codicil. This order was affirmed by the Supreme Court. (In re Sargavak's Estate, 35 Cal.2d 93, 216 P.2d 850, 21 A.L.R.2d 307.)

Thereafter appellants herein, nephews and nieces of decedent who are her heirs at law, filed a petition for order to determine heirship for the purpose of construing the meaning of the codicil. Respondents J. G. Ohanneson and Samuel G. Mahdesian each filed a separate answer and statement of claim alleging that by the codicil decedent made a full and complete disposition of her estate whereby one half was devised and bequeathed to Ohanneson and one half to Mahdesian.

At the hearing of the heirship petition respondents objected to introduction of any testimony by petitioners and moved to exclude testimony on the ground there was no issue of fact to be determined concerning the interpretation of the codicil because there was no ambiguity in the instrument and nothing was to be explained by extrinsic evidence. The court sustained this view and found the codicil revoked the former will except as to the meaning of Mahdesian as executor and adjudged that the codicil devised and bequeathed decedent's estate one half to each of respondents.

Questions: First: *Did the trial court err in interpreting the codicil above set forth to mean that decedent left one half of her estate to each of the respondents?*

[1, 2] *No.* Where questions presented on a subsequent appeal were necessarily involved in a former appeal, and the conclusion reached on the former appeal could not have been reached without expressly or impliedly deciding the question subsequently urged, the decision on the former appeal is the law of the case and rules throughout all subsequent stages of the action. (Kirman v. Borzage, 89 Cal. App.2d 898, 900 [2], 202 P.2d 303.) This rule is applicable in the instant case.

On the former appeal (Estate of Sargavak, Supra), at page 100 et seq., of 35 Cal.2d, at page 854 of 216 P.2d the Supreme Court said: "If it (the codicil) was intended as contestants assert, only as a notification to Mrs. Shooshan and her daughter that decedent 'didn't want them to be in her will at all', the testimony offers no explanation for the statement that 'She leaves everything she has to her Boy Sam Mahdesian & her *layer* J. G. Ohanneson.' Nothing in the evidence before the trial court clearly negatives the testamentary implication carried by those words. The impulse that prompted decedent to exclude Mrs. Shooshan from any share in her estate does not dispel the inference that at the same time she directed the disposition of her property to the two men who had served her and her husband as friends, counsel, and business advisers. * * * It cannot be said that it is unreasonable upon this evidence to conclude that Mrs. Sargavak, angered and harrassed by Mrs. Shooshan, *decided to leave her property to two men she had known for more than forty years and for whom she had demonstrated a warm personal affection. This purpose is clearly expressed by the terms of the instrument.*" (Italics added.)

In determining whether the codicil was written with a testamentary intent, the Supreme Court necessarily considered whether or not the instrument was ambiguous, and held the codicil was not ambiguous and made an unequivocal disposition of decedent's property to respondents. Therefore the decision of the court became the law of the case and probate court properly followed the decision in entering its decree.

Second: *Did the trial court commit prejudicial error in refusing to admit testimony of the circumstances surrounding the execution of the codicil in support of appellants' argument that the codicil contained ambiguities?*

[3] *No.* There is nothing ambiguous in the language of the instrument under consideration. It is addressed "To Whom It May Concern," and the writer begins by saying she "wants everyone to know that she is writing these lines of her own free will," that no one is urging her to do it. This is clearly language which a lay person might use in stating that she was not acting under undue influence. Next she states she "leaves everything she has" to her boy Sam Mahdesian and her lawyer, J. G. Ohanneson. The testatrix could hardly have expressed a testamentary disposition in any plainer language. She gives them power of attorney to divide what is left of her belongings "to them." The latter two words could refer only to Mahdesian and Ohanneson since they are the only persons who had been named. She then wants it understood that Mrs. Shooshan is to have nothing and adds that she would rather help her own nieces and nephews and perfect strangers who are in need of help. The fact that there are nontestamentary provisions along with the testamentary provisions does not render the will ambiguous.

The instrument is unambiguous and a testamentary intent is shown by the language used. Thus extrinsic evidence may not be considered.

Affirmed.

MOORE, P. J., and FOX, J., concur.

112 Cal.App.2d 90

PEHAU v. STEWART et al.

Civ. 8061.

Sac. 6204.

District Court of Appeal,
Third District, California.

June 27, 1952.

Action by John Pehau against Lauretta Stewart, and another, for specific performance of lease provision for retransfer by defendants of on-sale liquor license to plaintiff lessor upon termination of lease. Louis Chadaris intervened, and intervenor and defendant filed cross complaint. The Superior Court, Shasta County, C. A. Paulsen, J., entered judgment for plaintiff, ordered new trial on single issue whether relief should be granted under statute allowing relief from forfeiture, and, finally, vacated order for new trial. Defendants and cross-complainants appealed. The District Court of Appeal, Schottky, J., held that where defendants and cross-complainants had invested a considerable sum of money on the leased premises, the business thereon, and the liquor license, and breach of the rent provision was not aggravated, the trial court had jurisdiction to grant new trial.

Order affirmed.

1. New Trial ⚿165

Where trial court, on November 24, 1950, granted defendants' motion of September 29, 1950, for new trial, order of December 28, 1950, vacating order granting new trial was beyond trial court's power and ineffective. Code Civ.Proc. § 660.

2. Specific Performance ⚿123

In action for specific performance of lease provision for retransfer of on-sale liquor license to licensor upon termination of lease, evidence upon questions whether tenants defaulted under lease and whether landlord was estopped from objecting to late rent payment was for trial court.

3. Intoxicating Liquors ⚿103

Where seven year lease was executed on February 5, 1947, provision therein for retransfer of on-sale liquor license to landlord upon termination of lease was not invalid under statute, effective October 1, 1949, forbidding licensee to transfer his license as security for fulfillment of any agreement, nor against public policy. Civ. Code, § 3275; Code Civ.Proc. § 660; Gen. Laws, Act 3796, § 7.3.

4. Landlord and Tenant ⚿161(3)

Where landlord evicted tenants for nonpayment of rent when due after three day notice was served, tenants were not entitled to damages for conversion of their personal property which remained on the premises in view of fact that tenants were not refused possession thereof.

5. Attorney and Client ⚿140

A court may determine reasonable attorney's fees without hearing any testimony thereon.

6. Specific Performance ⚿134

In action for specific performance of lease provision for retransfer of on-sale liquor license to landlord upon termination of lease, where lease provided for reasonable attorney's fees in event that landlord should be required to commence legal action to enforce any of its terms, award of $500 attorney's fees was not abuse of trial court's discretion.

7. New Trial ⚿9

In action for specific performance of lease provision for retransfer of on-sale liquor license to landlord upon termination of lease, where lease was terminated upon three day notice for failure to pay rent, and tenants attempted to make such payment at landlord's attorney's office on third day, the trial court had jurisdiction to order new trial upon single issue whether relief should be granted pursuant to statute allowing relief from forfeiture. Civ.Code, § 3275; Code Civ.Proc. §§ 660, 1179; Gen.Laws, Act 3796, § 7.3.

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Joseph F. Aleck, Jr., and Richard B. Eaton, Redding, for appellants.

Carlton & Shadwell, Redding, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff Pehau, the owner and lessor of a tavern known as Oak Grove Tavern, located near Redding, California, brought this action on November 22, 1949, to specifically enforce the terms of the lease which provided for a retransfer of an on-sale liquor license to the lessor upon termination of the lease. It was alleged that the lessees failed to pay rental of $200 per month due on November 1, 1949; that plaintiff lessor served a three-day notice to pay rent or vacate; that the rental was not paid, and that thereafter the lessees relinquished and abandoned the premises. It was also alleged that defendant Stewart refused to execute a retransfer of the liquor license. Appellant Chadaris was granted permission to intervene in the action and appellants filed an answer and cross-complaint.

The answer denied that defendant relinquished, vacated or abandoned the premises; denied there was a wilful failure to pay the rental within the three-day notice, and alleged that a tender and offer to pay were made within the three-day period. By cross-complaint, defendants sought damages for an alleged wrongful eviction by plaintiff, and also prayed for general relief.

The trial court found that defendants failed to pay the November rental of $200 within the three-day period; that they were in default under the lease; that plaintiff had not wrongfully evicted defendants; that plaintiff was entitled to have the liquor license transferred to him; that Carlton & Shadwell had rendered legal services for plaintiff in said action of the value of $500; that defendants were not damaged by any acts of plaintiff. The court did not make findings on the issue of surrender or abandonment.

Judgment was entered for plaintiff in accordance with said findings. Defendant's motion for a new trial on all statutory grounds was filed on September 29, 1950. On November 24, 1950, the court filed the following order:

> "It is hereby ordered that the judgment be and the same is hereby vacated and set aside and a New Trial is ordered granted on the single question and issue of the relief to be granted; that is, as to whether it should be granted pursuant to the provisions of Section 3275 of the Civil Code. Dated this 22nd day of November, 1950."

On December 28, 1950, the court filed the following order:

> "It appearing that the Court acted in excess of its jurisdiction in Granting a Motion for New trial as to certain questions involved in the above entitled cause, the Order Granting said Motion for a New Trial, heretofore made, is ordered vacated and set aside. Dated December 20, 1950."

Defendants and cross-complainants have appealed from the judgment and have also appealed from the part of the order granting a new trial which limits the trial to the single issue. The two appeals have been consolidated. Before discussing the contentions of counsel we shall summarize briefly the factual situation as disclosed by the record.

The record shows that on February 5, 1947, respondent John Pehau leased Oak Grove Tavern to C. H. Unger, E. H. Wolfe and J. E. Womack for a term of seven years at a rental of $125 per month. The lease provided that the lessees were to operate a bar, night club and restaurant on the premises and recited that Opal Pruitt, the former lessee, was transferring a general liquor license to the new lessees and provided also that the lessees agreed to transfer the license to lessor at the expiration of the lease.

On March 2, 1948, Kenneth Howard entered into an agreement with Unger, Wolfe and Womack to purchase said business, including the license, stock-in-trade, leasehold interest and good will for the sum of $21,000 plus inventory, $10,000 to be paid within 60 days, and the balance to be paid at the rate of $500 per month, and respondent Pehau consented to the assignment of said lease.

On July 26, 1948, appellant Lauretta Stewart entered into a partnership agreement with Kenneth Howard under which she became a co-lessee under said lease, and respondent Pehau consented to said agreement in consideration of the rent being raised to $200 per month.

On April 28, 1949, Kenneth Howard assigned all of his interest in said lease to appellant, Lauretta Stewart, and also all of his interest in the agreement of sale with Unger, Wolfe and Womack, said assignments being with the consent of respondent Pehau and of Unger, Wolfe and Womack.

Thereafter, on April 28, 1949, appellant Lauretta Stewart, with the consent of respondent Pehau, assigned an interest in said lease and agreement to George Whiteman, and on July 14, 1949, the guardian of the Estate of George Whiteman assigned to appellant Louis Chadaris all of the interest of George Whiteman in said lease and agreement for the sum of $4500.

Appellants failed to pay the rent on November 1, 1949, and on November 2nd were served with a notice to pay the rent within three days or surrender possession. It appears that in several months from November, 1948, on, the monthly rental had been paid and accepted after the due date, and in July, 1949, a three-day notice was served on appellants and the rental for said month was paid to Mr. Shadwell, attorney for respondent, and accepted by him on July 14, 1949. Appellant Stewart testified that after service upon her of a three-day notice for failure to pay rent on July 1, 1949, Shadwell had instructed her that if another such notice was served that such rent was to be paid to Shadwell and not to Pehau, but Shadwell denied giving any such instruction.

Following the service on November 2, 1949, of the three-day notice appellant Stewart went to the office of Mr. Shadwell, on Saturday, November 5th, to pay the rent but the office was closed. On Monday morning, the 7th, she paid the money to a secretary in Shadwell's office and was given a receipt. In the meantime respondent went into the Oak Grove Tavern and told appellant Chadaris that he was taking possession. Appellant Stewart came in and showed respondent the receipt and respondent said it was too late. Respondent then phoned Shadwell and Shadwell talked to appellant Stewart on the telephone and told her that the payment had been made too late and for her to pick up the money at his office and that she had 24 hours to remove herself from the dwelling quarters adjacent to the night club. Respondent took the keys and appellants left the premises.

Appellant Chadaris testified that he did not tell respondent or anybody that he intended to abandon or give up the premises. Respondent testified that appellant Chadaris informed him prior to November 1, 1949, that he (Chadaris) was not going to pay any future rent; that on Monday, the 7th, "I told Mrs. Stewart to go and she told me she was going to get out"; that he received the keys to the tavern from her without complaint; and that appellants left the premises.

We shall first consider the question of the validity of the order granting a new trial and the effect of the purported order vacating it.

As hereinbefore stated the motion for a new trial was filed on September 29, 1950, and the order granting it was made on November 24, 1950. Under section 660 of the Code of Civil Procedure the power of the trial court to pass upon the motion for a new trial expires 60 days after notice of entry of judgment or notice of intention to move for a new trial. In Sparr v. Byers, 139 Cal.App. 668, at page 670, 34 P.2d 787, the court said:

> "We also think the order entered on April 19, 1932, purporting to set aside the order granting a new trial, was void under section 660 of the Code of Civil Procedure, as the same then stood. The power of the court to pass upon a motion for a new trial expired sixty days after February 9, 1932. Notwithstanding this fact, on April 19, 1932, the court attempted to set aside the order granting a new trial and to reinstate the original findings and judgment. This was an attempt to pass upon the motion for a new trial after the sixty days had expired by another and new order, the effect of which would be to deny a new trial. This was beyond the court's power, as it had then lost jurisdiction to pass upon the motion for a new trial."

[1] It is clear, therefore, that when the court made the order of December 28, 1950, vacating the previous order granting a new trial, it made an order that was beyond its power unless in making its order granting a new trial it had acted in excess of its jurisdiction, or the order was inadvertently entered or there was a clerical error in its entry.

Appellants contend that they were entitled to a new trial upon all of the issues. They argue that there was no evidence of abandonment or surrender, but inasmuch as there was no finding of abandonment or surrender it is unnecessary to discuss this contention.

[2] The appellants next contend there was no legal forfeiture of the lease and liquor license. Appellants point out that there were previously accepted late rent payments after the due date of the 1st of each month. In this connection it is argued that respondent is estopped to object to the late payment, and that respondent is also

estopped to object to a tender of payment to Shadwell. The lease contained a time is of the essence provision, and a provision for reentry upon default. The court did not specifically find on the issue of forfeiture but did find that "it is true that defendants are in default under" the lease. In view of the fact that appellants were late in their payment of rent on several occasions, that they had been served with a three-day notice in July and again in November, that they had ample opportunity to pay the November rent direct to respondent within the three-day period and did not do so, we cannot hold that as a matter of law there was no evidence to support the finding that they were in default under the lease. Nor can we hold that the evidence compels a finding that respondent was estopped to object to a late payment of the rent. While it may seem that the degree of default of appellants in the payment of the rent was not great, yet that was a question for the trial court.

[3] Appellants contend also that the court erred in requiring appellants to transfer the liquor license to respondent in accordance with the terms of the lease. They argue that the lease provision requiring retransfer or forfeiture of the liquor license was invalid under the statute and against public policy. Appellants cite Section 7.3 of the Alcoholic Beverage Control Act (Deering's Gen.Laws, 1949 Pocket Supp., Act 3796) which provides:

> "No licensee shall enter into any agreement wherein he pledges the transfer of his license as security for a loan or as security for the fulfillment of any agreement. Each application for the transfer of a license must be accompanied by or contain a statement verified by both the transferor and transferee specifically stating that the transfer application or proposed transfer is not made to satisfy the payment of a loan or to fulfill an agreement entered into more than ninety (90) days preceding the day on which the transfer application is filed with the board or to gain or establish a preference to or for any creditor of transferor or to defraud or injure any creditor of transferor. Said statement shall become part of the transfer application and any misrepresentation contained in said statement shall be considered the misrepresentation of a material fact."

Respondent in reply points out that said section 7.3 became effective October 1, 1949, and argues that the section is not retroactive, citing Etchart v. Pyles, 106 Cal.App.2d 549, at page 553, 235 P.2d 427, at page 430, where the court said:

> "Defendant directs our attention to section 7.3 of the Alcoholic Beverage Control Act, added by Statutes 1949, Chapter 1348, which provides that no licensee shall enter into any agreement where he pledges a transfer of his license as security for a loan, or as security for the fulfillment of any agreement. This section did not become effective until October 1, 1949. It is not retroactive, Campbell v. Bauer, 104 Cal.App.2d 740, 743, 232 P.2d 590, and is not applicable here."

Respondent also quotes from Saso v. Furtado, 104 Cal.App.2d 759, at page 769, 232 P.2d 583, at page 589, as follows:

> "As the agreement to retransfer as between the parties is not prohibited by the act, and as such agreements must be viewed in the light of the act which makes the transfer of all licenses subject to the discretion of the board, there is nothing illegal in such an agreement, nor is it in any way contrary to public policy."

The lease in question was executed February 5, 1947. The appellants became lessees thereunder by assignment. Appellant Stewart became the assignee of the liquor license on April 28, 1949, and appellant Chadaris became a partner with Stewart on July 14, 1949.

We therefore conclude that the trial court did not err as a matter of law in including in the judgment a provision requiring appellants to transfer the liquor license to respondent in accordance with the terms of the lease.

[4] Appellants contend the court should have awarded them $300 damages for conversion of the personal property, a witness

for respondent placing the value of said property at that amount. There is no merit in this contention. Respondent testified that the personal property was still in the tavern at the date of the trial. It does not appear that appellants have been refused possession of the personal property.

[5, 6] Appellants next contend that the trial court erred in awarding respondent the sum of $500 as attorneys' fees. Appellants state that respondent had the burden of proof to establish the requirement of and the reasonable amount of attorneys' fees, and that no evidence was adduced as to the value of the legal services. The lease provided for reasonable attorneys' fees in the event that the lessor should be required to commence legal action to enforce any of its terms. It is well settled that a court may determine what is a reasonable amount to be allowed as attorneys' fees without hearing any testimony as to the value thereof. The general rule is stated in 18 Cal.Jur., p. 517, as follows:

> "* * * As it is unnecessary to allege that the sum claimed as attorney's fees in a foreclosure action is a reasonable sum, so also a finding of that fact is unnecessary. The conclusion of law that the mortgagee is entitled to attorney's fees rests upon the provisions of the mortgage, and the court may determine what amount would be a reasonable attorney's fee without hearing any testimony thereon. The fact that the case was commenced in and tried before the court rendering the judgment affords sufficient evidence of the services of plaintiff's attorney, and the court has discretion to fix the fee without calling for the opinion of witnesses to assist it. [Citing cases.]"

Appellants in their closing brief assert that $500, the amount awarded, was excessive, but there is nothing to indicate that the trial court abused its discretion in fixing the amount of attorneys' fees.

[7] Having concluded that the trial court did not err in refusing to grant appellants a new trial upon all issues, we come now to the final question as to whether the court had jurisdiction to make the order of November 24, 1950, in which it ordered a new trial granted "on the single question and issue of the relief to be granted; that is, as to whether it should be granted pursuant to the provisions of Section 3275 of the Civil Code." We have already determined that the subsequent order of the court on December 28, 1950, purporting to vacate its order of November 24th, was in excess of its jurisdiction and wholly ineffective.

Respondent has not appealed from the order granting the limited new trial, but respondent contends that any new trial on this particular issue "would be a nullity as far as they [appellants] are concerned because the court has lost jurisdiction to proceed in the field of relief from forfeiture due to the passage of time." Respondent then argues:

> "All we need do is call the Court's attention to Section 1179 of the Code of Civil Procedure. The procedure set forth in that section is for the disgruntled tenant to follow and in this case the defendants, who were the tenants, failed to follow or take advantage of the provisions of said section within the time set forth therein. It is our position that the tenant defendants should have filed a petition within thirty (30) days after the notice of entry of judgment or be barred from asking relief from forfeiture of the leasehold interest.
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> "Conceding for the sake of argument that Judge Paulsen was in error in making an order setting aside the order granting a new trial, the Appellate Court would have before it the question of the propriety of Judge Paulsen's order granting a new trial on the special issue of whether or not the defendants should not be entitled to make a showing for the purpose of relieving themselves from a forfeiture. We are then confronted with Section 1179 of the Code of Civil Procedure which sets out the special procedure that must be followed before relief can be given in a case of this kind. The Appellate Court can come to but one conclusion

and that is that Judge Paulsen's first order granting a new trial on the special ground was erroneous and void."

So far as respondent's contention that the court's first order granting a new trial on the special ground is erroneous is concerned, respondent is hardly in a position to make that contention as he has not appealed from said order. If the trial court had jurisdiction to make the order and it made an erroneous order, the only way in which the order could be set aside would be by an appeal from it.

We are convinced that the court had jurisdiction to make the order granting a limited new trial and that said order was not void. The instant action was one to compel specific performance of provision in a lease upon the ground that appellants' rights under the lease had been forfeited. Appellants answered denying any breach and also filed a cross-complaint seeking damages for alleged wrongful eviction and for general relief. Both legal and equitable issues were involved in the action. It was not an action in unlawful detainer and, therefore, section 1179 of the Code of Civil Procedure, cited by respondent, was not applicable, for as stated in Hignell v. Gebala, 90 Cal.App. 2d 61, at page 70, 202 P.2d 378, at page 383: "It was not a proceeding under section 1179. This section is special in its nature, applying only to unlawful detainer proceedings, while section 3275 is general."

Section 3275 of the Civil Code provides:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Appellants contend that if a forfeiture resulted they are entitled to be relieved therefrom under section 3275 of the Civil Code. Appellants' cross-complaint does not ask relief under section 3275, but the prayer reads: "For such other and further relief as to the court may seem proper." The answer alleged that appellants were ready, willing and able to pay the rental on November 5, 1949, the last day under the notice to pay or quit, and deny there was a wilful failure to pay the rental. The answer also sets up the attempt to make payment at Shadwell's office on the 5th, and the payment of the money to the secretary on the 7th, and the refusal to accept payment and the return of the money. The court did not find upon the issue of wilful breach. The lease provided for a term from February, 1947, to February, 1954.

Appellants cite Barkis v. Scott, 34 Cal. 2d 116, at page 120, 208 P.2d 367, at page 370, where the court said: "Section 3275 presupposes that the party seeking relief is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application. [Citing cases.]" And also 34 Cal.2d at page 122, 208 P.2d at page 371: "On the other hand, when the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence. [Citing cases.]" See, also, Gonzales v. Hirose, 33 Cal.2d 213, 200 P.2d 793; Baffa v. Johnson, 35 Cal.2d 36, 216 P.2d 13; Freedman v. Rector, Warden & Vestrymen, etc., 37 Cal.2d 16, 230 P.2d 629.

We do not know what the trial court had in mind when it granted the motion for a new trial upon the issue as to whether relief should be granted pursuant to the provisions of section 3275, but in view of the fact that appellants had paid a considerable sum of money for the business, lease and liquor license, and the breach relied on by appellants was not an aggravated one, the court may well have felt that, in an action in which respondent was seeking the equitable relief of specific performance, all of the equities, including the right of relief from forfeiture, should be examined into further. These are matters which can only be determined upon the new trial, which we are satisfied the trial court had full power to grant and did grant.

The judgment having been vacated by the order granting a new trial, the appeal therefrom is dismissed. The order granting a new trial is affirmed.

PEEK and VAN DYKE, JJ., concur.

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112 Cal.App.2d 43

SWANSON v. WHEELER.

Civ. 18825.

District Court of Appeal, Second District, Division 3, California.

June 26, 1952.

Action by Wayne Swanson against Howard M. Wheeler for money allegedly due from defendant. The defendant filed a cross-complaint. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment adverse to plaintiff, and denied motion to set aside and vacate judgment, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that findings that contract for the sale had provided that plaintiff might withdraw therefrom within period of one year and would thereupon be entitled to return of his down payment, and that plaintiff had withdrawn, but that defendant had refused to return down payment, did not warrant judgment for defendant for balance of purchase price, but judgment should have been entered for plaintiff.

Judgment reversed, with directions.

1. Sales 🔑398

Findings that defendant had agreed to sell poultry business to plaintiff, and that plaintiff was to have right to withdraw from purchase agreement and to withdraw his $5,000 down payment within one year and that plaintiff withdrew and demanded the $5,000, and that agreement for sale and purchase was thereby cancelled, but that defendant failed to return the $5,000 despite his agreement to do so, were inconsistent with conclusions and judgment that defendant was entitled to recover sum representing balance of purchase price due from plaintiff.

2. Appeal and Error 🔑931(1, 3)

It is the policy of reviewing courts to give findings a liberal construction in support of judgment, but court may not, through purported construction, ignore clear and positive findings or supply those that are missing.

3. Sales 🔑391(5)

Where agreement for sale and purchase of poultry business provided that buyer might withdraw from agreement within one year and would be entitled to return of his down payment of $5,000, with profits for such period to be retained by seller, upon withdrawal by buyer, buyer was entitled to judgment for return of down payment, without deduction of expenses of operation and repair of his truck which was used in the business, or of repairs to seller's truck and automobile.

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Elwood Bowles, Los Angeles, for appellant.

Walleck & Olstyn, Henry L. Walleck, Van Nuys, for respondent.

SHINN, Presiding Justice.

Plaintiff sued for $5,000 as money had and received for his use and benefit. His claim was in reality for money due under an express oral agreement and which also became due upon mutual cancellation of the agreement; defendant counterclaimed for $5,000 alleged to be due him under the same agreement, and for other relief. Plaintiff appeals on the judgment roll from the judgment rendered in a trial to the court. Defendant has not filed a brief.

The court made the following findings: August 8, 1949, defendant orally agreed to sell and plaintiff agreed to buy a poultry business for $10,000, $5,000 down and the balance on or before January 1, 1950 (this time was extended to August 8, 1950), title was to remain in defendant until the purchase price should be paid; plaintiff was given the right and privilege of withdrawing from the purchase of the business within one year from August 8, 1949, and in the event plaintiff did so withdraw his $5,000 down payment was to be returned to him; defendant was to retain the profits of the business for the first year; plaintiff paid $5,000 and no more; the business was jointly operated; the profits between August 8, 1949 and February 28, 1950, were $3,343.57; On February 17, 1950, plaintiff withdrew from the business and demanded $5,000; on that day the agreement for sale and purchase of the business was cancelled and terminated by mutual agreement and defendant promised and agreed to return to plaintiff $5,000, but failed to do so; between October 1, 1949 and February 17, 1950, $410.15 was expended for gas and oil for plaintiff's truck which was used in the business, and $391.25 for repairs on plaintiff's truck, defendant's truck and defendant's private automobile. The court also found it was not true that $5,000 was due, owing and unpaid from plaintiff to defendant.

The court drew conclusions of law from the facts found, as set out below.[1] The judgment was practically identical with the conclusions of law. Plaintiff made a motion under section 663, Code of Civil Procedure, for new conclusions of law and a different judgment on the findings, awarding him $5,000 and interest; the motion was denied.

It appears from the record that plaintiff's attorney was directed to prepare findings and judgment. It also appears from a memorandum decision of the Trial Judge that he understood during the trial that the parties wished to complete the sale and purchase of the property. There is nothing to that effect in the findings, nor elsewhere in the record. The statement may not be considered for any purpose and it also appears to have been in error as to the facts. It would seem that if the parties had desired to complete the transaction they would have done so, and would not be before us with an appeal.

[1] The findings are all in favor of plaintiff and the conclusions and judgment are in favor of defendant for specific performance of the agreement. Plaintiff was entitled to judgment on the findings for several reasons, first, under the terms of the original agreement upon his withdrawing from the business, second, as a legal consequence of the cancellation of the agreement, and third, under the agreement of defendant to repay the money upon cancellation of the agreement.

We are at a loss to account for the conflict between the findings and the conclusions. It might be supposed they were not prepared by counsel in accordance with the court's directions, and were signed without knowledge of what they contained, but this does not seem to be a reasonable explanation in view of the fact that plaintiff made a motion for other conclusions and judgment, consistent with the findings, and this motion was denied. We cannot understand why the motion was denied, when it was clear that the present judgment could not stand. The fact that defendant did not file a brief indicates that his counsel were of the opinion that the judgment could not be sustained.

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[1] "Cross-complainant Howard W. Wheeler, is entitled to recover from cross-defendant Wayne Swanson, the sum of $5,000.00 with interest thereon at the rate of 7% per annum from January 1, 1950, on condition that within thirty (30) days from the date of entry of judgment herein, cross-complainant deliver to cross-defendant, all documents necessary to transfer to cross-defendant the title and good will to the business known as Howard Wheeler Poultry, as of February 18, 1950, and the assets of said business consisting of: one 1948 GMC truck with one-ton flat bed; all coops on the property at 13412 Victory Boulevard, Van Nuys, California, or elsewhere, used in said business; one Fairbanks scale, 500-pound capacity; one Fairbanks scale, 1000-pound capacity; two spring scales; One L. C. Smith adding machine; all batteries, and other moveable equipment now used in said business wherever located, and on the further condition that cross-complainant pay to cross-defendant the net profits of Howard Wheeler Poultry for the period from August 1, 1949 to February 28, 1950.

"In the alternative, and in the event the foregoing conditions are not complied with, plaintiff shall be entitled to judgment against defendant for the sum of $5,000.00 with interest at the rate of 7% per annum from February 13, 1950, less the sum of $605.77 being the cost of the care, maintenance and operation of plaintiff's truck used by him in connection with the business of defendant."

[2] Again we call attention to the importance of having correct and adequate findings. Although it is the policy of reviewing courts to give findings a liberal construction in support of the judgment, even liberality has its limits, and the court may not, through purported construction, ignore clear and positive findings or supply those that are missing. Inadequate, contradictory and ambiguous findings create difficult problems on appeal and often imperil the judgment. We seldom see a set of findings that are decisive of the material ultimate issues of fact, and contain no evidentiary and redundant matter. We have had occasion before to comment upon the subject. See Eggeman v. Binford, 106 Cal.App.2d 556, 235 P.2d 409; Robbins v. Holther, 98 Cal. App.2d 674, 220 P.2d 585; Crummer v. Besser Mfg. Co., 100 Cal.App.2d 189, 223 P.2d 100; Alles v. Hipp, 108 Cal.App.2d 730, 239 P.2d 451; Sanal v. Meador, 108 Cal.App.2d 820, 239 P.2d 908.

[3] There is no apparent reason for deducting from the sum due plaintiff the expenses of the operation and repair of his truck which was used in the business, or of the repairs to defendant's truck and automobile. Defendant retains the profits of the business. He promised to pay plaintiff the exact sum of $5,000, and there is no finding that any deductions were to be made.

The purported appeal from the order denying motion to vacate the judgment is dismissed. The judgment is reversed with directions to vacate the conclusions and judgment, make new conclusions of law consistent with this opinion, and enter judgment in favor of plaintiff against defendant for $5,000, with interest at seven per cent per annum from February 17, 1950.

PARKER WOOD and VALLÉE, JJ., concur.

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112 Cal.App.2d 22

WOODHOUSE v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 18788.

District Court of Appeal, Second District, Division 3, Califorina.

June 25, 1952.

Rehearing Denied July 10, 1952.

Hearing Denied Aug. 21, 1952.

Stratford Woodhouse brought an action against Pacific Electric Railway Company, a corporation, and others, for injuries. The Superior Court, Henry M. Willis, J., entered an interlocutory judgment in favor of plaintiff and defendants appealed from such judgment and from various orders. The District Court of Appeal, Vallée, J., held that the appeals were premature.

Appeals dismissed.

1. Appeal and Error 🔑248
Judgment 🔑210
New Trial 🔑26

Where answer sets up special defenses not involving merits of cause of action but constituting bar to prosecution thereof, and decision is for plaintiff, action is in same status it would have been had special defenses not been pleaded, and a judgment should not be rendered or entered, and action should then proceed to trial on issues made by complaint and other defenses pleaded, with judgment being rendered or entered upon their determination, and in such event decision of court on special defenses tried and on all rulings on trial are deemed excepted to and, by statute, may be reviewed on motion for new trial or upon appeal from judgment. Code Civ.Proc. § 597.

2. Appeal and Error 🔑248
New Trial 🔑26

If, on trial of special defenses not involving merits of cause of action but constituting bar to prosecution thereof, decision favors defendant, trial is ended and a judgment is then entered for defendant, and, on motion for new trial or upon appeal from judgment, decision on special defenses and all rulings on trial of them may be reviewed. Code Civ.Proc. § 597.

3. Pleading 🔑111.47

Where special defense in action for injuries is of another action pending, and such defense only is sustained, an interlocutory judgment is entered to effect that no trial of other issues shall be had until final determination of such other action. Code Civ.Proc. § 597.

4. Appeal and Error ⚷70(3)

Where special defense in action for injuries is of another action pending, and such defense only is sustained and interlocutory judgment is entered to effect that no trial of other issues shall be had until final determination of such other action, such interlocutory judgment is appealable. Code Civ.Proc. § 597.

5. Appeal and Error ⚷337(2)

Where answer to action against railroad and others for injuries pleaded in bar that superior court by a written order had approved compromise of plaintiff's claim and that while plaintiff was minor railroad paid plaintiff's father on behalf of plaintiff and that plaintiff's father had executed release of claim against defendants, and pleaded in bar that superior court subsequently denied motion to set aside such order which was made on ground that court lacked jurisdiction, and such pleas in bar were denied after trial of such pleas before trial of other issues, appeals filed before entry of judgment on trial of other issues were premature. Code Civ.Proc. § 597.

6. Pleading ⚷49

Prayer for relief does not necessarily establish character of action and subject matter of action and issues involved are determinable from facts pleaded rather than from title or prayer for relief.

7. Appeal and Error ⚷337(2)

Where only reference to injunction was in prayer of answer which set up pleas in bar which alleged no facts for injunctive relief, such reference did not give defendants right to appeal from action of trial court in denying such pleas before entry of judgment on trial of other issues and in entering interlocutory judgment for plaintiff. Code Civ.Proc. § 597.

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C. W. Cornell, Oscar O. Collins and Randolph Karr, Los Angeles, for appellants.

Lasher B. Gallagher, Henry E. Kappler and Sampson & Dryden, Los Angeles, for respondent.

VALLÉE, Justice

Plaintiff, shortly after he attained the age of twenty-one, brought this action for damages for personal injuries alleged to have been sustained as a result of the negligence of defendants on September 29, 1938, when he was fourteen years of age. In their answer, among other defenses, defendants pleaded two pleas in bar, (1) that on July 7, 1939, on petition of plaintiff's father, the Superior Court of Los Angeles County by written order approved a compromise of plaintiff's claim against defendants on account of the injuries described in the complaint; that pursuant thereto defendant railway company paid plaintiff's father $500 on behalf of plaintiff, and plaintiff's father executed a release of all claims against the defendants; (2) that on March 30, 1946, plaintiff moved the Superior Court of Los Angeles County to set aside the order of July 7, 1939, on the ground among others that the court was without jurisdiction to make the order; that the motion was denied. The answer prayed that plaintiff take nothing and that an injunction be issued against plaintiff enjoining him from prosecuting this action and from pressing or filing any claims, action, or actions against defendants arising out of the accident.

Pursuant to section 597 of the Code of Civil Procedure the court proceeded to the trial of the special defenses before the trial of any other issue in the case. At the conclusion of such trial the court caused a minute order to be made overruling and denying the pleas in bar, filed a memorandum for decision, made findings of fact and conclusions of law, and rendered an interlocutory judgment adjudging that the release was not binding on plaintiff, that the court was without jurisdiction to approve the compromise, and that plaintiff is entitled to maintain and prosecute the action.

Defendants then filed a notice of intention to move for a new trial. Defendants also filed a notice of appeal from the interlocutory judgment and from the order and judgment refusing to grant the injunction requested and prayed for. No mention was made of an injunction in the minute order deciding the issues made by the pleas in bar, or in the interlocutory judgment. Thereafter the court dismissed the motion for a new trial on the ground it was premature and vacated the interlocutory judgment on the ground it was not authorized by section 597 and was inadvertently entered. Defendants then filed a notice of appeal from (1) the memorandum for decision, (2) the findings of fact, (3) the conclusions of law, (4) the interlocutory judgment, (5) the minute order dismissing the motion for a new trial and vacating the interlocutory judgment, and (6) the minute order overruling the pleas in bar and deciding them in favor of the plaintiff.

The various matters appealed from are nonappealable and the appeals must be dismissed.

Section 597 provides: "When the answer pleads that the action is barred by the statute of limitations, or by a prior judgment, or that another action is pending upon the same cause of action, or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court, or the verdict of the jury upon any special defense so tried (other than the defense of another action pending) is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated; and where the defense of another action pending is sustained (and no other special defense is sustained) an interlocutory judgment shall be entered in favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of such other action, and the plaintiff may appeal from such interlocutory judgment in the same manner and within the same time as is now or may be hereafter provided by law for appeals from judgments. If the decision of the court, or the verdict of the jury, upon the special defense or defenses so tried shall be in favor of the plaintiff, trial of the other issues shall thereafter be had upon the motion of either party, and judgment shall be entered thereon in the same manner and with the same effect as if all the issues in the case had been tried at one time. In such event any and all decisions or verdicts upon such special defense or defenses, and all rulings on the trial thereof shall be deemed excepted to and may be renewed on motion for a new trial or upon appeal from such judgment."

[1] When, as in the present case, the answer sets up special defenses not involving the merits of plaintiff's cause of action but constituting a bar to the prosecution thereof, and the decision of the court is in favor of the plaintiff, the action is in the same status it would have been had the special defenses not been pleaded,—and a judgment should not be rendered or entered. Cf. Blume v. MacGregor, 64 Cal.App.2d 244, 249, 148 P.2d 656. The action then proceeds to trial on the issues made by the complaint and the other defenses pleaded,—and, on their determination, a judgment is rendered and entered. (See 13 So. Cal. L.Rev. 18.) In such event the decision of the court on the special defenses tried and all rulings on the trial of them are deemed excepted to and, by the express language of section 597, may be reviewed on motion for a new trial or upon an appeal from the judgment.

[2–4] If, on the trial of special defenses only, the decision is in favor of the defendant pleading the same, the trial is at an end, Steiner v. Thomas, 94 Cal.App.2d 655, 658, 211 P.2d 321; a judgment is then entered for the defendant; and, on a motion for a new trial or upon appeal from the judgment, the decision on the special defenses and all rulings on the trial of them may be reviewed. An interlocutory judgment should not be entered when a special defense constitutes a bar to the prosecution of the action. It is only where a special defense is of another action pending,[1] and such defense only is sustained, that an interlocutory judgment is entered to the effect that no trial of other issues shall be had until the final determination of such other action. See Lord v. Garland, 27 Cal.2d 840, 851, 168 P.2d 5. An appeal lies from such an interlocutory judgment.

[5] In the case at bar the decision of the court in favor of plaintiff on the special defenses and all rulings on the trial of them may be reviewed on appeal from the judgment entered on the trial of the other issues, and the present appeals are premature.

[6, 7] Appellants say they prayed for an injunction; that the effect of the decision for the plaintiff on the special defenses was to deny them an injunction; and that, therefore, they have a right to appeal because an order refusing an injunction is appealable. Code Civ.Proc. sec. 963. In Weber v. Superior Court, 26 Cal.2d 144, 148, 156 P.2d 923, 925, the court said: "[T]he prayer for relief does not necessarily establish the character of an action. As stated in Standard Brands of California v. Bryce, 1 Cal.2d 718, 721, 37 P.2d 446, 447, 'The subject matter of an action and the issues involved are determinable from the facts pleaded, rather than from the title or prayer for relief.' [Citations]. If a plaintiff prays for relief beyond the obvious purpose of the complaint and not warranted by the facts alleged, the prayer may be disregarded. [Citations]." No facts for injunctive relief are alleged in the special defenses tried. A plea in bar does not constitute ground for an injunction. Since the only reference to an injunction was in the prayer of the answer, it was properly disregarded by the trial court. The mere fact that a request for an injunction was inserted in the prayer does not give defendants the right to appeal.

The appeals are dismissed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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112 Cal.App.2d 107

PARTRICK v. PARTRICK.

Civ. 4284.

District Court of Appeal, Fourth District, California.

June 27, 1952.

Husband sued wife for annulment of marriage on ground that at time of purported marriage ceremony between them, wife was married to another from whom she had only obtained an interlocutory decree of divorce, and wife, by cross-complaint, asked that validity of marriage be determined, that she be granted a divorce, and that an equitable division of property acquired by them be made. The Superior Court, San Diego County, Robert B. Burch, J., granted the annulment, but ordered that property of the marital community be divided equally between the parties, and husband appealed. The District Court of Appeal, Griffin, J., held that in view of fact that wife had held good faith belief that valid marriage had existed and that parties had agreed to share equally in the accumulations of property by the marital community, wife was entitled to her share of the community property.

Judgment affirmed.

1. Marriage ⚷60(7)

In action by husband to have marriage annulled on ground that at time of marriage ceremony, wife was still married to another, evidence sustained finding that wife, who married plaintiff shortly after obtaining, by default, an interlocutory divorce decree, believed that a valid marriage between her and plaintiff existed.

2. Marriage ⚷60(7)

In husband's action for annulment wherein wife filed cross-action for divorce, evidence sustained finding that there had been an agreement between the parties to share equally in the accumulations of property by the marital community.

3. Marriage ⚷63

Where wife, who married after receiving only an interlocutory decree of divorce from another held good faith belief that a valid marriage existed, and parties thereafter agreed to share equally in accumulations of property by the marital community, wife was entitled, in husband's action for annulment on grounds of invalidity of marriage to decree for equal division of the marital property.

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[1] And perhaps in cases where the plea in abatement is other than that of another action pending. (See 13 So.Cal.L.Rev., 14, 15.)

4. Appeal and Error ⚿931(1)

The appellate court is bound to accept as true the evidence of the party in whose favor judgment was rendered, and the favorable inferences adduced therefrom.

◆

Myers & Martin, John F. Martin, Encinitas, for appellant.

William S. Warden, Solana Beach, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action for annulment of marriage against defendant upon the ground that at the time of the purported marriage ceremony between them defendant was married to one Charles Orr, from whom she had only obtained an interlocutory decree of divorce. The final decree was obtained on April 7, 1941, about six months after the marriage. These facts are conceded. Defendant showed that she married Orr in 1922, and due to his being a chronic alcoholic, leaving home for short periods of time and committing acts of cruelty upon her, she divorced him in 1934. She obtained custody of their minor son. Thereafter, a reconciliation was partially effected. The parties remarried on June 11, 1936. Within a week, Orr again went on one of his usual "tantrums". He again disappeared. Defendant testified that since Orr had been gone two or three years and due to the fact that he traveled under assumed names, slept in questionable places, was of poor health, did not return within a few weeks as he usually did, did not make his usual call to see his mother, to whom he was very close, did not return to attend her funeral, and due to the fact that his mother received word from some friend who knew Orr and that this friend heard of a train accident wherein some one was killed who answered Orr's description she, and all the family, definitely believed or felt that Orr was dead. Defendant consulted a lawyer who advised her she must wait seven years before she could judicially establish a record of his death and remarry upon the claim of presumption of death, or she could file for divorce and secure service by publication. About the month of August, 1939, she filed for divorce and an interlocutory decree was entered March 29, 1940.

Through advertisement (Lonely Hearts) plaintiff Partrick met defendant the first week in September, 1940. Plaintiff claims defendant told him she was a widow. On October 5, 1940, they were married. Defendant testified on many occasions that she then felt and believed that her husband was dead and that she entered into the marriage ceremony in good faith believing she had the legal right to do so; that when the year was up she had the final decree entered as a matter of precaution.

Apparently both parties entered upon the matrimonial venture in good faith. Plaintiff, according to his story, was possessed of a residence costing less than $4,000, upon which he had paid about one-half; he had about $700 in the bank and a claimed $1,300 in cash, which he said he carried in his pocket. He also owned a 1937 Ford, and during their eleven years of married life, he claimed he inherited about $3,000 from his father's estate.

Defendant fixes the purchase price of the real property at $3,000 to $3,500, and claims that plaintiff owed $2,300 on it when they were married; that all plaintiff had was about $700 in the bank and a 1937 Ford; and that the inheritance was only about $1,000; that she had household furniture and a refrigerator valued at $450, and on which $40 was yet due; that they started housekeeping and Mr. Partrick was working as a production engineer in an aircraft accessory business and, at times, earned as much at $750 per month; that they agreed to pool their property and efforts, to live economically, save their money, and put it in savings bonds; that when he was making $350 per month they would save at least $200 and purchase bonds with it "for our future life together".

Plaintiff testified that shortly after their marriage they discussed their savings program; that "the idea would be to build this property and sell it and get some more property and go to another one and sell it"; that at that time he "intended for her to participate in that property" as his wife; that it was his feeling that whatever they were able to accumulate should be equally hers and his; and that that was the plan they were operating under. Thereafter, in 1945, the real estate was sold for $6,150. About $6,000 was invested in a farming enterprise, which was later sold without a profit. The proceeds were invested in another property which was improved in 1947, and sold for $9,000. $5,000 was still due plaintiff and defendant thereon under a deed of trust in their favor.

They acquired and improved a piece of property in Cardiff, which at the time of trial stood in plaintiff's name and which was partially completed. It was valued at $6,800. The accumulated defense bonds amounted to approximately $9,900 (face value) and title was taken by the parties in joint tenancy. Title to the real estate, other than that otherwise indicated, was taken in their joint names. After about ten years, defendant's son received a card from his father, Mr. Orr, informing him of his whereabouts, but requesting the son not to tell his mother or his relatives of this fact. Later, the son informed his mother that Mr. Orr was alive. Defendant claims she later related the entire circumstances to plaintiff; that she suggested that plaintiff and she remarry if there was any question in his mind about the validity of their marriage; that he said: "You know the legal end of it doesn't mean a thing to me."

January 12, 1951, plaintiff filed this action for annulment. Defendant answered and by way of cross-complaint asked that the validity of her marriage to plaintiff be determined, for a divorce, and that an equitable division of the property acquired by them be made. After hearing, the court found generally in accordance with the facts stated, granted plaintiff the annulment, and especially found that:

> "It is true that the defendant entered into the marriage with plaintiff as aforesaid in good faith, genuinely believing her former husband, Charles Orr, to be dead, and continued in such good faith and genuine belief during all of the time during which said joint estate was acquired * * *.
>
> "It is true that the labor and efforts of the defendant contributed equally with those of the plaintiff to the acquisition and accumulation of the property in issue * * *.
>
> "It is true that at the time of the marriage of the parties as aforesaid, or shortly thereafter, they expressly agreed to pool their earnings, labor and efforts and to share equally in all properties acquired or accumulated as the result thereof; and that thereafter, and during all of the time in which said property was acquired, said agreement remained in full force and effect, and was carried out and completely performed by the parties."

The court ordered the real property, trust deed, and savings bonds sold or cashed and the proceeds divided equally.

Plaintiff takes issue with the last mentioned special findings upon the claim that they are not supported by the evidence; that the undisputed evidence shows that there was no impediment to marriage insofar as plaintiff was concerned; that in good faith, he married defendant who had told him she was a widow and who never had told him the true circumstances; that believing she was actually and truly his wife, and by reason thereof, plaintiff intended that she share as a wife in his property and accumulations; that the evidence does not show any express agreement between them to the effect that she was to share equally in the property, earnings and accumulations; that even if there was such evidence, it clearly was made upon his part solely and only because of his belief and reliance upon the existence of an actual and valid relationship with her; that defendant is entitled to no share of the property or accumulations in the absence of proof that there "is a *bona fide* belief on the part of the 'wife' in the existence of a valid marriage." Citing Flanagan v. Capital National Bank, 213 Cal. 664, 666, 3 P.2d 307, 308; Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342; Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761; and Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884.

Defendant points out that the parties attempted to contract a ceremonial marriage, engaging in a civil marriage ceremony pursuant to a license regularly issued; that defendant testified no less than 16 different times during her direct and cross-examination that at the time of the purported marriage she believed her former husband to be dead and hence that she was able to contract matrimony; that at the time of the marriage of the parties, and prior thereto, it was generally reputed among the members of Mr. Orr's family, including his parents, that he was dead; that the parties lived together as husband and wife for over eleven years, both believing during that time that a valid marriage existed; that the fact that there may have been other evidence introduced from which it might be inferred that the respondent had no genuine belief in the death of her former husband presents nothing more than a conflict in the evidence and the finding of the trial court on conflicting evidence may not be reviewed. The conclusion of the trial court in this respect is reflected in his written opinion wherein he states:

> "Her (defendant's) conduct from the date of her marriage to Mr. Partrick has been that of a faithful, sincere and earnest wife and business partner, and strongly supports her sworn testimony that she believed Mr. Orr to be dead, and this, notwithstanding the fact of her divorce action from the latter, and the advice of her counsel incident thereto. I can find no reason in the record to deny her the fruits of her honest, but misguided efforts."

[1, 2] The evidence amply supports the finding that the respondent believed a valid marriage existed. Likewise, the evidence amply supports the finding of an agreement between the parties to share equally in the accumulations of property. From the evidence it appears that there was at least an implied agreement and plan for the parties to share jointly in their accumulations; that the agreement and plan were actually carried out in detail by the purchase of various items of property in joint tenancy; that defendant assisted plaintiff in every way to save and accumulate the funds which were invested in the properties now owned by them; that she actually assisted plaintiff in the manual work of house construction, managed the housework, and cooperated with plaintiff in accumulating the property through their joint efforts and by commingling their separate property.

[3] In Vallera v. Vallera, supra [21 Cal.2d 681, 134 P.2d 762], where plaintiff brought an action for separate maintenance and for a division of community property against the man with whom she had been living as his wife, it was said that

> "* * * a woman who lives with a man as his wife in the belief that a valid marriage exists, is entitled upon termination of their relationship to share in the property acquired by them during its existence"; and that "The proportionate contribution of each party to the property is immaterial in this state * * * for the property is divided as community property would be upon the dissolution of a valid marriage"; that "The essential basis of a putative marriage, however, is a belief in the existence of a valid marriage"; and "If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property." (Citing cases.)

[4] From a reading of plaintiff's briefs, it would appear that he would have this court weigh the evidence and arrive at a different conclusion from that of the trial court and ignore the evidence favorable to defendant. If the trial court had found in favor of plaintiff on the issues presented, a different question would here arise. The appellate court is bound to accept as true the evidence of the defendant and the favorable inferences adduced therefrom. Bank of Italy v. Cadenasso, 206 Cal. 428, 270 P. 931, 274 P. 536; Tedder v. Johnson, 105 Cal.App.2d 734, 234 P.2d 149.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

111 Cal.App.2d Supp. 972

SCHEIN et ux. v. HOLBROOK et al.

C. A. 7967.

Appellate Department, Superior Court,
Los Angeles County, California.
June 13, 1952.

Action by Louis Schein and wife against Mrs. V. Holbrook and others. The Municipal Court of the Los Angeles Judicial District, William R. Gallagher, J., entered judgment for plaintiffs and defendants appealed. The Superior Court, Appellate Division, Shaw, Presiding Judge, held that default of appellants in failing to give notice to clerk of Municipal Court necessary to procure the preparation or filing of the record on appeal was ground for dismissal of appeal where no excuse for their failure was presented and no effort was made to be relieved from their default, even after it had been called to their attention.

Appeal dismissed.

1. Evidence ⚷43(1)

The Appellate Department of the Superior Court can take judicial notice of its own records.

2. Courts ⚷190(6)

Appellant has the right to appeal on judgment roll. Rules on Appeal from Municipal Courts in Civil Cases, rules 4, 6, 7, 5(f).

3. Courts ⚷190(6)

Practice of clerk of Municipal Court of sending the judgment roll to Appellate Department of Superior Court on every appeal from a judgment where appellant had not given notice to clerk to prepare judgment roll as a record is unauthorized by the rules on appeal from the municipal court in civil cases. Rules on Appeal from Municipal Courts in Civil Cases, rules 4–7, 13(c).

4. Courts ⚷190(6)

Default of appellants in failing to give notice to clerk of Municipal Court necessary to procure the preparation or filing of the record on appeal was a proper ground for dismissal of appeal to Appellate Department of Superior Court, where no excuse for failure was presented and no effort was made to be relieved from their default even after it had been called to their attention. Rules on Appeal from Municipal Courts in Civil Cases, rules 4–7, 13(c).

Bent & Clapp, Los Angeles, for appellants.

Nicolas Ferrara, Los Angeles, for respondents.

SHAW, Presiding Judge.

[1] Respondents have moved to dismiss the appeal by reason of appellants' failure to comply with Rules 4, 5, 6, and 7 of Rules on Appeal from Municipal Courts in Civil Cases. It appears from the affidavit in support of the motion, and from a certificate of the clerk of the trial court in the files, that none of the notices specified in Rules 4, 5 and 7, and no statement under Rule 6, has been filed in the trial court, although the time for filing each of them has long since expired. No showing in opposition or excuse was made and we must accept these facts as established. We also know from our own records, of which we can take judicial notice, Gackstetter v. Market St. Ry. Co., 1935, 10 Cal.App.2d 713, 716, 52 P.2d 998, that appellants have made no application to us for relief from their default in complying with any of these rules, as they might have done under Rule 22.

[2] This court has often held that failure of an appellant to proceed under Rules 4, 6 and 7, or any of them, is not ground for dismissing an appeal. Rule 4 provides that "when an appellant desires to present any point which requires a consideration of the oral proceedings * * * he shall" serve and file "a notice to prepare a reporter's transcript." There are many points which can be made on appeal without consideration of the oral proceedings, and this rule does not foreclose their consideration without a reporter's transcript. Rule 6 provides that an appeal "may be presented" on an agreed statement, but does not require such a statement. Rule 7 provides that "if, in lieu of a reporter's transcript, the appellant desires to set forth the oral proceedings by a settled statement, he shall serve and file a notice so stating." This merely provides a substitute for a reporter's

transcript and is no more mandatory than are the provisions of Rule 4 regarding such transcript. None of these rules prevents the submission and decision of an appeal on the judgment roll alone. See Pacific Gas & Elec. Co. v. Scott, 1938, 10 Cal.2d 581, 584, 75 P.2d 1054; indeed, subdivision (f) of Rule 5 authorizes this. Cheesman v. Odermott 1951, 106 Cal.App.2d 827, 828, 236 P.2d 211. Of course, an appellant may find little or no support in the judgment roll for the points he argues; but if so, this is ground for an affirmance, not for a dismissal of the appeal. For these reasons we have refused to dismiss an appeal where the judgment roll appeared in the record.

But this conclusion must be contingent upon the presence of the judgment roll being duly authorized. Rule 13, subdivision (c) of the rules above mentioned provides: "If the appellant shall fail to perform any act necessary to procure the preparation or filing of the record on appeal or shall otherwise fail to prosecute his appeal with diligence, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed by the reviewing court on motion of the respondent or on its own motion." Where appellant has failed to give any notice necessary to procure the preparation of the judgment roll as a record, and, as here, no sort of excuse for his failure is presented, clearly the fault is his own and not that of any court officer or other party, so our question here comes down to this, is the notice to the clerk, provided for by Rule 5, necessary to the preparation or filing of the record on appeal, as far as the judgment roll is concerned? For some time the clerks of the Municipal Courts in this county have been following the practice of sending the judgment roll to this court on every appeal from a judgment, even though no notice has been given under Rule 5 and no proceedings have been taken under Rule 6. This practice has not hitherto been challenged by a motion to dismiss an appeal, and this court has never passed on its propriety. But now the question is directly presented to us by respondents' motion to dismiss, and must be decided.

[3, 4] We regard the practice as unauthorized by the rules, and the default of the appellants in failing to give the notice as a proper ground for dismissal under Rule 13(c), above quoted.

Rule 5(a) of the rules above mentioned provides that "within 10 days after filing the notice of appeal, the appellant shall serve on the respondent and file with the clerk of the municipal court a notice designating the papers or records on file or lodged with the clerk, including the clerk's minutes and any written opinion of the municipal court and exhibits either admitted in evidence or rejected, and any notices, affidavits, orders, and written instructions given or refused, which he desires incorporated in the record on appeal." The word "shall" here is mandatory, Rule 15(d). However, Rule 6 sets forth an alternative mode of preparing a record, and procedure under it would dispense with compliance with Rule 5; but here there was no such procedure.

Rule 5 contains other provisions which seem to have been confusing to the clerks of the trial courts. After requiring, in subdivision (c), that the appellant make arrangements for payment of the cost of preparing the clerk's transcript as estimated to him by the clerk, the rule, in subdivision (d), directs the clerk, after appellant has arranged for this cost, to prepare a transcript and to include in it the judgment roll, the notice of appeal, and certain other matters "whether designated in the notices or stipulations or referred to in the statements of the parties or not." It seems to be thought that this dispenses with the necessity of any notice for the preparation of a clerk's transcript if only the judgment roll is wanted on the appeal. But this is too liberal a construction of the provision. By subdivision (a) of Rule 5 every appellant is required to designate what matters he wants in the record, by subdivision (b) the respondent is given the right to designate other matters for the record, and the parties are authorized to substitute a stipulation for both notices. But time limits are placed on all these acts, and unless appellant arranges for payment of the cost demanded of him by the clerk, his notice is not "effective for any purpose." Subd. (c). In every case there will be some cost for the appellant to pay, for a copy—not the original—of the notice of appeal is one of the papers to be included in every record, though not designated by the parties, subdivisions (d) and (e) of Rule 5, and the clerk must make a charge for copying it, as will presently appear. Subdivision (f) of Rule 5 also indicates the necessity of appellant's notice designating papers, etc. by its provision that "Where the appellant has designated only the papers and records constituting the judgment roll * * * the judgment roll shall constitute the record on appeal * *" In denying the motion to dismiss we would be holding, in effect, that the judgment roll constitutes a record on appeal although the condition here specified has not been complied with.

Section 32 of the Municipal Court Act of 1925, added to that act by Stats.1951, p. 1863, and amended by Stats.1951, p. 2808, Gen.Laws, Act 5238, formerly section 4300*l* of the Political Code, directs that the clerk of each municipal court "shall charge" specified fees for "preparing" a copy of any paper "on file in his office" subds. (*o*) and (p) and for "comparing with the original" a copy of any such paper made by another and presented for his certificate. Subd. (r). These services, some of which would be necessary for the completion of every record on appeal, are obviously not included in the services paid for by the fee of $1 which the clerk is directed, by subdivision (f) of the same section, to charge "for certificate and transmitting transcript and papers on appeal." The last mentioned fee must be the only one intended by the provision of Rule 10(a) of the rules above mentioned which requires the appellant, at the time of filing the notice of appeal, to pay "the fee payable to the clerk of the municipal court on appeal." The amount of any of the other fees above mentioned could not be known or estimated at that time, the contents of the record being then undesignated.

All of these provisions show the necessity for the appellant's notice to the clerk. Until it is served, the respondent's time for designating additional record does not begin to run. Until both notices are filed, the clerk cannot estimate the cost of preparing his transcript, failure to arrange for which deprives appellant's notice of any effect. Until the amount of this estimate is paid, the clerk is not required to begin preparing his transcript. Until this transcript, as well as any other properly required part of the record, has been "completed," the clerk is not required to transmit the record to the clerk of this court. Rule 10(a). In view of this train of events, all depending on the appellant's notice designating the matters he wishes in the record, it is plain to us that that notice is an "act necessary to procure the preparation or filing [both, in fact] of the record on appeal."

In Averill v. Lincoln, 1944, 24 Cal.2d 761, 764, 151 P.2d 119, 120, the Supreme Court, on consideration of the provisions of Rules on Appeal (from Superior Courts) regarding preparation of the record, which are substantially the same as those of the above cited rules governing appeals from Municipal Courts, said: "If the specified time and allowable extensions have elapsed, the appeal will be dismissed under rule 10(a) unless the appellate court grants relief." Rule 10(a) is the same as our Rule 13(c) above quoted.

If there is any discretion to be exercised in the matter (as to which Averill v. Lincoln, supra, raises some doubt), we note the facts that here the notice under Rule 5 should have been filed not later than March 3, 1952, that notice of the motion to dismiss the appeal was served by mail April 11, 1952, and the motion was heard April 17, 1952, and that appellants have never made any application to this court, under Rule 22, for relief from their default in not giving the notice. The failure of appellants to show any excuse for their neglect to give the notice, or to make any effort to be relieved from their default, even after it was called to their attention, is a sufficient reason for exercising our discretion, if we have any, in favor of a dismissal.

The appeal is dismissed.

BISHOP and STEPHENS, JJ., concur.

39 Cal.2d 321

HANSEN v. CRAMER et al.

L. A. 21902.

Supreme Court of California, in Bank.

July 16, 1952.

Action by E. C. Hansen against Carole Cramer, and others, to set aside conveyance allegedly made to defraud creditors. The Superior Court, Los Angeles County, Percy Hight, J. pro tem., rendered judgment of nonsuit and plaintiff appealed. The Supreme Court, Spence, J., held that the conveyance was void as against plaintiff.

Reversed.

Prior opinion, 238 P.2d 620.

1. Appeal and Error ⚿927(3)

On plaintiff's appeal from judgment of nonsuit, evidence was viewed in the light most favorable to plaintiff with every legitimate inference drawn in his favor and inconsistencies disregarded.

2. Fraudulent Conveyances ⚿206(2)

Relationship of debtor and "creditor", within statute providing that conveyance made without consideration by person who is or will be thereby rendered insolvent is fraudulent as to "creditors", arises in tort cases the moment cause of action accrues. Civ.Code, § 3439.04.

3. Husband and Wife ⚿149(1)

Debt arising from business contract between husband and another person was owed by husband, and wife's separate property was not liable therefor. Civ.Code, § 171.

4. Fraudulent Conveyances ⚿87(1)

The discharge of another's debt does not constitute "fair consideration" for a conveyance by one who is not responsible therefor, within statute providing that conveyance made without "fair consideration" by person who is or will be thereby rendered insolvent is fraudulent as to creditors. Civ.Code, § 3439.04.

See publication Words and Phrases, for other judicial constructions and definitions of "Fair Consideration".

5. Fraudulent Conveyances ⚿77

What constitutes a "fair equivalent" or a "fair consideration" under Uniform Fraudulent Conveyance Act must be determined from standpoint of creditors, and while a debtor may be satisfied to give his assets to a stranger or to exchange them for some worthless chattel the law will not permit him to do so if he thereby renders himself uncollectible to the detriment of his creditors. Civ.Code, § 3439.03.

6. Fraudulent Conveyances ⚿77

The test in determining propriety of creditor's challenge of conveyance for lack of "fair consideration" within meaning of Uniform Fraudulent Conveyance Act depends on whether debtor is thereby rendered execution proof, and existence of any intent of fraud on part of either grantor or grantee is an immaterial factor. Civ.Code, § 3439 et seq.

7. Fraudulent Conveyances ⚿95(5)

Deed which conveyed wife's separate property and which was executed by wife while action against wife was pending and which was delivered to grantee for cancellation of antecedent debt which was owed by husband to grantee and for which wife was not liable was not supported by "fair consideration" within Uniform Fraudulent Conveyance Act, and conveyance, which rendered wife insolvent was void as against judgment creditor of wife. Civ.Code, §§ 164, 171, 3439 et seq.

◆

Marshall & Farnham, J. F. Marshall and Theodore G. Lee, Long Beach, for appellant.

Parker, Stanbury, Reese & McGee and John H. Peckman, Los Angeles, for respondents.

SPENCE, Justice.

[1] Plaintiff appeals from a judgment of nonsuit in an action to set aside a conveyance allegedly made to defraud creditors. Viewing the evidence in the light most favorable to plaintiff, with every legitimate inference drawn in his favor and inconsistencies disregarded, Berger v. Lane, 190 Cal. 443, 452–453, 213 P. 45; Milana v. Credit Discount Co., 27 Cal.2d 335, 342–343, 163 P.2d 869, 165 A.L.R. 621, it must be concluded that the court erred in grant-

ing defendants' motions for nonsuit made at the close of plaintiff's case.

Plaintiff's assignor obtained a judgment against defendant Carole Cramer on October 27, 1948, on a cause of action for false arrest which accrued in February, 1947. On October 1, 1948, and while the false arrest action was on trial, defendant Carole Cramer executed and delivered a deed to the property in question to defendant Coury. The only consideration given her for the deed was the cancellation of an antecedent debt owed by her husband, defendant Paul Cramer, to defendant Coury. Defendant Carole Cramer had no other property out of which the judgment of plaintiff's assignor could be satisfied, and this action was brought to set aside said deed.

The parties do not dispute that title to the property conveyed stood in the name of defendant Carole Cramer, and that she alone executed the deed in question. There also is no dispute that the debt cancelled by defendant Coury in exchange for the deed was owed solely by defendant Paul Cramer.

Section 3439.04 of the Civil Code provides: "Every conveyance made * * * by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made * * * without a fair consideration." In view of this section, the only questions here presented are: (1) Was plaintiff's assignor a creditor of the grantor at the time of the conveyance; and (2) Was the cancellation of the antecedent debt of the grantor's husband "a fair consideration" within the meaning of the statute?

[2] It is well settled in this state that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues. Allee v. Shay, 92 Cal. App. 749, 758–759, 268 P. 962; McKinney v. Wright, 105 Cal.App. 401, 406–407, 287 P. 506; see, also, Civ.Code, §§ 3429, 3430; Chalmers v. Sheehy, 132 Cal. 459, 465, 64 P. 709; Withrow v. National Surety Co., 122 Cal.App. 242, 246, 10 P.2d 83. Accordingly, it appears from the above facts that plaintiff's assignor was a creditor of defendant Carole Cramer at the time she executed and delivered the deed in question to defendant Coury.

[3] As shown by the testimony of defendant Coury (Code Civ.Proc., § 2055), the debt owing to him and cancelled in consideration of the said deed was one arising from a business contract between himself and defendant Paul Cramer. The debt was therefore owed by said Paul Cramer, and his wife's separate property was not liable therefor. (Civ.Code, § 171.) The property conveyed, standing in his wife's name, was presumptively her separate property (Civ. Code, § 164), and the record discloses no evidence to rebut this presumption. The conveyance involved thus appears to be one made in consideration of the discharge of the antecedent debt of another. Is this "fair consideration" within the meaning of the Uniform Fraudulent Conveyance Act? (Civ.Code, Div. 4, Pt. 2, Tit. 2, § 3439 et seq.; Stats. 1939, ch. 329, p. 1667.)

[4–6] "Fair consideration" is defined by section 3439.03 of the Civil Code as the exchange of property or the satisfaction of an antecedent debt which is the "fair equivalent" of the property conveyed. However, the antecedent debt alleged in support of the conveyance must be a legally enforceable obligation of the grantor, and the discharge of the debt of another does not, within the meaning of the Fraudulent Conveyance Act, constitute a fair consideration for a conveyance by one who is not responsible therefor. It was so held in Neumeyer v. Weinberger, 236 Wis. 534, 295 N.W. 775, 776, where the wife's assignment of all her assets to her husband's creditor in satisfaction of her husband's debts was held void as to her creditors. See also Davis v. Hudson Trust Co., 3 Cir., 28 F.2d 740, certiorari denied 278 U.S. 655, 49 S.Ct. 179, 73 L.Ed. 565. A similar conclusion was reached in Merchants' Bank v. Page, 147 Md. 607, 128 A. 272, where it was held that a mortgage executed by a wife in repayment of money fraudulently obtained by her husband, thus forestalling an impending criminal prosecution of the husband, was void as to the wife's creditors. As was stated by the court in McCaslin v. Schouten, 294, Mich. 180, 292 N.

W. 696 at page 699: "What constitutes 'a fair equivalent' or 'a fair consideration' under the Fraudulent Conveyance Act must be determined from the standpoint of creditors. The debtor might be satisfied to give his assets to a stranger or to exchange them for some worthless chattel. But the law will not permit him to do so if he thereby renders himself uncollectible to the detriment of his creditors." See also 37 C.J.S., Fraudulent Conveyances, § 155, sub. a, p. 976; Hollander v. Gautier, 114 N.J. 485, 168 A. 860, 862; Kline v. Inland Rubber Corp., Md., 69 A.2d 774, 780. The test in determining the propriety of a creditor's challenge of a conveyance for lack of a "fair consideration" within the meaning of the Act depends on whether the debtor is thereby rendered execution proof, and the existence of any intent of fraud on the part of either the grantor or the grantee is an immaterial factor. Merchants' Bank v. Page, supra, 147 Md. 607, 128 A. 272, 273.

[7] From the evidence before the trial court, it would appear that defendant Carole Cramer did not receive "fair consideration" for her conveyance and since she was thereby rendered insolvent, the conveyance was void as against plaintiff. Since the antecedent debt discharged was that of a third person, her husband, for which she was not liable, this case presents no question as to the right of a debtor, in the absence of fraud, to exercise a preference in the payment of his own creditors. Civ.Code, § 3432; U. S. Fid. & Guar. Co. v. Postel, 64 Cal.App.2d 567, 572, 149 P.2d 183. Under the circumstances, the trial court erred in granting defendants' motions for nonsuit.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I concur in the judgment. I think, however, that the concluding paragraph of the majority opinion is too broad in the light of any evidence I have been able to find in the record. That paragraph says: "From the evidence before the trial court, it would appear that defendant Carole Cramer did not receive 'fair consideration' for her conveyance and since she was thereby rendered insolvent, the conveyance was void as against plaintiff."

This is an action to set aside a conveyance allegedly executed to defraud plaintiff, a judgment creditor of defendant Carole Cramer. The judgment held by plaintiff against Carole is based on a tort which she committed. The testimony of defendant Coury, called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, indicates that a debt owed Coury by defendant Paul Cramer (Carole's husband), was cancelled in return for the deed (to Coury) from defendant Carole Cramer, and that such debt represented payments past due to Coury as lessor of certain business property held by Paul Cramer as lessee, from which Coury had threatened to oust Cramer unless the debt was paid. If, upon a retrial of this action defendants establish that Carole Cramer possessed a community property interest in the business conducted by her husband, or in the earnings thereof, and gave the deed in order to protect such interest, then I think a different question might be presented as to whether her conveyance was made "without a fair consideration" under the terms of section 3439.04 of the Civil Code.

On such a retrial the matters of whether the business and its earnings constituted community property, whether Carole's tort (on which plaintiff's judgment is based) was committed before or after her marriage to Paul Cramer, and whether community property of Paul and Carole is liable for such tort (see Civ.Code, §§ 170, 171a; Johnson v. Taylor (1931), 120 Cal.App.Supp. 771, 4 P.2d 999; White v. Gobey (1933), 130 Cal.App.Supp. 789, 19 P.2d 876; Smedberg v. Bevilockway (1935), 7 Cal.App.2d 578, 581–583, 46 P.2d 820; Medical Finance Ass'n v. Allum (1937), 22 Cal.App.2d Supp. 747, 66 P.2d 761; McClain v. Tufts (1947), 83 Cal.App.2d 140, 187 P.2d 818; 5 Cal.Jur. 353, § 31; 3 Cal.Jur. Ten-Year Supp. 667–668, § 149; see also 21 So. Cal.L.Rev. 388; 22 Cal.L.Rev. 554; Mc-

Caslin v. Schouten (1940), 294 Mich. 180, 292 N.W. 696), would appear relevant to the issues of "fair consideration" and validity of the conveyance. We should not (as was held in Hampton v. Superior Court (1952), 38 Cal.2d 652, 242 P.2d 1, to have occurred in Young v. Hampton (1951), 36 Cal.2d 799, 806, 228 P.2d 1) use language so broad as to render res judicata or law of the case an issue which has never been litigated.

39 Cal.2d 883

HARUYE MASAOKA et al. v. PEOPLE.

L. A. 21479.

Supreme Court of California, in Bank.

July 9, 1952.

Action by Haruye Masaoka and others against the People of the State of California to determine whether certain property had escheated to the State by operation of the Alien Land Law. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for plaintiffs, and defendant appealed. The Supreme Court held that the Alien Land Law was unconstitutional because it violated the 14th Amendment to the Federal Constitution.

Affirmed.

Schauer, Shenk and Spence, JJ., dissented.

Aliens 🔑10

Constitutional Law 🔑215

The Alien Land Law is unconstitutional because it violates the 14th Amendment to the Federal Constitution. Gen. Laws, Act 261; U.S.C.A.Const. Amend. 14.

◆

Fred N. Howser and Edmund G. Brown, Attys. Gen., Everett W. Mattoon, Asst. Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for appellant.

James C. Purcell, William E. Ferriter, Guy C. Calden, San Francisco, Saburo Kido, A. L. Wirin and Loren Miller, Los Angeles, for respondent.

PER CURIAM.

Five brothers, American citizens of Japanese ancestry, agreed among themselves to build a home for their widowed mother, a Japanese alien ineligible to citizenship, who had no property or income other than a small pension. One brother and his wife purchased a residential lot in Pasadena and executed a deed giving the mother a life estate in the property with remainder to the five brothers. The mother, together with her sons and daughter-in-law, then brought this action to determine whether the property had escheated to the state by operation of the Alien Land Law. (1 Deering's Gen.Laws, Act 261.) The trial court quieted title in the mother and sons, holding that the alien land law is unconstitutional because it violates the Fourteenth Amendment to the federal Constitution.

Our decision in Sei Fujii v. State of California, 38 Cal.2d 718, 242 P.2d 617, is controlling and for the reasons there stated the judgment must be affirmed.

Judgment affirmed.

SCHAUER, Justice.

I dissent.

At the time the judgment in this case was rendered in the court below it was indisputably contrary to the law of this state. That law was enacted by the people by initiative (1 Deering's Gen.Laws, Act 261) and was sustained by the judgments of this court (In re Akado (1922), 188 Cal. 739, 207 P. 245; In re Okahara (1923), 191 Cal. 353, 357, 216 P. 614; Porterfield v. Webb (1924), 195 Cal. 71, 77, 231 P. 554; Mott v. Cline (1927), 200 Cal. 434, 253 P. 718; People v. Oyama (1946), 29 Cal.2d 164, 165, 173 P.2d 794; Palermo v. Stockton Theatres, Inc. (1948), 32 Cal.2d 53, 195 P.2d 1) and of the Supreme Court of the United States (Terrace v. Thompson (1923), 263 U.S. 197 [44 S.Ct. 15, 68 L.Ed. 255] [Washington statute]; Porterfield v. Webb (1923), 263 U.S. 225 [44 S.Ct. 21, 68 L.Ed. 278] [California statute]; see, also, Webb v. O'Brien (1923), 263 U.S. 313 [44 S.Ct. 112, 68 L.Ed. 218]; Frick v. Webb (1923), 263 U.S. 326 [44 S.Ct. 115, 68 L.Ed. 323], and Oyama v. State of California (1948), 332 U.S. 633 [68 S.Ct. 269, 92 L.Ed. 249]).

Since the judgment in the court below, this court in a four to three decision, in Sei Fujii v. State of California (1952) 38 Cal.2d 718, 242 P.2d 617, has undertaken to hold, in contravention of its own earlier decisions and of the decisions of the Supreme Court of the United States, that the statute is (and if, the holding is sound, since its enactment 32 years ago has been) invalid.

In the absence of federal limitations this court has authority to overrule it own earlier decisions and to strike down acts of the Legislature as well as initiative measures. All that appears from its practice to be necessary is that four or more justices agree that the end seems desirable. (See e. g., Perez v. Sharp (1948), 32 Cal.2d 711, 198 P.2d 17; Fujii v. State of California (1952), supra, 38 Cal.2d 718, 242 P.2d 617.) But the absoluteness of this power ends when it is sought to be exercised in a case and on a ground which brings it into collision with the federal Constitution. In that circumstance it was formerly held by this court that "the decision of [the Supreme Court of the United States] * * * is absolutely binding upon this tribunal" and that "Whether or not the facts in the case * * * are such as to call for a modification of the views expressed in [the earlier federal decision] * * * is a question which can only be decided by the federal courts." (In re Letcher (1904), 145 Cal. 563, 564, 79 P. 65.) This principle which the majority here (as they did likewise in Fujii) refuse to follow, is nevertheless one which they have not the power to effectively overrule. The Supreme Court of the United States speaking of the duty of state tribunals in a similar situation said: "But the vice of this position is that, in following its own prior decision [whether *following* or *overruling* is immaterial; it is *contrariety* of ruling which is important], the court ignored the decision of this court to the contrary. This lawfully it could not do; the question * * * being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding." (Chesapeake & O. Ry. Co. v. Martin (1931), 283 U.S. 209, 51 S.Ct. 453, 458, 75 L.Ed. 983.)

In 21 C.J.S., Courts, § 206, at pages 366, 367, the same principle is expressed in these words: "So the decisions of the federal court are binding as to the construction of the federal constitution, and are also binding as to the validity vel non of state statutes assailed as being in conflict with the federal constitution."

Again, in 11 American Jurisprudence at pages 740, 741, it is stated thus: [§ 104] "It is a fundamental principle of the constitutional system of government of the United States that the decisions of the Federal Supreme Court are final and authoritative declarations as to the proper and correct construction to be placed on the Constitution and laws of the United States, and as to whether a state law contravenes any provisions of the Federal Constitution. On this principle, the construction given by that court to the Constitution and laws of the United States is received by all as the true construction. Whenever the Supreme Court of the United States declares that state legislation is in conflict with the Federal Constitution, the judicial tribunals of such state are bound to accept and conform to such decision.

"If necessary, state tribunals will overrule or modify their prior decisions in order to conform with the announcements of the Supreme Court of the United States in reference to constitutional questions. Similarly, where a state court has held a state statute to be unconstitutional because in supposed conflict with the Constitution of the United States, and the Supreme Court of the United States has so interpreted the Federal Constitution that the supposed conflict is found not to exist, it is customary and proper for the state court to change its rulings so as to sustain such statutes. Hence, if after a state court of last resort has decided that a statute of the state is invalid because it contravenes the Federal Constitution, the Supreme Court of the United States determines that a statute of another state which is substantially similar in all respects does not violate the Constitution of the United States, the state court will overrule its former holding of invalidity in a subsequent case and follow the decision of the Supreme Court of the United States." See also State v. S. S. Constitution (1872), 42 Cal. 578, 590; Tuttle v. Block (1894), 104 Cal. 443, 449, 38 P. 109; Foley v. Foley (1898), 120 Cal. 33, 42, 52 P. 122; In re Letcher (1904), supra, 145 Cal. 563, 564; Laurel Hill Cemetery v. City and County of San Francisco (1907), 152 Cal. 464, 477, 93 P. 70, 27 L.R.A.,N.S., 260; Moon v. Martin (1921), 185 Cal. 361, 366, 197 P. 77; Miller & Lux v. Board of Supervisors (1922), 189 Cal. 254, 266, 208 P. 304; In re Smith (1924), 193 Cal. 337, 340, 223 P. 971; Elmendorf v. Taylor (1825), 10 Wheat. (U.S.) 152, 6 L.Ed. 289, 292; Cook v. Moffat (1847), 5 How.(U.S.) 295, 12 L.Ed. 159, 165; United States v. Reynolds (1914), 235 U.S. 133, 35 S.Ct. 86, 90, 59 L.Ed. 162; State of South Carolina v. Bailey (1932), 289 U.S. 412, 53 S.Ct. 667, 670, 77 L.Ed. 1292; Pennekamp v. Florida (1945), 328 U.S. 331, 335, 66 S.Ct. 1029, 90 L.Ed. 1295.

That the question as to the validity of California's statute might never have been entertained by the high federal court if the California Supreme Court had in the first instance and consistently thereafter ruled that the law was void, and that if the question had reached it, the federal tribunal might then have followed the lead of California in the direction of invalidation, is quite immaterial. The fact is that California did not hold the statute unconstitutional and that the question did reach, and was determined by the Supreme Court of the United States. Since we ruled on the subject originally and the federal court considered and sustained our views, we are not at liberty to perform a flip and expect the high tribunal to match us with a flop.

The conflict of authority between the United States Supreme Court and this court, which the Fujii decision creates, places the law enforcement officers of California in a somewhat anomalous and difficult position. Ordinarily California law enforcement officers may and should look to the Supreme Court of this state for guidance as to the interpretation and validity of state laws. But when there is a conflict between the holding of the Supreme Court of the United States and the holding of the state court as to the validity of a state law in respect to a federal constitutional issue the ruling of the United States Supreme Court must prevail.

Whatever are the personal views of the justices of this court who joined in the Fujii decision and who join as the majority here, the fact remains that the statute as enacted still is valid according to published decisions of the Supreme Court of the United States. Since the majority here assert a federal ground for their holding, and since the highest federal court on the precise point here involved has held contrary to the views the majority now assert, and up to this time the federal court has staunchly refused to overrule or disavow the sound constitutional principles upon which its decisions, like the earlier decisions of this court, rest, it seems obvious that under constitutional precepts the law of California on this point is controlled, and is as enunciated, by the United States Supreme Court. Until the high federal tribunal has reversed itself it still remains my duty as a justice of this court, as it likewise remains the duty of all affected law enforcement officers of this state, to uphold and enforce the law as enacted.

And it well may be called to the attention of those who would break down these principles in order to favor a minority group in a particular case that such groups are the last ones who in wisdom should seek such an end. Their safety, their only ultimate protection, depends upon staunch enforcement of the constitutional processes and guarantees. As I pointed out in my dissent in the Fujii case (38 Cal.2d 718, 242 P.2d 617) "whether this law [the alien land act] should be modified or repealed or continued in force is not * * * a proper subject for our debate or ruling. The people enacted it and * * * the only classification it makes is created by an act of the Congress of the United States. By constitutional processes the people, if they will, can amend or repeal it or the Congress can abolish the classification. But until and unless the people or the Congress act by the constitutional process, the law should not unnecessarily be stricken down by judicial intervention." The constitutionally prohibited invasion and seizing of a function of the legislative process by either the judicial or the executive department of government is anarchical in character and of ominous import.

Under the accepted concept of government in the United States of America as I understand it, no end, however humanitarian it may appear, justifies judges in refusing to uphold a valid law. Other law enforcement officers may at less peril to our government (albeit at their own substantial risk) refuse to perform their duty but when judges refuse to enforce constitutional processes and instead impose their personal views as to what they would like the law to be, we cease to have a government of laws and have instead a government by whimsy of man. We are fighting governments of that type now. I would not debase our own to that level.

For adequate discussion and documentation of the constitutional principles upon which I stand reference is made to my dissenting opinion in Fujii v. State of California (1952), supra, 38 Cal.2d 718, et seq. 242 P.2d 617.

In conformity with constitutional government, the judgment should be reversed.

SHENK and SPENCE, JJ., concur.

112 Cal.App.2d 177

TRAVELERS INDEMNITY CO. v. McINTOSH.

Civ. 8080.

District Court of Appeal, Third District, California.

July 3, 1952.

Hearing Denied Aug. 28, 1952.

The Travelers Indemnity Company, a corporation, brought action against J. C. McIntosh to recover on an assignment. The Superior Court of San Joaquin County, George F. Buck, J., entered summary judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held that where assignment was ambiguous, and either plaintiff's construction thereof or defendant's contrary construction thereof was reasonable, parol evidence was admissible in aid of interpretation of assignment, thereby presenting a question of fact which would preclude a summary judgment.

Judgment reversed.

1. Evidence 🔑450(5)
Judgment 🔑181(8)

Where assignment was ambiguous, and either plaintiff's construction thereof or defendant's contrary construction thereof was reasonable, parol evidence was admissible in aid of interpretation of assignment, thereby presenting a question of fact which would preclude a summary judgment. Code Civ.Proc. § 437c.

2. Judgment 🔑185

On motion for summary judgment, affidavits of moving party are to be construed strictly and those of his adversaries to be construed liberally. Code Civ.Proc. § 437c.

3. Judgment 🔑185

Facts alleged in affidavit of party against whom motion for summary judgment is made must be accepted as true, and they need not be composed wholly of evidentiary facts. Code Civ.Proc. § 437c.

4. Judgment 🔑178

The summary judgment statute was not intended, nor can it be used, as a substitute for existing methods in the trial of issues of fact. Code Civ.Proc. § 437c.

5. Judgment 🔑181(4)

Because of the very drastic nature of the summary judgment statute, power given thereby should be used with caution, and hence when there is doubt as to propriety of the motion, courts should, without hesitancy, deny the motion. Code Civ.Proc. § 437c.

6. Judgment 🔑185

In action on assignment, which was ambiguous with respect to question whether defendant assigned the first $5,000 received under construction contract to plaintiff, or the first $5,000 after payment of all costs of construction, defendant's affidavits showing that he was prepared to put in evidence figures from which it could be determined whether contractor made a profit on the job and how much profit, were not so deficient that defendant should be denied a trial on the merits, and motion of plaintiff for summary judgment be granted. Code Civ.Proc. § 437c.

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Forrest E. Macomber, Gordon J. Aulik, Stockton, for appellant.

R. P. Wisecarver, San Francisco, for respondent.

PEEK, Justice.

This is an appeal by defendant from a summary judgment entered in favor of plaintiff and respondent The Travelers Indemnity Company.

The complaint alleges that on January 5, 1945, the Indemnity Company issued a faithful performance bond for A. R. Liner, a contractor, who had entered into a contract to construct a hospital for Yolo County; that Liner defaulted on said contract, and the Indemnity Company was thereby compelled to take over and complete the building at a cost to it in excess of $20,000; that Liner compromised the loss at that figure, giving plaintiff a four year installment note for $20,000, payable at the rate of $5,000 per year, the first payment to be "secured" out of the first moneys that would become due to Liner on a contract he had with Modesto City School District; that the payments due thereunder had been previously assigned to defendant and appellant McIntosh, the underwriter under the second contract, which assignment McIntosh accepted and agreed to pay. The assignment reads:

"To: J. C. McIntosh
Stockton
California.

"Whereas, I have heretofore * * * assigned to you all moneys due or to become due to me on account of the construction and completion of the * * School * * * and

"Whereas, I am indebted to the Travelers Indemnity Company * *.

"Now, Therefore, I hereby assign out of the first moneys due to me on account of said * * * School job, the sum of Five Thousand and no/100 ($5,000.00) Dollars unto Travelers' Indemnity Company and I do hereby authorize and instruct you to pay over said sum to Travelers' Indemnity Company * * * out of the first moneys due to me on account of said job.

"Dated: May 18, 1948.

"(Signed) A. R. Liner

"I hereby accept the within assignment and direction, and I will pay unto Travelers' Indemnity Company * * the said sum * * * in accordance with said instructions, out of the first moneys due to A. R. Liner on account of said * * * job.

"(Signed) J. C. McIntosh

"That the prior assignment from A. R. Liner to J. C. McIntosh referred to in the following document * * * is in words and figures as follows:

"To Modesto City, School District * * * For Value Received, I do hereby assign * * * unto J. C. McIntosh, all moneys whatsoever due or to become due to me on account of the construction and completion by me of the * * * School * * *.

"(Signed) A. R. Liner"

"Accepted

Modesto City School District * * *."

The complaint concluded with the allegations that McIntosh received moneys in excess of $5,000 from the School District but had refused to pay the same, and a prayer for judgment in that amount.

A general demurrer by McIntosh was overruled, and his answer which was thereafter filed, denied only the allegations of paragraph 6 of the complaint, which were that he had received more than $5,000 from the School District. Affirmatively he alleged in substance that no profit was made on the job hence Liner had no money due him under the contract.

The Indemnity Company moved for a summary judgment, its affidavits being to the effect that McIntosh had received a $27,000 payment from the School District. The counter-affidavits were to the effect that appellant was indemnitor to Pacific Indemnity Company, the surety, on the Modesto contract; that the assignment had been made but all moneys had been paid out in costs, there actually being a loss on the job after allowance for depreciation was taken, and that therefore nothing was due to Liner or the Indemnity Company for the reason that no profit was made.

The motion was granted and this appeal was then taken from the judgment entered.

Since it appears, as defendant contends, that the trial court abused its discretion in granting said motion it becomes unnecessary to discuss the additional contentions made by defendant.

The situation presented by the instant case comes squarely within the rule as enunciated in Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62, 65. In that case the plaintiff (who was the adopted son of the defendant) brought an action to recover money to which he claimed to be entitled under the modified property settlement agreements between his adoptive parents. Defendant denied she owed plaintiff any sum whatsoever under said agreements and moved for a summary judgment. In opposition to defendant's motion plaintiff submitted, by affidavit, his version of the proper interpretation of the agreements. The trial court "After hearing of the motion and consideration of these divergent views of the litigants as to the meaning attributable to the language employed in these agreements * * * resolved the conflict in favor of the defendant and entered summary judgment dismissing plaintiff's complaint." Plaintiff appealed, contending this action to be an abuse of the trial court's discretion. The Supreme Court, in passing upon this contention there said:

> "* * * in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further * * * issue finding rather than issue determination is the pivot upon which the summary judgment law turns. * * *
>
> "We are of the opinion * * * that the words * * * used are ambiguous and indefinite. * * * On its face the phraseology * * * considered in its entirety is reasonably consistent with either of the interpretations advanced here by the litigants. When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.*' (Citation.) The governing principle as to when parol testimony may be introduced to explain the language of a contract or to ascertain the intention of the parties is * * * (Citation.) * * * 'that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown.' (Citation.) * * * 'When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact.*'" See also Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 152 P.2d 774.

In the present case the affidavits of respondent show that appellant received a sum of money in excess of $5,000 from the School District. Respondent predicates its right to the claimed portion of said fund upon Liner's assignment to it which reads: "I hereby assign out of the first moneys due to me on account of said * * * School job, the sum of Five Thousand and no/100 ($5,000.00) Dollars", which assignment appellant consented to by agreeing to pay the said sum "out of the first moneys due to A. R. Liner on account of said * * * job." In fact respondent's pleadings and affidavits are both based upon a construction of Liner's assignment which would entitle it to the first $5,000 paid under the contract.

On the other hand an examination of appellant's affidavit discloses that appellant agreed to act as indemnitor for the Pacific Indemnity Company on the faithful performance bond it issued on the Modesto job, and in consideration thereof Liner executed to him an assignment of "all moneys whatsoever due or to become due" on said job for the purpose of indemnifying appellant from any loss on his indemnity agreement with the Pacific Indemnity Company; that his acceptance of the second assignment was to be effective only in the event that all obligations incurred on the Modesto contract were paid in full and that Liner failed to make a net profit on the job. The affidavit of A. J. Snell, a certified public accountant, whose affidavit was also introduced by appellant, is to the effect that he kept the books and records for the Modesto job, that all receipts and disbursements properly attributable to said job were duly and regularly entered, and upon completion of the job, after an allowance for depreciation in accordance with the income tax laws of the State of California, a net loss of $468.53 was sustained. From the above summary it can be seen that the affidavits of appellant as well as his answer are premised upon a construction of the second assignment (Liner to Travelers') which would give respondent no right to the money paid under the contract of construction until it was determined that Liner was entitled to same by reason of his having suffered no loss on his agreement to indemnify Pacific and that there was an excess of receipts over expenses incurred and paid.

[1] We are of the opinion that both respondent's contention that Liner's assignment to it was to be the first $5,000 paid on the contract, and appellant's contention that said assignment was only to be the first $5,000 after the payment of all costs of construction and indemnifying appellant if such be necessary, are reasonable interpretations of the language used in the assignments under the circumstances disclosed by the pleadings, and that under such a situation parol evidence was admissible in aid of the interpretation of said agreements, thereby presenting a question of fact which would preclude a summary judgment. Walsh v. Walsh, supra.

Respondent, however, contends that even if the theory of appellant be adopted his affidavits are insufficient to prevent the rendition of a summary judgment here because they fail to show there was no profit made on said job, that the affidavit of the accountant to the effect that the loss was sustained after allowance for depreciation, is a conclusion, not a statement of fact, and hence does not raise a triable issue.

[2–6] We cannot agree. Affidavits of the moving party are to be construed strictly and those of his adversary to be construed liberally. The facts alleged in the affidavits of the party against whom the motion is made must be accepted as true and they need not be composed wholly of evidentiary facts. U. S. Fidelity & Guaranty Co. v. Sullivan 93 Cal.App.2d 559, 561, 209 P.2d 429. The summary judgment statute was not intended nor can it be used as a substitute for existing methods in the trial of issues of fact. Because of the very drastic nature of the statute the power given thereby should be used with caution. Hence, when there is a doubt as to the propriety of the motion, courts should, without hesitancy, deny the same. Gibson v. De La Salle Institute, supra, 66 Cal.App.2d at pages 617, 632, 152 P.2d 774. Examining appellant's affidavits in the light of the above principles we do not think they are so deficient that he should be denied a trial on the merits. The affidavits show he is prepared to put in evidence figures from which it can be determined whether Liner made a profit on the job and from which evidence, assuming, consonant with appellant's construction of the assignments, the necessity of a profit before the Indemnity Company is entitled to payment, it can be determined how much profit was made.

The judgment is reversed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

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112 Cal.App.2d 160

VOGEL v. BANKERS BLDG. CORP. et al.

Civ. 18923.

District Court of Appeal, Second District,
Division 2, California.

July 2, 1952.

As Modified on Denial of Rehearing
July 25, 1952.

Hearing Denied Aug. 28, 1952.

Action by Louis Vogel against the Bankers Building Corporation and others to determine the rights and obligations of the parties in a leasehold purchased by defendant corporation and for other relief, wherein Adolph G. Zalkus intervened. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered judgment for defendants and plaintiff and intervener appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to show that money advanced by plaintiff to be used for purchase of the leasehold by the corporation was a loan and not a capital investment in the corporation, but that portion of judgment requiring payment to one of defendants of stipulated amount by plaintiff and intervener would be modified.

Judgment modified and as modified affirmed.

1. Contracts 🔑170(1)

When the meaning of contract is uncertain and parties have acted under it for a period of time, the practical interpretation which parties have given contract by their acts and conduct is cogent and persuasive evidence of their intent and true meaning of agreement.

2. Declaratory Judgment 🔑347

In action for determination of rights and obligations of corporation to plaintiff who advanced to one of organizers of corporation, certain money used as portion of price of building leasehold purchased by corporation, evidence was sufficient to show that transaction between plaintiff and organizer was a loan and not a capital investment in corporation.

3. Trusts 🔑72

Where money furnished by organizers of corporation to corporation for purchase of a building leasehold represented a loan, party who advanced a portion of purchase price to one of the organizers was not entitled to an interest in corporation in proportion to his contribution on theory that corporation held leasehold as trustee for persons who purchased it in proportion according to which such persons contributed to purchase price.

4. Joint Adventures 🔑1.5

The relationship of "joint adventurers" derives from the intent of parties to enter into a special combination where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Adventurers".

5. Corporations 🔑32(11)

Evidence was sufficient to show that a corporation, formed in connection with enterprise whereby corporation was to be organized for purchase of a building leasehold, was in fact a corporation and not a joint adventure, notwithstanding fact that no stock was issued by corporation.

6. Partnership 🔑1, 17

A "partnership" connotes co-ownership in partnership property with a sharing in the profits and losses of a continuing business and its existence depends primarily upon intention of parties as ascertained from their writings and surrounding circumstances.

See publication Words and Phrases, for other judicial constructions and definitions of "Partnership".

7. Contracts ⚷54(1)

A single consideration may support several counter-promises made by the other party to a transaction.

8. Contracts ⚷10(6), 63

An agreement whereby plaintiff advanced money to defendant to be used as portion of purchase price of a leasehold to be purchased by corporation to be organized by defendant, in return for which defendant promised that plaintiff would have an interest in the property in proportion to his contribution to the purchase price, as security, until plaintiff had received his money back, at which time plaintiff and defendants would share profits 50–50 in proportion of plaintiff's contribution to total purchase price, was not without consideration or mutuality of obligation.

◆

William Katz, Los Angeles, for appellants.

Max Bergman, Leo Goodman and Warren M. Goodwin, Los Angeles, for respondents Bankers Bldg. Corp., Leo Goodman and Sylvia Adler.

Fred Horowitz, Alvin F. Howard, Los Angeles, for respondent William Berk.

FOX, Justice.

Defendant Berk has been engaged in the real estate business in Los Angeles for many years. Plaintiff Vogel was a manufacturer of ladies' suits and coats. These men, prior to the events leading up to this litigation, were neighbors. Vogel told Berk that he had "a little money lying around" and "he would like very much to be given an opportunity" to put some money in one of his real estate deals. Berk assured him he would be given such opportunity.

Thereafter, "around July, 1945," Berk learned that the 99-year leasehold covering the "Bankers Building" on Hill Street in Los Angeles was for sale. He contacted defendant Goodman who indicated he would like a half interest in the deal.

They thereupon entered into negotiations with Mr. Metcalf, the agent of the owner, resulting in Berk's making a deposit of $10,000 on August 22, 1945. This was in the form of a check of the Republic Realty Co., which was a corporation "controlled by" Berk and which was the instrumentality used by Berk and Goodman in making the final contract of purchase with the sellers on October 15, 1945.

In order to consummate the purchase, for which approximately $250,000 was required, defendants Berk and Goodman arranged for a loan of $150,000 from the Farmers & Merchants Bank upon the security of the leasehold, while the remaining sum of slightly in excess of $100,000 was to be provided by Berk and Goodman in equal amounts, in exchange for which each was to obtain a 50 percent interest in the entire transaction. It was proposed that a corporation to be known as the Bankers Building Corporation, a defendant herein, would be organized for the purpose of eventually taking over the leasehold, with Berk and Goodman each obtaining a 50 percent stock interest. The procurement of the funds required in excess of the amount loaned by the bank was arranged independently by both Berk and Goodman. Berk contacted plaintiff Vogel, outlined to him the salient details of the proposed purchase and its contemplated ownership by a corporation subsequently to be formed, and informed him that he could participate in the venture to the extent of $10,000. On November 26, 1945, plaintiff delivered to Berk a check in the sum of $10,000 payable to the Republic Realty Company, and drawn upon the account of the Country Club Coat Co., of which Vogel was a partner with Adolph G. Zalkus, intervener in this action. Plaintiff used partnership funds in entering the deal with Berk and was acting in behalf of himself and intervener Zalkus.

After the $10,000 was transferred to Berk, the specific terms on which Vogel was to be included in the project, and the technique by which the acquisition, holding, management and operation of the building was to be achieved, which had previously been the subject of general discussion between Vogel and Berk, was incorporated in more definitive form in a letter dated

December 15, 1945, which Berk sent to Vogel and whose pertinent sections read as follows:

> "The total purchase price was about $250,000, and it may probably run $3,000 or $4,000 more. We have borrowed from the Farmers and Merchants Bank the sum of $150,000 for five (5) years at three (3%) per cent interest. However, we must pay over to the bank all of the net earnings from this property until our loan is liquidated, leaving us a net investment of about $100,000.
>
> "I do not know exactly how the mechanics will work out as to whether all of the investors will treat their investment as a loan to the corporation, in which case they will receive a note from the corporation, or whether they will take stock, or part loan and part stock. It all depends which will be the most advantageous to all of us from an income tax standpoint.
>
> "We have formed a new corporation called the Bankers Building Corporation, which takes over all of the assets of the old corporation which was known as the 629 South Hill Street Company. * * *
>
> "Regarding your investment, you and I agreed as follows: After you have received the full amount of your investment, you and I will share the profits fifty-fifty. This profit of course appertains to the proportion that $10,000 bears to the total investment, namely, one-tenth, so after you have received your money back, you will own five percent (5%) of the equity in the entire property. Up to that time you will be entitled to and will have as security, the entire ten per cent (10%)."

Vogel signified his approval in writing on a copy of the letter which he returned to Berk.

Meanwhile, on November 23, 1945, defendant Bankers Building Corporation was incorporated and an escrow was opened during the course of which the Republic Realty Corporation assigned its contract of purchase to the defendant Bankers Building Corporation, which in turn purchased the building from the sellers in its own name. In addition to the $150,000 loan (which was fully repaid to the Farmers & Merchants Bank at the close of 1948), a total of $107,200 was deposited in escrow, of which Berk and Goodman each furnished $53,600. Of this sum of $107,200, $100,000 represented a part of the purchase price, while the remaining $7,200 was paid for commissions, escrow fees and other charges. The entire amount of $107,200 supplied by Berk and Goodman was treated by them as a loan and was thus entered on the books of the Bankers Building Corporation. By the time of trial, all amounts in excess of $101,000 had been repaid to Berk and Goodman. Of this unpaid obligation, an amount of $100,000 has been represented in the form of two promissory notes issued by the Bankers Building Corporation, each in the amount of $50,000, payable to Berk and Goodman respectively, each bearing an interest rate of 6 percent per annum. The balance of $1,000, of which Berk and Goodman each provided $500, has been left with the corporation for the purpose of applying to the Commissioner of Corporations for a permit to issue stock in that amount.

The sum of $50,000 which is covered by the promissory note executed by the corporation to Berk and carried on its books as a loan, includes the $10,000 supplied by plaintiff to Berk; the balance is derived from $20,000 which Berk himself furnished, and $10,000 apiece from Ben Weingart and Alfred Lushing, whom Berk had interested in helping finance the purchase. Of Goodman's half-interest in the venture 10 percent thereof was allocated by him to two of his associates, Max Bergman and Irving Shulman. Goodman was not concerned with the source of Berk's $50,000 investment and not until about 1950 did he become aware either of plaintiff's agreement with Berk or of the fact that Berk had associated others in his side of the financing of the purchase. The interest on the $50,000 note was paid by the corporation to Berk.

From the date of incorporation to the time of trial on July 3, 1951, Berk and Goodman were the controlling directors and officers of the corporation. Not until January 24, 1951, three months after the filing of this action, did defendant corporation apply for a permit to authorize the issuance of 1,000 shares of stock, at $1 per share, to eight named individuals, the amount of shares allocated to each individual being that proportion which his financial participation in the purchase of the building bears to $100,000. Plaintiff's name does not appear among the designated shareholders, but it was apparently intended that he receive his shares from the number credited to Berk's name.

The evidence discloses that during the years 1946 to 1949, inclusive, Berk received annual interest payments of 6 percent on his $50,000 note from the corporation, and he paid to plaintiff that share of the interest accruing to him by virtue of the $10,000 he had advanced to Berk. The payments were made by check bearing notations that they were for interest on the $10,000, which plaintiff deposited with his bank. In January, 1951, plaintiff for the first time rejected Berk's interest payment because of the dispute which culminated in the bringing of this action. Defendant Berk testified that prior to the trial he offered to return to plaintiff the $10,000 and to give him 5 percent of the stock in the corporation from his own share just as soon as it was issued.

Plaintiff's amended complaint comprises three causes of action, the first being a suit for declaratory relief to determine the rights and obligations of the parties in the 99–year leasehold, in the defendant corporation, and the rights and duties of the parties towards each other. The second cause of action prayed the court to impress a trust in plaintiff's favor with respect to a 10 percent interest in the said leasehold. The third cause of action was a demand that defendant corporation be compelled to apply for authorization to issue capital stock in the amount of $100,000 and that 10 percent of such stock be issued to plaintiff. Zalkus filed a complaint in intervention alleging that Vogel's $10,000 consisted of partnership funds invested in his behalf, pleading and praying for relief substantially identical with plaintiff's demand and considered in this appeal as having rights inseparable from those of plaintiff.

By its interlocutory judgment the court decreed that:

1. Defendant William Berk pay to plaintiff Louis Vogel and intervener Adolph G. Zalkus the sum of $5,000 each, within ten days after notice of entry of said judgment, with interest at 6% per annum from November 1, 1949, to the date of payment;

2. Defendant Bankers Building Corporation make an application to the Corporation Commissioner of the State of California within ten days after notice of the entry of said judgment, for the issuance of one thousand shares of the capital stock of said corporation for the total sum of $1,000;

3. Defendant Bankers Building Corporation deliver to plaintiff Louis Vogel 25 shares, and to intervener Adolph G. Zalkus 25 shares of said stock, if and when a permit is granted for the issuance of 1,000 shares of the capital stock of said corporation for the total sum of $1,000, upon payment to defendant Berk of the sum of $25 each by plaintiff and intervener.

It is from this judgment that plaintiff and intervener appeal.[1] One of their basic contentions is that the $10,000 which Vogel turned over to Berk constituted a capital investment in the Bankers Building Corporation and that the court erred "as a matter of law," in holding that the $100,000 advanced by the various parties to consummate the purchase was a loan. Their position cannot be sustained.

[1] In determining the rights and duties of the parties to a contract the court seeks to ascertain their intention. When the meaning of a contract is uncertain and the parties have acted under it for a period of time the practical interpretation which they have thus given to it by their acts and

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[1] **Plaintiff and intervener will hereafter be referred to as "plaintiff."**

conduct is cogent and persuasive evidence of their intent and the true meaning of the agreement. Moore v. Wood, 26 Cal.2d 621, 629, 160 P.2d 772; Dougherty v. Cross, 65 Cal.App.2d 687, 700, 151 P.2d 654; Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665.

[2] At the time plaintiff delivered the money to Berk it had not been determined just how the financing of the deal would be handled. That uncertainty is reflected in the letter from Berk to Vogel in which the former advised the latter that "I do not know how the mechanics will work out as to whether all of the investors will treat their investment as a loan to the corporation, in which case they will receive a note from the corporation, or whether they will take stock, or part loan and part stock." Thereafter notes in the sum of $50,000 each were issued by the corporation to Berk and Goodman providing for interest at 6 percent. The books of the corporation reflected this indebtedness. Then for a period of four years Berk sent plaintiff his check for the interest on $10,000 as soon as the corporation paid its interest to him on the $50,000 note which he held. Vogel accepted these checks and deposited them without remonstrating with Berk. This conduct of the parties, together with the testimony of Berk, amply support the court's determination that the transaction between him and Vogel was a loan, and not a capital investment in the Bankers Building corporation. The character of this transaction was essentially a question of fact which the trial court resolved adversely to plaintiff's position. We cannot therefore say as a matter of law that the money furnished by him did not constitute a loan with the right to share in the profits of the enterprise as agreed in the contract between him and Berk.

The testimony of Berk and Goodman that each would furnish half of the financing in excess of the bank loan; that the books of the corporation showed that each of them had advanced $50,000; that the corporation had issued notes to them representing such advances; that interest had been paid on said notes for a period of years; and that Goodman was unaware of plaintiff's dealings with Berk, or that plaintiff claimed any interest in the deal for some five years although plaintiff had met Goodman and knew he was an officer of the corporation, amply support the trial court's determination that the $100,000 was a loan.

Plaintiff cites a series of cases dealing with corporate debt financing in which contributions of capital to corporations have been treated for tax purposes as capital investments. These authorities do not control the rights and obligations of the parties inter se, since they are founded upon valid contracts which may be enforced according to their particular terms under state law, regardless of the interpretation which might be given the transaction in the application of a federal tax statute. See Burk-Waggover Oil Ass'n v. Hopkins, 269 U.S. 110, 114, 46 S.Ct. 48, 70 L.Ed. 183.

The findings dispose of another of plaintiff's contentions: namely, that the defendant corporation is obligated to issue capital stock for the sum of $100,000 and to issue 10 percent thereof, aggregating $10,000 in amount, to plaintiff. Obviously this cannot be done since the $100,000 represents a loan to the corporation by Berk and Goodman, and since Vogel's rights are derived from his contractual relations with Berk.

[3] Plaintiff also argues that defendant corporation holds the Bankers Building as trustee for the persons who purchased it in the proportions according to which such persons contributed to the cash purchase payment of $100,000. To support this proposition he seeks to apply the theory of a resulting trust on the basis that the money furnished by plaintiff and the other parties constituted the consideration which was paid for the property, title to which was merely taken in the corporation's name. Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 244, 196 P. 884. That principle, however, is not applicable because the trial court has determined upon substantial evidence that the $100,000 was a loan to the corporation by Berk and Goodman. Consequently the money belonged to the corporation which paid the consideration for the title which it acquired.

[4–6] Plaintiff urges that due to the failure of the corporation to issue stock, it should be regarded merely as an instrumentality of those participating in the venture and that Berk, Goodman, Vogel and the other participants in the transaction be treated as partners or joint adventurers. The relationship of joint adventurers derives from the intent of the parties to enter into "a special combination * * * where in some specific venture a profit is jointly sought without any actual partnership or corporate designation * * *." 48 C.J.S., Joint Adventures, § 1, p. 801; See Hansen v. Burford, 212 Cal. 100, 109, 297 P. 908; Nelson v. Abraham, 29 Cal.2d 745, 749, 177 P.2d 931, 933. The evidence clearly shows that the parties contemplated the organization of a corporation in which management of the purchased property was to be vested and that there was to be no control by any of the associates as individuals. Since there is no showing of fraud of a nature to justify piercing the corporate veil, and the record discloses no agreement by the parties containing the elements of a joint venture nor such conduct in their operations as would imply that a joint adventure was created, we can find no basis for plaintiff's contention. See Enos v. Picacho Gold Min. Co., 56 Cal. App.2d 765, 772, 133 P.2d 663. "A partnership connotes coownership in the partnership property with a sharing in the profits and losses of a continuing business" Nelson v. Abraham, supra, and its existence "depends primarily upon the intention of the parties as ascertained from their writings and from surrounding circumstances". Thomas v. Juarez, 93 Cal.App.2d 846, 848, 209 P.2d 966, 968. No intent to create a partnership appears, and the contract and conduct of the parties do not as a matter of law establish such a relationship in this transaction.

[7, 8] Plaintiff also contends the promise to return one-half of the profits in the enterprise to Berk is void because: (1) it is not founded upon a consideration and (2) it is lacking in mutuality of obligation.

In raising these arguments plaintiff is proceeding upon the theory that the promise to return one-half of the profits to Berk is a separate and independent contract. In this he is in error. The agreement to return one-half of the profits was an integral part of the initial transaction. In Berk's letter to Vogel he stated that after the latter had received his money back they, i.e. Berk and Vogel, would share the profits fifty-fifty in the proportion that $10,000 bears to $100,000, namely, one-tenth. Thus after the return of plaintiff's $10,000 he would own 5 percent of the equity in the property. Until the return, however, of his money, he would have the entire 10 percent *as security*. In his testimony Berk explained the security feature was for protection in case either of them should die. It is thus plain that the reduction in the amount of plaintiff's stock interest upon the repayment of the $10,000 was simply a part of the original deal and in accordance with its terms, and supported by its consideration. Green v. Brooks, 81 Cal. 328, 331, 22 P. 849. A single consideration may support the several counter promises made by the other party to the transaction. First Nat. Bank v. Pomona Tile Mfg. Co., 82 Cal.App.2d 592, 603, 186 P.2d 693.

There was mutuality of obligation here since the $10,000 was a loan to Berk and he could not get his share of the profits from plaintiff until he repaid plaintiff's loan. Berk was under the further obligation to account to Vogel for his proportionate share of whatever profits or interest he received until Vogel's $10,000 was repaid. This is far from being an illusory obligation as plaintiff contends.

Plaintiff challenges the sufficiency of the evidence to support a number of the findings of the trial court. The first of these reads as follows: "That on October 15, 1945, pursuant to negotiations commenced on or about August 22, 1945, Republic Realty Co., a corporation, entered into a written agreement to purchase the issued and outstanding stock of Six Twenty-nine South Hill Co., a corporation, hereinafter called '629 South Hill Co.', or, at its option, to purchase the assets of said corporation consisting principally of that certain 99-year lease described in paragraph III of plaintiff's amended complaint." Both Berk and Goodman testified they entered into negotiations with Mr. Metcalf, the owner's agent, in August, 1945, for the acquisition of this property. On August 22d Berk delivered to Metcalf the check of Republic Realty Co. for $10,000 as a down payment, and on October 15 a written contract (Plaintiff's Ex. 8) was signed by the realty company to purchase the issued and outstanding stock of Six Twenty-nine South Hill Co., or, at the option of Republic, to purchase the assets of said corporation. This evidence furnishes clear support for the questioned finding.

Plaintiff also contends there is lack of evidentiary support for the court's finding that Berk and Goodman each advanced $53,600 to defendant corporation, which sums were recorded on its books as loans payable to them. Both Berk and Goodman testified to having made such advances to the Bankers Building corporation and produced records of such payments. The general ledger sheets of defendant corporation show that such sums were recorded therein as loans payable to them.

Plaintiff makes similar attack upon the finding that the defendant corporation treated the moneys received from Berk and Goodman as loans. The evidence shows the corporation issued to each of them its note, and later a renewal thereof, for $50,000. Also, interest was regularly paid on these notes at 6 percent per annum. He challenges, however, the finding that interest was paid by defendant corporation on these obligations. But the evidence shows such payments were made, the amounts thereof, and the dates on which they were made.

It is further contended there is no evidentiary support for the court's finding that Goodman did not enter into any contractual relation with plaintiff, and that he did not know of the existence of any agreement between Berk and plaintiff until 1951. This finding is in accordance with the testimony of Goodman.

It is hardly necessary to specifically consider other challenged findings. Implicit in plaintiff's argument that the findings are lacking in evidentiary support is not that they are out of harmony with the testimony but that he disagrees with the legal consequences flowing therefrom.

Plaintiff objects to the finding of the trial court "That all of the allegations of plaintiff's amended complaint and the complaint in intervention, inconsistent with the findings of fact stated herein, are untrue," and argues that the court failed to make any findings on a number of allegations which he deems material to the issues and not inconsistent with the findings, or, if the court deemed the allegations inconsistent with the findings, then this "inconsistency finding" is unsupported by the evidence. A careful examination of the testimony and exhibits indicates that the findings are sufficiently specific and comprehensive, with the single exception hereafter noted, to support the judgment. The issues upon which findings were allegedly omitted were either immaterial to the determination of the case, covered by the finding that allegations inconsistent with the facts found to be true, are untrue, or not of such nature that a finding in plaintiff's favor would adversely affect the judgment rendered. Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 154, 80 P.2d 723; Strauch v. Bieloh, 16 Cal.App.2d 278, 282, 60 P.2d 582.

The interlocutory judgment, however, must be modified in one particular, namely: the provision requiring payment to Berk of $25 each by both plaintiff and intervener if, as and when the defendant corporation issues 25 shares of stock to each of them must be stricken. In Berk's letter to Vogel he stated "after you have received your money back, you will own five per cent (5%) of the equity in the entire property." There is nothing in the writing or in the evidence to indicate that the 5 percent interest was subject to any condition other than the return of the $10,000, or that plaintiff would be required to pay for any stock that might be issued to represent such interest.

It is therefore ordered that the following language be stricken from paragraph 3 of the interlocutory judgment: "upon the payment to defendant Berk of the sum of $25.00 by plaintiff and upon payment to defendant Berk of the sum of $25.00 by intervener."

As so modified the judgment is affirmed, respondents Bankers Building Corporation, Leo Goodman and Sylvia Adler to recover their costs on appeal, respondent William Berk to recover his costs on appeal less $50.

MOORE, P. J., and McCOMB, J., concur.

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111 Cal.App.2d 781

PEOPLE v. McLAUGHLIN et al.

Cr. 4762.

District Court of Appeal, Second District,
Division 2, California.
June 19, 1952.

Hearing Denied July 17, 1952.

Defendants were convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of conspiracy to aid and abet others in violating statute prohibiting bookmaking and their joint motion for new trial was denied, and they appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

Order affirmed.

1. Criminal Law 🔑32

Ignorance of existence of statute inhibiting crime of bookmaking can afford no excuse to those who conspire to aid others to violate such statute, since doctrine that ignorance of law excuses no one still prevails. Pen.Code, § 337a.

2. Criminal Law 🔑33

While ignorance of the law is no defense to criminal prosecution, penalty may be avoided upon proof of ignorance or mistake of fact. Pen.Code, §§ 26, 31, 182, 337a.

3. Criminal Law 🔑32

Where operators of "wire service" were aware that their operations abetted bookmaking, fact that operators may have been unaware of existence of statute inhibiting bookmaking could not operate as defense to charge of conspiracy to aid and abet others in the commission of crime of bookmaking, since at most there was but ignorance of the law. Pen.Code, §§ 26, 31, 182, 337a.

4. Criminal Law 🔑32

The guilt of those who conspire to do an act which is prohibited by law is measured by the intent with reference to the act to be performed, and not by the amount of their knowledge or ignorance of whether such acts are contrary to statute.

5. Criminal Law 🔑312

An unlawful intent is logically inferred from the doing of an unlawful act.

6. Conspiracy 🔑23

The gist of the crime of conspiracy is a corrupt agreement of two or more persons to commit an offense against the state, and whether the conspiracy is a crime depends upon intention of the accused construed in connection with the purpose contemplated.

7. Conspiracy 🔑28

Where several persons are accused of having conspired to abet others to violate the law, the only question for trial court's determination is whether such persons violated the law, and not whether they had knowledge of the law violated.

8. Conspiracy 🔑47

Evidence sustained convictions for conspiracy to aid and abet others in commission of crime of bookmaking as prohibited by statute. Pen.Code, §§ 26, 31, 182, 337a.

9. Criminal Law 🔑27

The crime of bookmaking as prohibited by statute is a felony until judgment has been pronounced assessing a penalty less than confinement in a state prison. Pen. Code, § 337a.

10. Gaming 🔑79(1)

Operators of "wire service" who furnished information to assist and abet others in violating statute inhibiting bookmaking and who attempted to protect those making books from arrest, were accessories after the fact, in that crime of bookmaking is felony until judgment has been pronounced assessing penalty less than confinement in a state's prison. Pen.Code, §§ 32, 337a.

11. Conspiracy ⚷45

In prosecution of operators of a "wire service" for conspiring to aid and abet others in commission of crime of bookmaking, admission of decision of public utilities commission which recognized relation between bookmaking and wire services and which was to be considered with rules and regulations of telephone company as part of contract for installation of telephonic instrument, was proper for purpose of showing criminal intent and guilty knowledge. Pen.Code, §§ 26, 31, 182, 337a.

12. Criminal Law ⚷1172(1)

In prosecution for conspiring to aid and abet others to violate statute prohibiting bookmaking, wherein there was evidence that bookmaking statute had been violated, instruction that conspirators are guilty of a crime if they agree to aid person who is committed or is about to commit a felony, if after the agreement they violate the law, although broader than statute relating to accessories after the fact, was not prejudicial. Pen.Code, §§ 32, 337a.

13. Criminal Law ⚷1172(1)

In prosecution for conspiring to aid and abet others in violating statute inhibiting bookmaking, instruction that if two conspirators agree to a criminal act and thereafter commit an overt act in furtherance of such agreement, then such agreement and act constitute a criminal conspiracy, even though the actors believe the act is lawful, was not prejudicial. Pen.Code, §§ 26, 31, 182, 337a.

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Ward Sullivan, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., John Barnes, Deputy Dist. Atty., Los Angeles, for respondent.

MOORE, Presiding Justice.

The seven appellants were convicted of a conspiracy to violate sections 31 and 32 and subdivisions 1, 2, 4 and 6 of section 337a of the Penal Code. The proceedings were suspended as to McLaughlin and O'Leary; they were placed on probation for a term of years, nine months thereof to be served in the county jail. Judgments were entered for each of the five women to serve a jail sentence of 90 days each. Thereupon, execution of their sentence was suspended and each of them was granted probation for two years. All have appealed from the order denying their joint motion for a new trial insisting that (1) the verdicts are contrary to the evidence and to law, (2) there were errors on questions of law arising at the trial, and (3) the jury was misdirected.

Evidence Sufficient.

In March, 1951, McLaughlin and O'Leary, who were brothers-in-law, were engaged as partners in a "wire service" business. For three years they had operated such business which they had taken over from McLaughlin's father. When arrested they were operating at 847 North S Street, Los Angeles. The premises were rented to McLaughlin in the name of the United Hosiery Company. Thereafter the monthly rental was paid in cash, the receipt therefor being made out to United Hosiery Company and given to McLaughlin. The application for the installation of telephones at that address was made on behalf of the United Hosiery Company by one John Chesterton. The women codefendants were employees of the two partners.

The conduct of a "wire service" was not the subject of the indictment. The prosecution was instituted against appellants for conspiring and agreeing to aid, abet and encourage other persons in the commission of the crime of bookmaking in violation of section 337a, subdivisions 1, 2, 4 and 6, and that the conspirators would conceal and aid diverse persons who to the knowledge of the defendants were principals in the commission of the felonies of bookmaking as described in said statute, with the intent on the part of the defendants that such persons might and would avoid and escape from arrest, trial, conviction and punishment. The service had originated prior to the time its domicile was established at 847 North S Street. The senior McLaughlin had operated it at 1357 North W Street for two years during which time the listing of the telephones in his name remained unchanged until the telephone company disconnected them, pursuant to the orders of the police department. O'Leary thereupon attempted to obtain a listing in his own name, the telephone to be used for giving race results. "This effort failed," state appellants in their brief, "the telephone was refused by the telephone company and the defendant O'Leary found that he could not get a telephone in his own name." During the period McLaughlin and O'Leary were operating the wire service they received 25 letters from the telephone company in which they were advised that their telephone service was being disconnected because the telephone company had been informed by the police that they were using the telephones to aid and abet bookmaking. They then rented the office of a real estate broker on Western Avenue with three instruments. After a year had elapsed the police found them and again the company disconnected the instruments. O'Leary testified he did not "know where we went from there; we just kept moving around, I would say about 25 times, the same procedure all the time."

Bookmaking in Los Angeles County is ordinarily conducted with the use of scratch sheets, markers, cards, telephones and "wire service." The California Digest is also used in connection with the distribution and receipt of the latest race results. This digest carries the code numbers of the horses currently running. It cannot be bought where periodicals are usually available but evidently is obtained by subscriptions of bookmakers and "wire service" operators and is delivered surreptitiously. Scratch sheets carry information concerning races and tracks, horses and jockeys. About the business have developed numerous phrases descriptive of adjuncts ordinarily indispensable.

"Wire service" is indispensable to an up-to-date bookmaker's success. It reports to him in code the "off time," number of horses, their index numbers taken from the California Digest, the winners of the race and the order of their finish, the mutuels paid by each, the amount paid for the winners in their order and "the post time of the bottom race." So important is "wire service" to the bookmaker that he pays $35 a week for it. And so lucrative is the service that on being denied a listing for a "wire service," those engaged in the business procure their telephones by using fictitious names or other subterfuge to outwit the police. O'Leary paid one party $100 for obtaining telephones for the place on S street. Ninety nine percent of the customers of "wire service" are bookmakers. Such patronage is gained by virtue of the fact that "wire service" can supply information faster than any other system that has been devised, as a rule within 90 seconds after the race is run. The same news by radio takes from 20 to 45 minutes.

The partners knew that most of their patrons were bookmakers. McLaughlin had worked at bookmaking and knew of the need of the bookmakers for wire service. They rarely or never saw their customers who paid for the service in cash but never received receipts. Giving receipts, testified O'Leary, was "not in the line of this business."

When the police learned of the operations on S street they caused a dictaphone to be there installed. After that, evidence was gathered by the police which proved that appellants were giving out information required by bookmakers on the races run daily. The officers visited the house, found the five women appellants at work, four of them answering the eight telephones, giving results of races by number. The officers took charge of the telephones, answered the customers and obtained the telephone numbers of some of them. After the officers departed the girls engaged the customers in conversation about the call of the police and the fear the latter might have obtained the telephone numbers of the customers. The women attempted on the telephone to soothe and reprove the customers who called on the telephone and to emphasize the necessity of never giving their own numbers to a telephonic inquirer. Some of them talked about having worked in bookmaking phone spots and two days later in a conversation among themselves they discussed the matter of "going back to work for bookmakers and of the open cash rooms in town."

In a conversation with the officers on March 28, 1951, appellant Ille said, "I know we warned the bookmakers that you guys had their numbers." Appellant Tomczishin said, "Most of the guys who use our service are books. We have code names for all of our customers." Appellant Reeve said, "I guess you wouldn't understand why we warn our customers, but after * * * so long you get to know them and like them and don't want to see them get arrested." Appellant Seba said, "We warned all the bookies not to give their phone number because we didn't want them to get in trouble." Such statements serve to show the generous service afforded by "Wire Service" in saving the bookmakers from arrest.

Further proof of the protection enjoyed by the bookies as patrons of appellants is found in the experience of Officer Lestelle, who while at a place on Ceylon Street answered a telephone call from appellants' office. Miss Reeve said, "Service" and gave the results on a race. Pretending to be a patron and about to change his location, he asked for her number in order to call her, but she declined to give it and referred the call to McLaughlin, who also refused to give the number. However, he took the number of the witness and said he would code it.

Following the visit to the house on S street the officers called at several addresses, the telephone numbers of which they had obtained in answering the telephones at the S street location. In each of them the officers found various paraphernalia usually found in the headquarters of bookmakers. In one place the officer answered the telephone call of a lady who wished to place a bet and also observed a patron who entered and demanded the money which he had won on a race.

Appellant Seba worked in a fully equipped "phone spot" in Los Angeles in 1946. She and a male companion were arrested for bookmaking. Appellant McLaughlin was arrested for operating a "phone spot" about 1941, in Los Angeles. Some six years thereafter he was found in a bookmaker's headquarters in the rear of a store in East Los Angeles with 11 male companions sitting around a table. The place was equipped with all necessary paraphernalia, including nine telephones.

Numerous other instances were detailed by witnesses which left no room for doubt that "wire service" is an important and necessary adjunct to bookmaking and that appellants jointly and severally knew that by furnishing the wire service they were aiding, abetting and encouraging violations of section 337a. Also, they had knowledge of decision No. 41415 of the Public Utilities Commission which by implication is included in every contract made for the installation of telephones. That decision recites that "in order to conduct successful bookmaking, the operators thereof must have information in excess of that which can be obtained through regular news and radio channels. Accordingly, there has grown up a specialized wire service which has for its principal purpose the dissemination of detailed racing information within a matter of minutes after the occurrence of the actual events * * * These wire services sell this information to bookmakers who, in turn, use it in conducting their business * * * that successful bookmaking cannot be conducted without access to these wire services or without access to telephone facilities." The decision recites other reasons why communication facilities should not be furnished for use of bookmakers or "related illegal purposes" or continued where such facilities are so used.

Defendants received repeated notices from the telephone company to the effect that their telephones were being disconnected by reason of the nature of the business they were conducting. They never resisted the removal of their telephonic instruments. They made no use of judicial process to prevent the removal, nor to obtain the installation of such instruments. They merely moved to a new "spot" and continued the old traffic. Their customers were known to them only by code numbers. They gave no receipts for sales of service. The partners testified that speed in delivery of information was vital to their customers and that the latter were bookmakers. Miss Ingles testified that the wire service is characterized as "highly illegitimate;"

that newspapers do not give racing results to bookmakers and scratch sheets do not give posts, names or numbers which "wire service" does.

Because four of these appellants were experienced bookies it was a reasonable inference that they knew how to handle the "wire service" to furnish accurate news in the code of the "California Digest." Because such service was furnished only to those who paid cash in advance at $35 per week it was a fair inference that the violator of section 337a was paying for aid and assistance in his operations.

The partners were not "babes in the woods." McLaughlin was reared in the "wire service business." Since he took it over from his father it is a logical assumption that the son was advised of the lawlessness of the enterprise. Moreover, before embarking upon his father's course McLaughlin had been a bookmaker. He surely learned there the advantages to a bookie in having "wire service." Since O'Leary knew that most of his patrons were bookmakers it was not difficult for the jury to believe that the brothers-in-law were conscious of aiding and abetting criminal acts and that they proceeded on their course wilfully and knowingly. Their codefendants were no more in the dark than the partners. They knew so well the importance of the secrecy that must surround the "wire service" that they advised the bookmaking customers not to give their own numbers to any person who called them. Also, their conversation at the house on S street, following the raid by the police, disclosed their intimate knowledge of the bookmaker's methods and his need for the "wire service" and such assistance as appellants might furnish. From that and other conversations heard over a dictaphone it was proved that appellants warned bookmakers to evacuate those spots whose telephone numbers had been obtained by the officers. Thus, it is clearly established that the conspiracy was understood by all appellants. Each knew that he was part of an organized group to aid and abet violations of the Penal Code.

[1, 2] Appellants say they are innocent because they had no criminal intent, no corrupt motive, made no agreement to commit a crime. They contend that all they did was to agree to furnish racing information by wire service and that such an agreement is not a crime. Under such contention appellants make many extravagant claims and assert rare illustrations of their theses. They labor under the delusion that if they are ignorant of a statute that proscribes the doing of an act they cannot be guilty of a crime for agreeing to do such act. No doctrine is more universal or of more ancient vintage in the law than that ignorance of the *law* excuses no one. That doctrine still strides the world. Even though appellants had never read section 337a, yet if they ever accepted a bet or occupied a room with books and papers for recording bets they violated that statute. Their ignorance could not avail them in attempting to avoid conviction. Whether they ever read sections 31 and 182 of the Penal Code they are deemed to know that if they abet the commission of a crime they are principals in its commission, and that if they conspire together to commit *any crime,* they are guilty of a felony. Their only escape from the penalties of the statute is to prove that they were young children, idiots or lunatics or that they had committed the act "under an ignorance or mistake of fact". Pen.Code, sec. 26. One cannot avoid conviction if his sole defense to the indictment is his ignorance of the law. These appellants conspired to assist bookmakers in their operations. They had full knowledge of the crime, they knew the purpose for which the wire service was to be supplied and they sold and delivered the "service" with as much secrecy from the police as they could command enabling the bookmakers more felicitously to consummate their violations of section 337a.

[3-5] Had any appellant been ignorant of the workings of the customers of the "wire service", i. e. innocent of the object to be served she would be acquitted of the conspiracy, just as happened to the defendant in People v. Flanagan, 65 Cal.App. 268, 223 P. 1014. He had joined the I. W. W. under the mistaken belief that it was a lawful labor group. Judgment against him was reversed because he was ignorant of

the criminal character of the organization, not because he was ignorant of the law relative thereto. Appellants were not ignorant of the crimes to be abetted by their "wire service" and because they knew that fact they are guilty without regard to whether they knew or did not know of section 337a. The guilt of those who conspire to do an act which is prohibited by law is measured by their intent with reference to the act to be performed and not by the amount of their knowledge or ignorance of whether such acts are contrary to statute. Chadwick v. United States, 6 Cir., 141 F. 225, 243; Hamburg-American Steam Packet Co. v. United States, 2 Cir., 250 F. 747, 758–759. Knowledge of the law is imputed and need not be demonstrated by proof of the state of the inner consciousness of the actor. In other words, so long as an evil design filled the heart of a conspirator he is deemed to have known the legal consequences of his act. An unlawful intent is logically inferred from the doing of an unlawful act. Agnew v. United States, 165 U.S. 36, 49, 17 S.Ct. 235, 41 L.Ed. 624; Spurr v. United States, 174 U.S. 728, 735, 19 S.Ct. 812, 43 L.Ed. 1150.

Appellants emphasize their point that they merely supplied news of race results, "an act innocent in itself." But they give a false setting to the quoted statement. The fallacy underlying their contention is best illustrated by the case of Myers **v.** State, **1** Conn. 502. The defendant had loaned his carriage on Sunday under the impression that it would be used in a work of charity. Because the defendant was deceived by the borrower he did not thereby become a guilty conspirator. There was no corrupt agreement for the loan because the lender was innocent of the purpose of the borrower to violate the law.

[6, 7] The gist of the crime of conspiracy is a corrupt agreement of two or more persons to commit an offense against the state. Whether the conspiracy is a crime depends upon the intention of the accused construed in connection with the purpose contemplated. California Delta Farms v. Chinese American Farms, 207 Cal. 298, 305, 278 P. 227; People v. Flack, 125 N.Y. 324, 26 N.E. 267, 11 L.R.A. 807. If appellants intended to violate the law and agreed to abet others in doing so their purpose was corrupt; their intent was evil. See People v. Powell, 63 N.Y. 88. Where several persons are accused of having conspired to abet others to violate the law, the only question for the trial court's determination is whether they violated the law; not whether they had knowledge of the law violated. Chadwick **v.** United States, 6 Cir., 141 F. 225.

[8] The court below has by the verdict of a jury determined that the intent of appellants was evil; that they agreed to assist others to violate the will of the sovereign and the facts fully justify the verdict. Therefore, since there is substantial evidentiary support for this finding, this court is powerless to disturb the verdict. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Appellants' Authorities.

In support of their contention that a conviction for conspiracy can be sustained only where the conspirators have in mind the statutory provision prohibiting the act against which the conspiracy was directed, appellants have cited People **v.** Eiseman, 78 Cal.App. 223, 248 P. 716; People v. Bucchierre, 57 Cal.App.2d 153, 134 P.2d 505; People v. Corica, 55 Cal.App.2d 130, 130 P.2d 164; People **v.** Brophy, 49 Cal.App.2d 15, 120 P.2d 946. Not one of them goes so far as suggested by appellants. A close analysis will disclose that when the court observed, People v. Eiseman, supra, 78 Cal. App. at page 247, 248 P. at page 726, that "the jury could not have misunderstood the court's meaning that a corrupt motive was an essential element of the crime of conspiracy" it had reference to the defendants' knowledge of the *acts* which the conspirators were to perform. It is not the penal statute that renders an act corrupt and wrongful. On the contrary, it is because of the vice in the act that the people forbid it by statute. When Mr. Wharton announced that "the confederation must be corrupt," Wharton's Crim.Law, Vol. 2, 11th Ed. sec. 1606, he meant that the conspirators must have had in mind the doing of an act whose results are hurtful to society. The celebrated author was attempting to follow the doctrine announced by the court in People v. Powell, 63 N.Y. 88, 92. As commissioners of charities the defendants there were accused of having conspired to refuse to advertise for bids for commodities to be used for relief. The court instructed that it was no defense that defendants supposed they might lawfully purchase without advertising for bids and were ignorant of the statute. In reversing the judgment the court declared that "to constitute crime there must not only be the act but also the criminal intention and these must concur." The court did not say that which appellants at bar are maintaining but declared that "where a man is indicted for doing a prohibited act, he will not be allowed to say that he did not know of the existence of the law he had violated." It lies at the bottom of every case that when an evil act is prohibited a crime has been committed when that act is intentionally done, irrespective of the actor's knowledge of the existence of a statute denouncing the act as a crime.

The Powell case supplied appellants with another phrase which they have overworked in presenting their appeal, to wit, "an act innocent in itself." They argue that the act of disseminating racing news is innocent in itself. At the time of the Powell decision the act charged was not a crime (Laws of New York 1871, c. 491). But when appellants herein agreed to conduct a service helpful to the bookmaking industry they conspired to violate a law. A perusal of all the authorities cited by appellants discloses no support for their contention.

In People v. Bucchierre, supra, the defendants suffered a final conviction for conspiracy despite their ignorance of the Labor Code's provision against conducting an employment agency without first having obtained a license therefor. In People v. Corica, supra, the defendants were indicted for a conspiracy to violate section 337a. The court held, 55 Cal.App.2d at page 134, 130 P.2d at page 167, that "to render him guilty it is not necessary that a conspirator perform some act which is in itself unlawful in carrying out the criminal conspiracy. If there is a conspiracy to commit murder by means of poison sent through the mail, a conspirator may not escape responsibility because he only agreed to and did purchase the postage stamps with which the poison is sent to the victim".

People v. Brophy, supra, was a prosecution for perjury in two counts. The first was based upon an affidavit filed January 2, 1940. Count II was predicated upon an affidavit filed January 6 by Brophy in the same action for injunction filed December 22, 1939, to prevent the telephone company's disconnecting his service. January 4, the company filed its answer which, by a separate defense based upon information from the Attorney General, alleged that the company had been ordered by the Attorney General to disconnect Brophy's service because he was using it to run a wire service, thereby enabling others to violate 337a. Brophy was acquitted on appeal because the allegations of Brophy's affidavits were not necessary and therefore his false statements were not material. Neither Brophy nor the company was accused in the injunction action of participating in the gambling enterprise maintained by the bookmakers. The decision recognizes the fact that "wire service" is one of "gangland's golden arteries" and that if the law enforcing agencies desire to succeed they must sever that channel whereby the bookmaker's profits are multiplied.

Section 32, Penal Code.[1]

[9, 10] Appellants contend that to be guilty of an offense as accessory after the fact a person must know that the principal has committed a felony or is accused of such crime. They say that there is no

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[1] Section 32, Penal Code, reads: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

direct evidence that they had knowledge of any such violations. They did know they were delivering to bookmakers all the valuable information coming over their wire and gave counsel and support to their patrons to enable the latter to avoid arrest. A crime such as bookmaking, in violating section 337a, is a felony until judgment has been pronounced assessing a penalty less than confinement in a state's prison. In re Rogers, 20 Cal.App.2d 397, 400, 66 P.2d 1237.

Errors Re Admissibility.

[11] No prejudice can be successfully asserted by the admission of the findings or decision No. 41415 of the Public Utilities Commission. It was admitted without objection to be considered with the rules and regulations of the telephone company. Also it was a part of every contract for the installation of a telephonic instrument. Every subscriber was bound to know its provisions. Moreover the jury were warned that it was not to be used as evidence that defendants were engaged in aiding the bookmakers. The document was properly received for the limited purpose indicated, to wit, to prove criminal intent and guilty knowledge. People v. Morani, 196 Cal. 154, 158, 236 P. 135.

No Misdirection of the Jury.

[12] Assignment is made of the instruction that conspirators are guilty of a crime if they agree to aid a person who has committed or is about to commit a felony, if after the agreement they violate the law. They say that it is too broad in scope and should have been limited to only those accessories who act after the crime is complete, citing 22 C.J.S., Criminal Law, § 97, page 167. Appellants were charged with conspiracy to violate the two statutes. The proof was abundant that they were involved in a continuous conspiracy. No prejudice could have reasonably resulted from the instruction even though it be broader than section 32. The evidence is plethoric that section 337a was violated.

[13] Neither did appellants suffer prejudice from the instruction that if two conspirators agree to do a criminal act and thereafter commit an overt act in furtherance of such agreement, then such agreement and act constitute a criminal conspiracy, even though the actors believe the act is lawful. The criminal intent of appellants to form the conspiracy to violate section 337a is imputed to them by law. The case of People v. Bucchierre, supra, does not support appellants' contentions.

Order affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

Hearing denied; SCHAUER, J., dissenting.

112 Cal.App.2d 218

TRUITT v. SOUTHERN PAC. CO.

Civ. 14842.

District Court of Appeal, First District,
Division 2, California.

July 15, 1952.

Rehearing Denied Aug. 14, 1952.

Hearing Denied Sept. 12, 1952.

Personal injury action under Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq., by Elmer H. Truitt against Southern Pacific Company. The Superior Court, City and County of San Francisco, Franklin A. Griffin, J., rendered judgment of nonsuit and plaintiff appealed. The District Court of Appeal, Goodell, J., held that evidence whether railroad failed to furnish switchman a safe place to work was for trier of fact.

Reversed.

1. Master and Servant 🔑270(13)

In action under Federal Employers' Liability Act for injuries sustained by switchman due to allegedly dangerous condition caused by wire cable stretched above track, in defendant railroad's yards, if witness should testify that within reasonable time prior to accident he had been almost caught on top of a car by same cable or had seen it in a dangerous condition and had lodged his grievance with the recognized "griever" for yardmen and griever had related the grievance on to yardmaster or general yardmaster, the evidence of both witness and griever would be admissible to prove notice to railroad of the danger. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Master and Servant ⚿270(10)

In action under Federal Employers' Liability Act for personal injuries which were sustained by switchman while switching in defendant railroad company's yards on industry track serving lumber company and which were allegedly due to dangerous condition caused by wire cable stretched above track, lease from railroad company to lumber company would be admissible if lease related to duties of railroad company and lumber company respecting dangerous obstructions and clearances. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and Servant ⚿286(15)

In action under Federal Employers' Liability Act for personal injuries sustained by switchman while switching in defendant railroad company's yards, evidence whether railroad failed to furnish switchman a safe place to work in that railroad had been cognizant for sometime of dangerous situation arising out of impaired clearance and had done nothing whatever toward removing dangers was for trier of fact. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

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Hildebrand, Bills & McLeod, D. W. Brobst, Oakland, for appellant.

Arthur B. Dunne, Dunne, Dunne & Phelps, San Francisco, for respondent.

GOODELL, Justice.

Plaintiff, a switchman, sued under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., for personal injuries sustained while switching in respondent's yards at Eugene, Oregon. The action was prosecuted on the theory that respondent had not furnished appellant, its employee, a safe place in which to work.

The court granted a motion for nonsuit and from the judgment entered thereon this appeal was taken after a new trial had been denied.

The accident happened on October 12, 1948 about 8 p. m. on an industry track serving the plant of Clements Lumber Co. and other lumber concerns situated within the railroad yards. Plaintiff was one of a crew of five, the others being the foreman named Drury, an engineer, a fireman, and a switchman named Buffington. Buffington's duties were closest to the engine while those of plaintiff, called a field man, were farthest therefrom.

The track was used for the loading of lumber and its products. The empties would be "spotted" at intervals along the track and the materials loaded into them by boom, chute, and other methods. When loading was completed the switching crew would return, couple the loaded cars together and pull them out to the main line for despatching to their destinations.

On one side of this track was a wooden loading platform. A contrivance consisting of a gin-pole and boom was at the edge of this platform, for lifting and swinging lumber onto the cars. It was rigged with wire cables one of which stretched above the track at a right angle thereto and was at one elevation or another according to the particular operation in which the boom happened to be engaged.

On the other side of the track and at a distance of some 65 feet from the gin-pole was a wooden bin equipped with a metal chute which dropped scrap wood into the cars. This chute was about 36 inches wide and 18 inches deep.

The cable extending across the track was sometimes well up above the tops of the cars, giving ample clearance to anyone standing on the roofs thereof, but at other times, including this instance, it was down and stretched only a few feet above the roofs of the box cars, all depending on the movements of the boom or the way it was left by the lumber company's people after its last operation.

The chute occasionally was elevated, well in the clear, but generally it was down. When down it overhung the roofs of box cars or automobile cars (which are box cars but larger than ordinary ones) by about 30 inches. On box cars, running fore-and-aft along the mid-line of the roof, are level wooden runways of a width permitting the trainmen to walk back and forth thereon in doing their work. The overhang of the chute did not reach to, or impinge on, these runways; at its closest point it reached inward to within about 8 inches from the runway's edge and was about 10 inches above the car's roof.

On the night of the accident plaintiff went in on the track with the switching crew for the purpose of pulling out 12 loaded cars which had been "spotted" at intervals at various loading points along the industry track. It was dark and there was no illumination of the area. He carried a lighted lantern for signaling purposes. His job was to see to it that as the cars were shoved together by the engine they were securely coupled. This having been accomplished without incident, and the cars being ready to pull out, he climbed a ladder on the last car of the string (an automobile car) to the runway on its roof, and walked toward its rear end, that is, in the direction away from that in which the cars were traveling. According to measurements taken later that night the cable was stretched about 54 inches above the runway. While the train was moving this cable hit plaintiff and threw him to the roof of the car. While trying to regain his footing he was hit by the overhanging chute and knocked from the roof of the car to the ground, sustaining the injuries for which he sues. It is stated above that the lower end of the chute did not reach closer than about 8 inches toward the edge of the runway. It appears (in reconstructing what occurred) that when knocked down by the cable plaintiff fell or rolled from the runway onto the roof of the car on the side of the overhanging chute. He was found lying on the ground just under the chute. The distance along the track from the loading boom and its cable to the wood bin and its chute is about 65 feet. *Thus he was hit twice because of two impaired clearances in that short distance.*

When the crew searched for plaintiff he was found on the ground beside the track, "draped" around the ladder attached to the wood bin. He was dazed and unconscious to the extent that he failed to identify his crew mates as they came to the rescue. He was very seriously injured.

The record shows that the track in question was uneven, laid on a sawdust roadbed, and one witness testified that in 40 feet of track there would be only one or two good ties. The result was that as the cars passed over this area of respondent's yards they would rock and sway. The loading platform was so close to the track that it, and the lumber piled on its edge, constituted a serious hazard as the cars swayed and rocked. For this reason the switchmen could not safely hang onto the side of the car, grasping a handhold and with foothold in stirrup (as is usual in switching) for fear of being crushed, but had to go onto the roof of the car for their own safety. Thus the plaintiff when injured was on the roof of a car traveling on an uneven track, in the dark, with a wire cable stretching across the track a few feet above the roof's runway and a large metal chute overhanging the roof which was supposed to afford him a safe place to work.

A complaint as to the impaired clearance of the chute had been made by plaintiff within ten days or two weeks preceding the accident. Plaintiff had "reported the wood chute bearing down too low" to Assistant Yardmaster Koenig one afternoon while awaiting orders, and on another occasion a few days before the accident, some time in September, "there was five of us", said plaintiff, "wrote up some blank and signed it and gave it to him." Plaintiff testified: "it is part of the business of every man, whether he is on the switch crew or what he is doing, to continually report any unusual or dangerous condition * * * every man that works on the railroad is a kind of an inspector", and it is one's duty "to watch out for and inform yourself about impaired clearances." Rule 2060 was read into evidence as follows: "Keep informed as to location and nature of impaired clearances to avoid being struck or injured."

John E. Buffington, the other switchman on the crew, testified that several times prior to the accident he "had complained to [Koenig] the yardmaster about this wood chute not being safe", and that the lumbermen were not pulling up the chute when they quit work; that he also complained to Koenig respecting the loading boom that "There was a weight or a down-pull, or something, that it was hanging over the foot path."

F. J. Drury, foreman of plaintiff's crew, testified respecting the chute: "We complained to the assistant yardmaster to have it raised. They said they would have it taken care of, *and that is all they done.*" (Emphasis added). He testified further: "what time I was on the job I complained to Yardmaster Koenig at different times, probably every day, because we were always unhappy about that * * *. We had different complaints. We were always arguing there with the yardmaster about it, to try to get him to correct it." The chute, Drury said, "was one of the main things we always complained to the assistant yardmaster about."

Two other witnesses, Chapman and Hofdahl, were called by plaintiff but most of their proffered testimony was not admitted. This is discussed later.

Taking, then, only the testimony of Truitt, Drury and Buffington, and you have not only ample evidence of the accident itself, showing two major impairments of clearance within a distance of about 65 feet of track, but evidence of complaints to yard authorities made by crew members within two weeks or so preceding the accident.

It must be conceded that the record contains more evidence of complaints as to the impaired clearance of the overhanging chute than as to that of the wire cable stretched above the track. At the same time, however, it appears that the trial judge was convinced that the respondent had notice of the cable hazard, from his remark that "It is conceded that this situation existed several times, *and they had notice of it,* but were they bound to operate that mechanism out there?" (Emphasis added). Apparently where he fell into error was in assuming—contrary to the fact—that respondent had notified its lessee, the lumber company, of the dangerous situations.

What, then, was the legal duty of respondent, possessed, as it was of notice of both unsafe conditions? Certainly it could not ignore the complaints which had put it on inquiry, and do nothing at all without being chargeable with negligence. In the face of such a showing it was incumbent on respondent to prove that it had taken some action toward the removal of the unsafe conditions. Its own rules called for *some* action although not too much. Rule 1094 went into evidence without objection, respondent's counsel remarking at the time that it was "the only one that would apply." It reads: "Where occupants of company property under lease encroach upon standard clearances with buildings, lumber, coal piles or other obstructions, they must be courteously notified to comply with standards." Just what communications, if any, respondent had with the lumber company of course do not appear since no defense evidence was before the court. The record as it stands fails to show any communication at all from respondent to its lessee, or any compliance by respondent with its own rule 1094 requiring a courteous notification to its lessee. That being so there is no need to decide whether such notification, if given, would have met the full measure of respondent's legal duty. It is extremely doubtful, we think, that it would have done so.

The record shows that the court was laboring under a misapprehension of the facts. During the colloquy between court and counsel respecting Hofdahl's testimony they were discussing "the condition of allowing the cable to be lower than a safe height, where it would imperil the men working there." The court then said:

"The evidence is to the contrary in this case, because the day before the cable was in proper place, and men rode under it without any trouble, according to your own [plaintiff's] testimony in this case. What happened a few weeks before, *I think the people who were responsible for that cable were notified and it had been corrected, apparently*." (Emphasis added). To this plaintiff's counsel immediately replied: "It had not been corrected, your Honor." Counsel was right. There was no evidence whatever either that "the people who were responsible for that cable were notified" or that "it had been corrected." That the judge continued under this misapprehension is indicated by his remark shortly before granting the nonsuit, to wit, that plaintiff's case was "against the people who operated the boom and who were responsible for the condition up there, but I don't think it is the Southern Pacific Company * * * *they have done their duty when they notify these people to correct the situation*." (Emphasis added.) This was the judge's second erroneous assumption that respondent had notified the lumber people, and it probably accounts for his ultimate ruling.

There is not only no testimony that the situation had been corrected, but the position of both cable and chute at the time of the accident was *some* evidence that it had *not* been corrected. Moreover, Drury's testimony that "They said they would have it taken care of, and *that is all they done*" (emphasis added) must, of course, be taken as true on the motion for nonsuit. Hence on plaintiff's own case there was some evidence that respondent had done nothing at all.

With no evidence whatever that respondent had notified the lumber company of the dangerous conditions or had taken any action toward removing them, it can hardly be said that a *prima facie* case of negligence was not made out.

Since on this record respondent did not even meet the terms of its own self-imposed rule 1094 requiring notice to its lessee, nor the minimum duty stated by the trial judge under his mistaken assumption that respondent had notified "these people to correct the situation", there is no need for us to volunteer an opinion as to *what might have been* respondent's legal duty in the event it had notified its lessee and the lessee had taken no corrective action. Such question is not before us.

Respondent's duty to inspect, discussed in the briefs and by the court is rendered of no consequence because of the complaints lodged by Truitt, Drury, Buffington and the 5-man round robin. Had inspections been made *at the times when the cable and chute were down, in dangerous positions*, (we emphasize this) they would have disclosed no more, but perhaps even less, than the company had learned from the trainmen who themselves were constantly at work there. No inspection, by whomsoever made, could have developed more first-hand information than that supplied by the men who were directly up against the hazards from day to day. Respondent brought out on the cross-examination of plaintiff that "every man that works on the railroad is a kind of an inspector". The complaints turned in by the switching crew were not only in obedience to this rule, but they were made by men whose lives were being jeopardized by these self-same impaired clearances. As the record stands now, respondent did nothing about them. Inspection, then, is not a real factor in the case.

As already indicated, the court refused to admit certain proffered testimony of plaintiff's witnesses Chapman and Hofdahl directed to the question of complaints to respondent. Plaintiff contends that the court erred in excluding this testimony. It is extremely difficult to pass upon these rulings, because of the condition of the record covering the discussion between court and counsel at the time. There were several interruptions and some of the tenders were not pressed to a clear-cut issue. It is sufficient to state, as we do presently, our views with respect to admissibility in the light of a new trial.

J. R. Chapman, a yard man, employed by respondent since 1925 at Eugene, was also local chairman of the Brotherhood and it was his function to handle the grievances of the yard men. When asked if any complaints had been made to respondent about the cable and gin-pole prior to the accident respondent objected on the ground of hearsay and the court ruled: "I cannot see how the company would be bound by his testimony, if somebody told him that he made a complaint." Finally he was asked whether he had discussed the cable with Swierski, who was general yardmaster, and answered that as local chairman for the yard men he had done so 15 or 20 days before the accident because "One of the yard men called me between 8 and 9 o'clock one night" and Chapman talked to Swierski the next morning at the latter's office. When asked for the conversation there was an objection based on hearsay and the court ruled that "Unless you can connect it up with the fact that the same condition existed at that time as existed at the time of the accident, and that nothing was done about it, I think the testimony is incompetent." Plaintiff then made the folllowing offer of proof, which was rejected: "I propose to show by this witness that that cable had been left in that condition before, and that that matter was called to the attention of the Southern Pacific Company officials and that they did nothing about it. That is the purpose of this witness, and that is the purpose of the proof * * *."

It then developed that Chapman's complainant was one Ray Hofdahl, who was flown down from Eugene, and was in court the next morning. The nonsuit proceedings were re-opened for his testimony. He was prepared to testify, as indicated by the following tender on behalf of plaintiff: "We will bring out from this man's own experience the fact that he was almost knocked down by the cable himself, and he told me he told the company about it. He also told Mr. Chapman who was the man who took the complaints to the company, so that the yardmaster knew the condition that prevailed there." The pending question was withdrawn but it was during this colloquy that the court said: "I think the people who were responsible for that cable were notified and it has been corrected, apparently."

[1] The fact remains that Hofdahl's testimony was largely curtailed by the court. In view of the necessity for a new trial it is sufficient to say this with respect to the testimony of Chapman and Hofdahl: If Hofdahl can testify that within a reasonable time prior to the accident he had been almost caught on top of a car by the same cable (or, for that matter, had simply seen it in a dangerous position) and had lodged his grievance with Chapman, the recognized "griever" for the employees, and it appeared that Chapman had relayed it on to Swierski or Koenig, the evidence of both Hofdahl and Chapman will be admissible to prove that respondent had been charged with notice respecting the cable. The evidentiary chain would be unbroken and complete. No serious question of Chapman's agency would be involved since on the question of notice to the company any safety-conscious passer-by, or even a trespasser, could have dropped in at the yard office and reported the dangerous condition to anyone in charge and that could have been proved by the passer-by without any doubt. On a new trial plaintiff will be entitled to lay this evidence before the jury by both Hofdahl and Chapman.

In the course of one of the colloquies plaintiff's counsel said: "Incidentally, I would like to introduce in evidence this whole lease agreement. Counsel read part of it in his opening statement, but I would like to introduce the rest of it, particularly paragraph 6, which has to do with the breach of the terms and conditions on the part of the lessee." Thereupon the court said: "Wait a minute, gentlemen, we are getting into difficulty here." The jury was then excused and the discussion continued but there was no further mention of the lease. The tender of the lease apparently got lost in the shuffle and was never ruled on.

[2] We assume that the lease in question was one from respondent to Clements Lumber Co., since admittedly the industry track serving Clements was within the limits of respondent's Eugene yards. If so, it would appear that on a new trial the lease will be clearly admissible if paragraph 6 or

any other part of it relates to the duties of the parties thereto respecting clearances or dangerous obstructions, or otherwise bears upon the present controversy.

Section 51 of Title 45, U.S. Code Annotated reads:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis added).

In Bailey v. Central Vermont R. Co., 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444, 1448, the court said: "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudance.' [citation] It is part and parcel of the remedy afforded railroad workers under the Employer's Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. * * * To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In Blair v. Baltimore & Ohio R. Co., 323 U.S. 600, 604, 65 S.Ct. 545, 547, 89 L.Ed. 490, 494, the court followed the Bailey case and said: "We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer 'becomes "more imperative" as the risk increases.' Bailey v. Central Vermont R. Co., 319 U.S. 350, 352, 353, 63 S.Ct. 1062, 1063, 1064, 87 L.Ed. 1444 [1446, 1447]. See also Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610 [617], 143 A.L.R. 967. The negligence of the employer may be determined by viewing its conduct as a whole. Union Pacific Railroad Co. v. Hadley, 246 U.S. 330, 332, 333, 38 S.Ct. 318, 319, 62 L.Ed. 751 [754, 755]. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

[3] If "The duty of the employer 'becomes "more imperative" as the risk increased' " and if "The negligence of the employer may be determined by viewing its conduct as a whole", then the instant case is a striking example of both propositions. Here there was a compound impaired clearance situation, the second accident happening within a second or two after the first—a case if ever there was one, where "several elements" were "so closely interwoven as to form a single pattern". Abundant and substantial evidence shows that respondent had been fully cognizant of the dangerous situation for some time preceding the accident and, as far as this record shows, had done nothing whatever toward removing the dangers. In our opinion the court erred in granting the nonsuit.

The judgment is reversed.

NOURSE, P. J., and JONES, J. pro tem., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

112 Cal.App.2d 77

GENSER v. STATE PERSONNEL BOARD OF CALIFORNIA et al.

Civ. 8030.

District Court of Appeal, Third District, California.

June 27, 1952.

Petition for writ of mandate against the State Personnel Board and others to have a decision of the Board, suspending the petitioner from the position of Motor Vehicle Investigator, set aside. The Superior Court, Sacramento County, Jay L. Henry, J., rendered judgment for petitioner, and the respondents appealed. The District Court of Appeal, Schottky, J. pro tem., held that the evidence sustained the findings of the Personnel Board that petitioner had engaged in the business of selling new automobiles which was incompatible with petitioner's duties.

Reversed.

1. Officers ⚷72(2)

In proceeding to review State Personnel Board's suspension of motor vehicle investigator for alleged activities incompatible with his duties, where entire record and findings of Board were before trial court by stipulation, petition for review, though not incorporating Board's findings, was sufficient to bring the matter before the court and the technical rules of pleading were not dispositive. Vehicle Code, § 236; Code Civ.Proc. § 1094.5.

2. Mandamus ⚷172

Trial court, reviewing in a mandamus proceeding the decision of State Personnel Board that officer should be suspended for engaging in activities incompatible with his duties as motor vehicle investigator, was bound by rule that if there was any substantial evidence to support the Board's finding such finding should not be disturbed. Code Civ.Proc. § 1094.5.

3. Witnesses ⚷280

In State Personnel Board hearing to investigate charges that motor vehicle investigator had, while in office, engaged in the business of buying and selling new automobiles, question asked of investigator on cross-examination as to whether the automobiles mentioned in the hearing were the only ones purchased by him during the year in question should have been allowed.

4. Officers ⚷72(1)

Evidence sustained finding of State Personnel Board that motor vehicle investigator had engaged in the buying and selling of new automobiles which he was able to purchase from dealers by reason of preference gained through his official position. Government Code, §§ 18570, 19250, 19251, 19572.

5. Evidence ⚷5(2)

Courts will take judicial notice that during years 1947 and 1948 there was a great shortage of automobiles due to curtailment of production and that an average citizen had to wait a long period to get a new automobile.

6. States ⚷45

The Civil Service Constitutional Amendment was adopted to secure a high standard of public service and conduct in public service, and Civil Service Act was enacted to implement and carry out the constitutional amendment, and the State Personnel Board was created to administer the Act and carry out those purposes. Government Code, §§ 18570, 19250, 19251, 19572; Const. art. 24.

7. Officers ⚷69.12

Activities of motor vehicle investigator in selling new automobiles purchased from dealers by reason of preference gained through his official position, while perhaps not criminal, were inconsistent and incompatible with his position and were contrary to the spirit and intent of civil service amendment to constitution and violative of portions of the Civil Service Act, and justified his suspension. Government Code, §§ 18570, 19250, 19251, 19572; Const. art. 24.

8. Habeas Corpus ⚷25(1)

In the criminal law, where one is convicted of two counts and sentenced thereon, sentences to run concurrently, a subsequent invalidation of conviction on one count will not secure a release of defendant.

9. Officers ⚿72(2)

Where evidence was sufficient to sustain State Personnel Board's suspension of motor vehicle investigator on two counts of engaging in business of selling new automobiles preferentially purchased through dealers, District Court of Appeal would be required to reverse trial court's judgment setting aside board's decision even if other findings of trial court were not supported by the evidence. Code Civ.Proc. § 1094.5; Government Code, §§ 18570, 19250, 19251, 19572.

10. Officers ⚿72(1)

Evidence sustained State Personnel Board's finding that motor vehicle investigator had falsely represented to dealers, from which he purchased new automobiles, that such automobiles were for his own personal use and would not be resold.

11. Officers ⚿72(1)

Evidence was insufficient to sustain State Personnel Board's finding that motor vehicle investigator had violated the Vehicle Code by causing a motor vehicle to be registered to wrong address or that he had failed to expedite the issuance of a dealer's license as promised. Vehicle Code, § 236.

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Edmund G. Brown, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., for appellants.

Anthony J. Kennedy, Sacramento, for respondent.

SCHOTTKY, Justice.

Respondent, Morris Genser, who held a position as Investigator, Grade Two, in the Motor Vehicle Department, was suspended from his position on May 6, 1948. Charges were filed against him on May 12, 1948, and the appellant State Personnel Board, through a hearing officer, conducted a hearing on the charges on July 20, 1948. The State Personnel Board found that the following charges against respondent were true:

(1) Engaging in the business of buying and selling automobiles, purchasing the same from new car dealers, while occupying the position of Motor Vehicle Investigator, Grade Two, with the Department of Motor Vehicles, the same being incompatible with his duties as investigator and inimical to the public welfare.

(2) Securing preference in delivery of automobiles from dealers by reason of his official position not accorded other customers.

(3) Falsely representing to dealers that the vehicles purchased were for his own personal use and would not be resold.

(4) Violating Vehicle Code section 236 by causing a motor vehicle to be registered to a wrong address.

(5) Failing to expedite the issuance of a certain dealer's license as promised.

(6) Falsely representing to an applicant for a dealer's license which he was handling, that the only car he had was a 1938 Chevrolet, and soliciting the applicant's aid in obtaining a new one.

On February 4, 1949, appellant Board rendered its decision that respondent be suspended from his position from the date of his suspension to March 1, 1949. Following the denial of his petition for a rehearing, respondent filed a petition for a writ of mandate in the Superior Court, alleging: That in making said findings of fact, decision and order of suspension and in denying said petition for rehearing, respondent State Personnel Board proceeded in excess of its jurisdiction and committed prejudicial abuse of its discretion as follows:

(a) The acts of petitioner found to be incompatible with the duties of his said position were lawful acts done by petitioner in his private capacity.

(b) The charges, together with the amendments and supplement thereto and the hearing had thereon were an invasion of petitioner's non-official private life outside the authority of respondent director and respondent Board.

(c) The findings that acts of petitioner were incompatible with the duties of his position are not supported by the evidence.

(d) The order and decision of dismissal and denial of salary are not supported by the findings.

(e) The hearing procedure was defective.

No oral evidence was given upon the trial in the Superior Court, but the case was submitted on the transcript of the testimony in the hearing before the Board, the findings of the Board, and the pleadings. The court found that the State Personnel Board acted in excess of its jurisdiction, abused its discretion and acted arbitrarily and capriciously, and found further "that there was no substantial evidence, and the evidence received at said hearing by the State Personnel Board was insufficient to support" the charges against the petitioner.

Appellant contends that the petition does not state a cause of action to set aside the decision of appellant Board, under the theory that the hearing procedure was not in accordance with law, and also that the judgment could not be supported on this theory since the trial court did not find on the allegation, paragraph (e), that the hearing procedure was defective. However, respondent concedes that no part of the court's order was based upon said paragraph (e) and that upon failure to find upon it the allegations and contention that the hearing procedure was defective became moot.

[1] Appellant next contends that the petition does not state a cause of action to set aside the appellant Board's decision, under the theory that the decision is not supported by the Board's findings, because the findings of the Board are neither set out in nor attached as an exhibit to the pleadings, nor is the substance of the findings alleged. However, as pointed out by respondent, the entire record of proceedings before the appellant State Personnel Board, including the testimony and the findings, were filed with the court upon stipulation of the parties submitting the case to the court for decision. In view of this we deem it unnecessary to discuss this contention at any length because we believe that the allegations of the petition were sufficient to bring the matter before the court under section 1094.5 of the Code of Civil Procedure, and where, as here, the matter was submitted upon the entire record, it should be disposed of upon the merits rather than upon any technical rules of pleading.

[2] Appellant contends that this proceeding is of the type in which the trial court does not exercise its independent judgment on the evidence but merely determines whether the Board's findings are supported by substantial evidence. Respondent, in reply, argues that the Superior Court under the provisions of section 1094.5 of the Code of Civil Procedure was required to exercise its independent judgment upon the evidence submitted. This same question was before us in the recent case of Nelson v. Department of Corrections, 110 Cal.App.2d ——, 242 P.2d 906, and we there held that the trial court in reviewing a decision of the State Personnel Board is bound by the substantial evidence rule and is not entitled to exercise its independent judgment as to the weight of the evidence. In so holding we followed the decisions of the Supreme Court in Boren v. State Personnel Board, 37 Cal.2d 634, 234 P.2d 981, and Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545. In view of these authorities we consider that it is now settled that the substantial evidence rule is the rule by which a court is bound in reviewing a decision of the State Personnel Board.

In the case of Southern California Jockey Club v. California Horse Racing Board, 36 Cal.2d 167, 223 P.2d 1, 6, the court quoted from McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, as follows:

> " 'Unquestionably the testimony before the commissioner would sustain a conclusion either way upon the issue of the good moral character and fitness of the petitioners to engage in the bail bond business in San Francisco. If the trial had been before a court the evidence was sufficient to support findings either way or was sufficient to support a verdict either way on the issue. With this state of the record our inquiry on this phase of the case is at an end, for it cannot be said that there was not a sufficient factual basis for the conclusion of the commissioner and there-

> fore he did not act arbitrarily or otherwise abuse his discretionary power in denying the permit.'"

The court then said:

> "Those views have been consistently approved. [Citing cases.] And the rule was not changed by statute as is evident from the wording of section 1094.5 of the Code of Civil Procedure. We therefore hold, that in a case such as this, the trial court should not reweigh the evidence, and its sole function is, to determine from a review of the record, whether there is sufficient evidence to sustain the ruling of the board. If the trial court should hold the evidence insufficient, and this holding is attacked on appeal, the court to which the appeal is taken must review the record and determine the sufficiency of the evidence. If the evidence is found to be sufficient, the ruling of the board must be sustained."

And in Bank of Italy v. Johnson, 200 Cal. 1, at page 32, 251 P. 784, at page 796, which involved judicial review of administrative determination, the court said:

> "When the court is called upon, as in this case, to determine the character and sufficiency of the evidence to justify the writ as against the respondent, we are governed by the rule that, if there be any substantial evidence in the record which would have supported a conclusion on the part of the respondent that public convenience and advantage would not be promoted by the opening of such branches, the writ must be denied. *The rule which applies here is analogous to the rule that, if there be any substantial evidence to support the finding of a trial court on an issue of fact, such finding may not be disturbed, even though the court on appeal might consider that the evidence preponderated the other way.*" (Italics added.)

The rule referred to in the quotation is stated in Estate of Bristol, 23 Cal.2d 221, at page 223, 143 P.2d 689, at page 690, as follows:

> "The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co. (1935), 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. * * * Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding * * *."

Having determined that the substantial evidence rule is the rule by which a court is bound in reviewing a decision of the State Personnel Board, we shall proceed to discuss appellants' contention that the trial court's conclusion that the Board's findings are not supported by the evidence is incorrect as a matter of law.

The charges against respondent revolved primarily around the purchase by respondent and his wife of seven new automobiles from new car dealers between February 5, 1947 and March 15, 1948, and the resale of five of them. At the time of these transactions respondent was occupying the position of Motor Vehicle Investigator, Grade Two, and among his duties in addition to "collecting evidence, interviewing witnesses, and appearing in Court in the prosecution of persons charged with violations of state laws pertaining to the theft, sale, operation, registration and possession of vehicles," he was charged with the duty of "investigating alleged evasions of the law with respect to the operation of automobile dealers."

The record shows that during the thirteen months preceding March 15, 1948, respondent and his wife, Louise Genser, purchased and sold the following automobiles:

The automobile purchased from W. A. Stillwell was delivered to respondent on February 5, 1947. Notwithstanding the fact that respondent testified that he told the dealer he wanted and needed it personally, respondent sold the said automobile to Louis Green on March 1, 1947.

Name of dealer supplying car	Name of car	Date of purchase	Date of sale	Name of purchaser
W. A. Stillwell	Oldsmobile	2–5–47	3–1–47	Louis Green
Bryan Motors, Inc.	Oldsmobile	3–12–47	4–24–47	Florence Epstein
Wilmington Motors	Dodge	9–17–47	9–18–47	Taylor Auto
Howard Automobile	Buick	9–25–47	2–12–48	Taylor Auto
J. C. Wooten Pontiac Co.	Pontiac	10–1–47	1–19–48	Taylor Auto
Martin Pollard	Chevrolet	2–11–18	Not sold	
Kaiser Brothers	Oldsmobile	3–15–48	——	

The Oldsmobile purchased from Bryan Motors, Inc., was delivered to respondent on March 12, 1947, the check for the purchase price being signed by his wife, Louise Genser. He testified that he told the dealer in January that he wanted a car, that he thought he signed an order but paid no deposit. He resold the automobile on April 24, 1947, to Florence Epstein.

The Dodge 6, 4-door sedan purchased from Wilmington Motors was delivered to Louise Genser on September 17, 1947, and was sold by her to Taylor Automobile Company on September 18, 1947. Mr. Ginsburg, owner of Wilmington Motors, testified that Mrs. Genser asked him for a car a year or so before the delivery was made; that he had seen respondent several times and had told him that "I was going to get his wife a car."

The Buick sedanette purchased from Howard Automobile Company was delivered to Mrs. Genser on October 1, 1947, and sold by her to Taylor Automobile Company on February 12, 1948. Mr. Croxall, manager, testified that "the delivery was made and all the transactions in Mr. Morris Genser's name"; that respondent said he wanted a car for his wife.

The Pontiac 8 automobile purchased from Wooten Pontiac Company was delivered to respondent at the factory on October 1, 1947, and sold by him to Taylor Automobile Company on April 19, 1948. Mr. Snowden, office manager and distributor for the Pontiac Motor Company, testified that about September 1, 1947, respondent asked about chance to get a factory drive-out; said he wanted to go back to World Series; that he referred respondent to Mr. Porter, sales manager of one of their dealers, Wooten Pontiac Company, and that on September 11, 1947, he received a factory drive-out request through the mail. The checks for this automobile were drawn by Mrs. Genser.

The Chevrolet Aero sedan purchased from Martin Pollard Company was delivered to Mrs. Genser on February 11, 1948. Mr. Flaherty, chief of plant protection, Chevrolet, at Van Nuys, testified that he first met respondent around the first of the year 1948. We quote from the record:

> "A. Well at that time we had a lot of equipment, company cars that were necessary to go on the road, and we had no dealership in order to get plates, and I couldn't state positive whether he worked through our local Chevrolet dealer, or whether I called Motor Vehicles as to how it operated. We asked if we could have somebody come out to tell us what had to be done and arrange for a dealership.
>
> "Q. [By Mr. Rhone] In any event, a contact was made to the Motor Ve-

hicle Department with reference to getting dealer's plates; is that right? A. Yes, sir.

"Q. And pursuant to that response Mr. Genser came to the plant in Van Nuys? A. Yes, sir.

"Q. And he contacted you when he came there? A. It was necessary at that time, plant procedure, anyone coming on the property would have to clear through me to go into the plant.

"Q. I see. Now, did you handle the matter then, with reference to applying for the dealer's permit? A. No, sir, I introduced him to Mr. Thompson, who was at that time the car distributor for this area, and he made the arrangements for the dealership.

"Q. Well, were you present at part of that conversation? A. I was present practically all of the time.

"Q. Now was there anything stated at that time, and if so, what, with reference to the time it would take to get such a permit? A. (By Mr. Flaherty) Well, as I recall it, there was to be four or five weeks or something. I do know that whatever time was stated was far longer than we could afford to wait for the necessary plates.

"Q. (By Mr. Rhone) Well, now, who made the statement as to how long it would take? A. I believe Mr. Genser was the one. He must have been; he was the only one present.

"Q. And do you recall how long he stated it would take? A. No, I don't recall exactly how long; I think it was four or five weeks or something was necessary on it, putting us through.

"Q. And did you ask him, or was there anything said, about getting it done in less time than that? A. We did. We asked him if there wasn't any way possible and would he do everything he possibly could in order that we could get this dealership through; we couldn't afford to wait that long.

"Q. And—Well, tell us what he said in response to that. A. Well, he took it. He said he would go down and get the papers—I am not sure whether he had them with him at the time, but he said he would do everything possible through Sacramento and through whoever it was that he worked for, and he would follow it through, and that the very minute that the plates were received, and the dealership books, he would bring them out.

"Q. Then in the matter of several weeks, you received a permit, did you? A. As to the exact date, I wouldn't know, because previous to that and during that time, we called on Mr. Genser a number of times and he contacted the proper parties to straighten out quite a number of our supervisors who had out of town cars and needed transfers, registration, and so forth, and I am not sure which one of those times he did favors for us that he came out with those dealer's plates and books, because he was there before and after that.

"Q. Now, you say he was there quite a few times, was he? A. (By Mr. Flaherty) Yes, sir.

"Q. And did you notice what kind of a vehicle he drove at that time? A. Yes, I—I gave him a little rib about it. I allowed him to park in my parking space, and if I recall, he was driving an old car and I was ribbing him, threatening to throw him off the place if he didn't drive a better car, and I think he said that's all the state gave him, or that's all he had; I don't know which way it came up now, but that's all he said at the time.

"Q. Did—Prior to the time of the delivery of the permit, did Mr. Genser make any request to you to get a new Chevrolet? A. No, sir; that was my suggestion.

"Q. You state that it was your suggestion that the company supply—see that he could purchase a new Chevrolet? A. In view of what he had done for the company and several others—the rest of the supervision, I suggested to Mr. Thompson that if he wanted a car, he be given a car.

> "Q. And is that the car, then, that was subsequently sold to Martin Pollard and for Mr. Genser? A. Well, as far as that is concerned, it's only hearsay with me, because once I made the request to Mr. Thompson, I knew no more about it."

Respondent testified that he talked to Mr. Thompson of the Chevrolet plant about getting a Chevrolet and that he had the car registered in Mrs. Genser's name. Mr. Taggart, sales manager of the Martin Pollard Company, testified:

> "Q. (By Mr. Rhone) Well, was that sale made by your company or was it one that was assigned to the Chevrolet plant? A. It was assigned. Courtesy delivery.
>
> "Q. Courtesy delivery? A. For the wholesale organization.
>
> "Q. And do you know in whose name it was assigned as the buyer? A. Morris Genser."

The Oldsmobile purchased from Kaiser Brothers' distributors was delivered to Mrs. Genser on March 15, 1948. The car was ordered by respondent.

The two cars last mentioned were the only ones of the seven purchased that had not been resold at the time the charges were filed against respondent.

Respondent denied that he had exerted, or attempted to exert, any influence that he may have had by reason of his position in order to get delivery of any of the automobiles, and the various dealers testified that respondent had not been accorded any preference by reason of his position.

[3] The record also shows that while respondent was being cross-examined at the hearing he was asked: "Now these vehicles that we have mentioned here are not the only vehicles you purchased during 1946 and 1947?" Respondent's counsel objected to this question and the hearing officer sustained the objection. We think that the evidence should have been admitted as it might have thrown additional light on respondent's actions with reference to the purchase of automobiles from dealers.

Appellants contend that there is substantial evidence that respondent did engage in the business of buying and selling automobiles, purchasing the same from new car dealers, while occupying the position of Investigator, Grade Two; that he did secure preference in delivery of automobiles from dealers by reason of his official position; and that such conduct was incompatible with his duties as investigator and inimical to the public welfare.

Appellants set forth the duties of an investigator in the position of respondent, the material part of which we have hereinbefore mentioned.

Section 19572 of the Government Code sets out the causes for disciplinary action against state civil service employees. Specifically listed are "(b) Incompetency," "(c) Inefficiency," "(g) Dishonesty" and "(q) Violation of this part or board rule." The phrase "this part" means Part 2, Division 5, Title 2 of the Government Code, which is the State Civil Service Act, Sec. 18570. Also listed as a cause is "(r) Any other failure of good behavior or acts which are incompatible with or inimical to the public service."

Sections 19250 and 19251, a part of the State Civil Service Act, provided as follows:

> "19250. Every State employee shall fulfill to the best of his ability the duties of the office or position conferred upon him and shall prove himself in his behavior inside and outside the service worthy of the esteem which his office or position requires. In his official activities the State employee shall pursue the common good, and, not only be impartial, but so act as neither to endanger his impartiality nor to give occasion for distrust of his impartiality."
>
> "19251. 'A State officer or employee shall not engage in any other activity or enterprise inconsistent, incompatible, or in conflict with his duties as a State officer or employee.'"

[4, 5] Bearing in mind the rule that in reviewing the evidence before the Personnel Board all conflicts must be resolved in favor of the findings of the Board and all legitimate and reasonable inferences indulged in to uphold their decision, we are

satisfied that there is substantial evidence that respondent did engage in buying and selling automobiles which he was able to purchase from new car dealers by reason of preference gained through his official position. It is a matter of common knowledge, of which this court will take judicial notice, that during the years 1947 and 1948 there was a great shortage of automobiles, due to the curtailment of production of automobiles during World War II, and that the average citizen had to wait for a long period to get a new automobile. The record shows that respondent and his wife purchased seven new automobiles from dealers between February 5, 1947 and March 15, 1948, and resold five of them. It is fairly inferable from the evidence that respondent directed the purchase and sale of said automobiles. Notwithstanding the denials of respondent and some of the dealers that no preference was given to respondent because of his official position, the appellant Personnel Board was not required to accept such explanation, because it is unreasonable and unrealistic to believe that any private citizen who was not charged with investigating the licensing and transactions of new car dealers would have been able to purchase the number of new automobiles purchased by respondent at the time when they were purchased.

[6, 7] Respondent argues that the acts found to be incompatible with the duties of his said position were lawful acts done in his private capacity and that the charges were an invasion of his non-official private life outside of the authority of the Director of Motor Vehicles and the Personnel Board. With this contention we do not agree. While said acts may not have been unlawful in a criminal sense, we feel that they were inconsistent and incompatible with his position as investigator in the Motor Vehicle Department, that they were contrary to the spirit and intent of Article XXIV of the Constitution establishing civil service, and that they were violative of the portions of the Civil Service Act hereinbefore set forth. The people of California adopted the civil service constitutional amendment in order to secure a high standard of public service and a high standard of conduct in public service. The State Civil Service Act was enacted to implement and carry out the constitutional amendment. The State Personnel Board was created to administer the act and to carry out the high purposes of the constitutional amendment and the act. The act states that every state employee "shall prove himself in his behavior inside and outside the service worthy of the esteem which his office or position requires", and that he "'shall not engage in any other activity or enterprise inconsistent, incompatible, or in conflict with his duties as a State officer or employee.'" For an employee in the position of respondent to purchase from the dealers he was required to investigate the number of automobiles that the record shows he did purchase at the time he did purchase them, and then resell five of them within a short period, as shown by the record, is conduct which can only add to the growing criticism of the public service, and is conduct which, if the action of the State Personnel Board to eliminate it is not upheld by the courts, will eventually destroy confidence in civil service itself and do a great injustice to the thousands of civil service employees who are living up to the high standards of the constitutional amendment and the act.

The decision of the Personnel Board was as follows:

> "That for the acts as found to be true as set forth hereinabove, and for each of said acts separately and severally, the respondent is hereby suspended from the date of his suspension to March 1, 1949, and from his position as Motor Vehicle Investigator, Grade Two, of the Department of Motor Vehicles of the State of California."

[8, 9] It is clear that the Board intended to exact the penalty imposed on each count of the charges, and in view of the fact that we have reached the conclusion that the findings as to the first two charges are supported by substantial evidence, it is unnecessary to discuss at any length the remaining charges and findings. The State Personnel Board here has done what in effect a court does when a defendant in a

criminal prosecution is convicted on a number of counts and decrees that the sentences shall run concurrently. The rule in criminal law is that where one is convicted on two counts and sentenced thereon, the sentences to run concurrently, a subsequent invalidation of the conviction on one count will not secure the release of the defendant. In re Davis, 13 Cal.App.2d 109, 56 P.2d 302. So even if we should find that any or all of the remaining charges and findings are not supported by substantial evidence, we would still be required to reverse the judgment requiring appellant Personnel Board to set aside its decision. However, we shall refer briefly to the remaining charges.

[10] As to the charge that respondent falsely represented to dealers that the vehicles purchased were for his own personal use and would not be resold, there is evidence that respondent stated to at least one dealer that he wanted a car and needed it personally.

[11] As to the charge that respondent violated Vehicle Code section 236 by causing a motor vehicle to be registered to a wrong address, there is evidence that he did give the address of the Motor Vehicle Department instead of his home address when purchasing the Chevrolet. But there is also evidence that he almost immediately discovered the mistake and took steps to correct it, so the evidence with reference to this charge could hardly be considered substantial. Likewise as to the charge that respondent failed to expedite the issuance of a certain dealer's license as promised.

As to the charge and finding that respondent falsely represented to an applicant for a dealer's certificate, which he was handling, that the only car he had was a 1938 Chevrolet state-owned vehicle, and soliciting the applicant's aid in obtaining a new one, the testimony of Mr. Flaherty hereinbefore set forth shows that respondent told him when he "ribbed" respondent about driving an old car: "That's all the state gave him, or that's all he had," and "In view of what he had done for the company and several others—the rest of the supervision, I suggested to Mr. Thompson that if he wanted a car, he be given a car."

We are convinced that the decision of the State Personnel Board in the instant case is based upon substantial evidence, and that the Board did not act arbitrarily or otherwise abuse its discretionary power in imposing the extremely mild penalty that was imposed in this case. We are inclined to agree with appellants' statement that "respondent should consider himself fortunate that the Board merely suspended him instead of discharging him, as the appointing power requested." If it should be held in this case that the acts of respondent were not "an activity or enterprise inconsistent, incompatible or in conflict with his duties as a State officer," and that a court is justified upon the record here in setting aside the decision of the State Personnel Board suspending respondent for such acts and conduct, the position of Motor Vehicle Investigator would be an extremely desirable and profitable position in the event of another era of shortage of automobiles. The official duties of respondent included investigating alleged evasions of the law with respect to the operations of automobile dealers. The acts and conduct of respondent in his dealings with said dealers, as hereinbefore set forth, were contrary to both the letter and spirit of the civil service constitutional amendment and act. To hold that such acts were not incompatible with the position held by respondent would also be contrary to sound public policy.

In view of the foregoing the judgment is reversed.

VAN DYKE and PEEK, JJ., concur.

112 Cal.App.2d 191

CROFT v. INGLE et al.

Civ. 4278.

District Court of Appeal, Fourth District, California.

July 9, 1952.

Action by Doyle Croft against J. W. Ingle and another to recover payments made under a rescinded contract. The Superior Court, San Diego County, C. M. Monroe, J., gave judgment for plaintiff and defendants appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained the finding that the vendors of the Mexican land had not performed by assigning whatever interest in the land that they had and that vendee had rescinded the contract in writing and by offering to restore whatever he had received and by demanding the purchase money.

Affirmed.

1. Vendor and Purchaser ⚿123

In vendee's action to rescind contract for purchase of one third beneficial interest in certain Mexican land, evidence sustained finding that vendors had not performed by assigning whatever interest in the land they had and that vendee had rescinded the contract in writing and by offering to restore whatever he had received by demanding return of the purchase money and sustained judgment for vendee.

2. Vendor and Purchaser ⚿123

Where vendee purchased Mexican land, agreeing in part to pay certain notes, he was not barred from bringing suit for rescission and return of purchase money for vendors' breach, by his failure to pay note coming due after he had given notice of rescission and had demanded return of the purchase money.

George R. Baird, Ruel Liggett, Roy M. Cleator, E. C. Davis, San Diego, for appellants.

C. Guy Selleck, Jr., Fitzgerald & Selleck, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to recover the payments made under a rescinded contract.

The defendants, with one Frymeir and one Castillo had previously purchased certain land in Mexico. Title was taken in the name of Castillo, in order to comply with Mexican law, with an oral agreement that he would hold such title in trust, 1/3 for himself, 1/3 for Frymeir, and 1/3 for Ingle and Tadlock, and that a better method would be adopted when one could be found. They then started to form a trust with a Mexican bank as trustee, and the members of the group as beneficiaries.

On July 19, 1949, the defendants and the plaintiff signed two contracts, which in effect constitute one agreement, by the terms of which the defendants agreed "to sell their 1/3 interest" in this land to the plaintiff for $7,000; the plaintiff agreed to assume 1/3 of certain debts; and the defendants agreed "to draw up the necessary papers to be filed with the proper authorities in Mexico City, Mex., showing" that the plaintiff "has bought the 1/3 interest" in this land, and "to follow through and complete the transfer of title of land" from the names of the defendants to that of the plaintiff. The plaintiff paid $7,000 and signed the notes representing the indebtedness he agreed to assume.

The plaintiff and his family moved on the land but Ingle and Frymeir continued to manage the farming operations, keeping the books and handling the proceeds of the crops. They took in $27,000 from a crop of tomatoes, claiming that their expenses were much greater, but the plaintiff never knew what the costs actually were. The plaintiff kept asking for some evidence of title showing that he had an interest in the land, but nothing was furnished. On March 27, 1950, the plaintiff served on the defendants written notice that he had rescinded the contracts of July 19, 1949, demanding a return of the $7,000, and offering to restore everything he had received. The defendants having refused to return the money or cancel the indebtedness assumed, this action was brought on April 13, 1950.

The complaint alleged, among other things, the making of the agreements on July 19, 1949; that title to the land then stood in the name of Castillo; that the defendants then had no title whatsoever to the land and have not since acquired any title; that while the plaintiff knew that he could not hold title to the land, not being a Mexican citizen, the defendants informed him that the title could be put in his name "on the deed, but that the deed would have to be held for him" by the bank of Mexico; and that when the agreement was executed the defendants told him that title could be thus placed in his name within a week. The prayer was for a return of the $7,000 with interest, for a cancellation of one of the notes which the defendants held, and that the defendants be required to assume the other obligations for which the plaintiff had signed notes. The answer admitted that the defendants had entered into an agreement on July 19, 1949, covering the sale of their interest in this land to the plaintiff, and that they had agreed "to prepare and complete all necessary legal papers for such transfer." It was alleged, among other things, that this land was acquired in fee by Castillo under an oral trust for the benefit of himself, Frymeir and the defendants; that when the agreement for the transfer of defendants' interest to the plaintiff was entered into the land was "in the process of being transferred in trust for the benefit of" Castillo, Frymeir and the defendants; that this trust has since been completed; that the plaintiff was informed that what he was to receive under the agreement was a transfer of the defendants' interest as beneficiaries in that trust after it was completed; that after this trust was perfected the defendants were in a position "to convey to plaintiff their interest as beneficiaries" under that trust; and that defendants are now able and willing to complete their agreement with the plaintiff.

The court found, so far as material here, that the defendants entered into the written contracts on July 19, 1949, whereby they agreed to sell their 1/3 interest in this land to the plaintiff, and agreed to prepare and complete all necessary papers for the transfer of said interest; that plaintiff paid the $7,000 and assumed the agreed indebtedness by signing certain notes; that the defendants have failed and neglected to assign and transfer their 1/3 interest in this land to the plaintiff, as provided in the written contracts, and have refused and neglected to prepare and complete the necessary legal papers for the transfer of their 1/3 interest in the land; that plaintiff has demanded a conveyance of this 1/3 interest on numerous occasions; that the defendants could have assigned and transferred their 1/3 interest to the plaintiff between August 1, 1949 and March 27, 1950, but have failed to do so; that on March 27, 1950, the plaintiff in writing rescinded the contracts of July 19, 1949, demanding the return of the $7,000, and offered to restore, and did restore, all things of value received thereunder; that plaintiff is entitled to the return of the $7,000 and a cancellation of his obligation on the notes he signed; and that, since these findings are determinative as to plaintiff's right to rescind the contracts, it is unnecessary to make any findings on the other issues raised. Judgment was entered accordingly, and the defendants have appealed.

[1] The appellants contend that the pleadings do not support the findings or the judgment; that the evidence does not support the findings or judgment; that the respondent is barred by his own default since he did not pay one of the notes he signed which became due on December 31, 1949; and that the court erred in denying a new trial since the court was then informed of the errors and deficiencies in the complaint and the findings.

The main and controlling question presented is as to whether the evidence supports the findings to the effect that the plaintiff rightfully rescinded the contracts of July 19, 1949. It appears, without conflict, that when the agreements were entered into title to the land stood in the name of Castillo, that the appellants had furnished part of the money to buy the land, and that they had an oral agreement with Castillo that he was holding title for them insofar as a 1/3 interest is concerned. It also appears that the appellants, with Frymeir and Castillo, were working on a scheme under which title to the land was to be conveyed to a Mexican bank under a trust agreement wherein the beneficiaries would be Frymeir, Castillo and the appellants, the appellants having a 1/3 interest. The evidence is conflicting as to whether or not the respondent knew about that trust, its terms, or what was being done in connection with its formation. It does appear without conflict that this trust was not completed until June, 1950, three months after the rescission occurred. It further appears from this trust agreement, as finally completed, that Castillo was the trustor, the bank was the trustee, and Frymeir, Ingle and Tadlock were the beneficiaries; that the stated object of the trust was to guarantee that the money advanced by the beneficiaries would be repaid by Castillo; and that Castillo could end the trust and get the land back at any time by paying the amounts thus advanced by Frymeir and these appellants. No trust was ever formed in favor of the respondent, he was not mentioned in the trust agreement finally made, and no document of any nature was ever given to him conveying the appellants' interest in this land whatever that interest was. The respondent testified that when the agreements were made the appellants told him that he would receive within a week a copy of a deed, although the original deed would have to be held for him in a Mexican bank. The appellants testified that a different arrangement was made, including several oral agreements which are contrary to the provisions of the written contract. The trial court resolved these conflicts in favor of the respondent, and the evidence supports the findings and the judgment. The trust upon which the appellants rely was not a sufficient compliance with their written agreement, it made no mention of the respondent, and it was not completed until long after the rescission took place. While the appellants were not able to convey a full legal title to the respondent, they could have conveyed to him such interest in the land as they had. Instead of doing so, or making any effort to do so, they proceeded to form a trust which made it impossible for them to make such a conveyance since their interest had been pledged as security for the payment of other moneys with which he was not concerned.

[2] There is no merit in the contention that the respondent was barred by his own default since he had not paid one of the notes he signed, which became due in December, 1949. As was pointed out by the trial court, in denying a motion for nonsuit, his responsibility on this note was contingent upon his receiving some conveyance of the interest he was agreeing to purchase.

It is unnecessary to consider other points raised by the appellants. They are either without merit in themselves, or are controlled by the essential findings as supported by the evidence.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

112 Cal.App.2d 309

In re FAMA'S ESTATE.

FAMA v. KANTER.

Civ. 18884.

District Court of Appeal, Second District, Division 1, California.

July 21, 1952.

Rehearing Denied Aug. 13, 1952.

Hearing Denied Sept. 18, 1952.

Proceeding in the matter of the estate of Margaret Fama, also known as Dominica Fama, deceased, wherein Tony John Fama presented for probate as decedent's last will an instrument executed by mark, and Mary Kanter filed a contest to probate of such will. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment refusing to admit the will to probate and an order denying proponent's motion for new trial, and proponent and his co-beneficiary under will, Joseph Fama, appealed. The District Court of Appeal, Drapeau, J., held that refusal to reopen case for purpose of introducing further evidence as to identity of woman who executed will was abuse of discretion.

Appeal from order denying motion for new trial dismissed and judgment reversed.

1. Appeal and Error ⚷110, 870(6)

An order denying a motion for new trial was not appealable, but the order was reviewable on appeal from the judgment.

2. Trial ⚷66

Trial court has a wide discretion in passing on a motion to reopen case for purpose of introducing additional evidence, but such discretion should be exercised in accordance with legal principles and the ends of justice.

3. Wills ⚷322, 384

Where principal issue in will contest was the identity of woman who executed will by mark in presence of witnesses, who did not know her, refusal to reopen case to permit attesting witness, who had previously testified, but not on question of identity, to testify whether woman who executed will was the woman shown in photographs of purported testatrix was abuse of discretion, and such abuse of discretion coupled with prejudicial remarks of counsel in previous unsuccessful attempt to impeach witness amounted to a miscarriage of justice.

◆

Adler, Flinkman & Hahn, Los Angeles, for appellant Tony John Fama.

Waterman, Robbins & Kilpatrick, Los Angeles, for respondent.

DRAPEAU, Justice.

Margaret Fama died on June 14, 1950. She had been married twice and was survived by nine children: six by the first marriage and three by the second. She left a will dated August 3, 1949 in which she devised her entire estate to a daughter of her first marriage, to-wit: Mary Kanter. By a later will dated February 23, 1950, she left her entire estate to her two youngest sons, Tony John and Joseph Fama.

By his petition of July 24, 1950, Tony John Fama presented for probate the will of February 23, 1950, which was executed by mark. Petitioner's half-sister Mary Kanter filed a contest to the probate of said will on the grounds of fraud, undue influence, lack of execution and incompetency.

At the conclusion of the trial, the court directed the jury to bring in a verdict "finding Mrs. Fama was of sound and disposing mind on February 23, 1950." The other issues were submitted to the jury on written interrogatories, to-wit:

> "1. Did Margaret Fama place her cross on the will dated February 23, 1950."
>
> "2. Did Margaret Fama understand the provisions of said will."
>
> "3. Did said will express the intentions of Margaret Fama with respect to the disposition of her property."
>
> "4. If you find that Margaret Fama did place her cross on said will, was she at the time acting under the undue influence of Tony John Fama."

The jury unanimously answered the first three questions in the negative and left the fourth question unanswered.

Before accepting the verdict it was agreed by counsel for both sides that it was satisfactory in the form rendered without an answer to the fourth question.

Judgment was entered accordingly. Thereafter the court denied petitioner's motion for a new trial on the ground that the "moving party failed to comply with Rule 3–b of the Judicial Council Rules."

[1] Petitioner appeals from the judgment. He also appeals from the order denying his motion for a new trial. The latter is a nonappealable order and therefore should be dismissed. However, the order is reviewable on the appeal from the judgment. Lee v. Dawson, 44 Cal.App.2d 362, 364, 112 P.2d 683.

Respondent, the contestant, presented evidence that on February 23, 1950, Mrs. Fama was 65 years of age, suffered from diabetes and had very poor eyesight; that she spoke Italian and "very little English * * * not enough to hold any conversation." Also, that on the day in question, appellant took his mother to look at a liquor and grocery store which he said he might buy. She was wearing a dark house dress and no hat. When he brought her home she was carrying a gallon jug partly filled with wine, and said that Tony had given her some wine to drink.

Appellant testified that on February 23, 1950, his mother said she wanted to see an attorney. Appellant knew no attorneys but his wife's mother and father had a lawyer named Adler, so his wife made an appointment with him. Early in the afternoon, appellant called for his mother and took her to Mr. Adler's office. They had to wait a while because Mr. Adler was busy. And then "My mother did all the talking" to Mr. Adler, who drew up a will which he read to her. She signed by mark, Mr. Adler and his secretary signing as witnesses. She gave the will to appellant and he took her straight home. He placed the will in his safe deposit box and on June 14, 1950, his mother died.

Mr. Adler testified that a woman wearing a dark coat and a scarf on her head, accompanied by appellant came to his office on February 23, 1950 and said "I am Mrs. Fama and I want to make a will"; that appellant referred to her as "mama". Neither Mr. Adler nor his secretary, Eloida R. Aguerrebere, could speak Italian so Mrs. Fama conversed in English. She gave him the names of her children and said she wanted her sons Tony and Joe to receive everything she had. Mr. Adler then prepared the will and Mrs. Fama signed with her mark and he and his secretary witnessed the same.

Four photographs were submitted to Mr. Adler and he selected the one which he thought closely resembled the woman who signed the will in his presence. The contestant, Mary Kanter, then testified that this was not a picture of the decedent. Thereafter, appellant introduced in evidence four snap shots taken in 1948, and a photograph, all of which were identified by contestant as pictures of her mother, the testatrix.

From this point, the question of the identity of the testatrix became the main issue, it being contended by contestant that the woman who placed her mark on the will of February 23rd was not Mrs. Fama but an imposter.

Upon direct examination, Mrs. Aguerrebere, one of the witnesses to the will, testified that "Tony Fama and his mother, Dominica Fama, came into the office. They waited for Mr. Adler, Mr. Adler wasn't there. They waited some time and Mr. Adler came in. They walked into the office with him and they were in there some time. * * * And when he was ready to dictate, he called me in, he dictated the will, and he asked her—he usually asked them if that's all they want in there, if there is anything else that they want to add or they want to change, so we don't have to retype the will.

"She said, 'All right, it is all right, it sound all right,' and then I walked out and I typed out the will. I came back and handed the will to Mr. Adler. Mr. Adler read the will over to her in English. He read it over slowly, and then Mr. Adler said, 'I told you that you needed two witnesses, and my secretary and I shall act as witnesses and will be your witnesses,' so she took the pen. She put her cross there, and Mr. Adler said, 'Sign this as your last will and testament. You know what you are doing?'

"She said, 'I do,' and I took the pen and signed my name and gave it to Mr. Adler and Mr. Adler signed his name, and Mr. Adler handed her the will in a sealed envelope, and she walked out. That's all there is to it.

"Q. Mrs. Aguerrebere, at that time, did you hear Mr. Adler ask her if there was anything else that she wanted to say about the will after I dictated it to you? A. After you dictated it, you asked her if that was all right, and she said, 'All right, it is fine.' "

On cross-examination, contestant's attorney attacked this witness' recollection of what occurred on the day the will was executed and attempted to impeach her by showing inconsistent statements. The witness denied having made the statements attributed to her. After submitting the question to the Reporter's notes, contestant's counsel withdrew the question with the comment: *"I will leave it to the Jury's* *recollection of the matter.* The Court: If you withdraw the question, that's that."

An examination of the record discloses that the jury was not present when this witness first testified regarding the formal execution of the will, and further, that she did not impeach herself by any inconsistent statements or otherwise.

Mrs. Aguerrebere was recalled as a witness in surrebuttal on behalf of the appellant, when the following took place outside the hearing of the Jury:

> "Mr. Adler: At the time when he (respondent's attorney) was questioning her, * * * he asked her about the alleged, supposed will. In other words, it was the first time that that word was used. Now, that's before the Jury, the, allegedly, will.
>
> "Mr. Robbins: I think we should have the right to see if she can make any identification of anyone that was in the place at that time.
>
> "The Court: You should have asked her afterwards. I think this is not proper now.
>
> "Mr. Robbins: She testified again before the Jury.
>
> "The Court: No argument is necessary.
>
> "Mr. Adler: May I ask the Court to reopen the case to replace Mrs. Aguerrebere on the stand for the purpose of questioning her as to the identity?
>
> "The Court: You mean from those pictures?
>
> "Mr. Adler: From those pictures. I think we should be permitted to do that in justice to the parties. They showed up with pictures, and showed me one picture and asked me if that was the woman, and I picked out one picture for Mary (the contestant) and she said it wasn't. I am going to ask the Court to be permitted to reopen the case in chief for the purpose of permitting Eloida Aguerrebere to testify for identification purposes.
>
> "Mr. Robbins: She can't identify anything. She didn't know the party, if the Court please. In picking out any picture, she wouldn't identify anybody.
>
> "Mr. Kilpatrick: We object to that as improper, and on the ground that counsel was informed yesterday of the contention that the person in his office wasn't the true Mrs. Fama. I personally told that to counsel, that we were going on that theory. * * *
>
> "Mr. Robbins: If this witness had testified she was personally acquainted with Mrs. Fama, she could testify it was Mrs. Fama. All she can testify is that on a certain day a woman called at the office.
>
> "Mr. Adler: She can testify what picture, in her opinion—
>
> "Mr. Robbins: We are objecting that is not proper rebuttal.
>
> "The Court: I have ruled it isn't proper rebuttal. He asked to reopen the case. I think the motion will be denied."

Appellant here urges that the court abused its discretion in denying the motion to reopen the case to present further evidence of identification of the testatrix.

> [2] "While a court has a wide discretion in passing upon such a motion, this discretion should be exercised in accordance with legal principles and in accordance with the ends of justice. A trial in a court of justice is not a game and the judge is more than an umpire." Christina v. Daneri, 22 Cal. App.2d 190, 193, 70 P.2d 983, 984.

This witness had not previously been asked to identify the pictures, hence the offered proof was material and might have compelled a decision the other way.

The pictures were before the jury and the contestant had pointed out which were pictures of her mother, the testatrix. Mrs. Aguerrebere should have been permitted to testify whether the person who executed the will on February 23, 1950, was the same person shown in the various photographs, who had been acknowledged by contestant to be the testatrix.

[3] Under the peculiar circumstances here existing the case should have been

reopened in order to permit justice to be done and, in our opinion, the failure to grant the motion was an abuse of discretion. This, coupled with the prejudicial remarks of counsel in his attempted impeachment of the witness, amounted to a miscarriage of justice.

Because of the conclusion reached, it is not necessary to pass upon the other points raised in this appeal.

The appeal from the order denying motion for new trial is dismissed. The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

112 Cal.App.2d 172

DE ESCOBAR et ux. v. ISOM et ux.

Civ. 8006.

District Court of Appeal, Third District, California.

July 3, 1952.

Rehearing Denied July 24, 1952.

Hearing Denied Aug. 28, 1952.

Action by Antonio Pereira de Escobar and his wife, against Walter Isom, and his wife, to restrain defendants from using land included in boundary line dispute. Defendants cross-complained to quiet title in them to land involved and to have boundary line established. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain trial court's findings that plow ridge was a permanent, visible, and substantial monument and that fence which had been erected on ridge had been accepted as boundary line.

Judgment affirmed.

1. Boundaries ⇨1, 3(3)

In determining boundaries, recourse must first be had to monuments placed in the original surveys, and then, if such cannot be established, to courses and distances, natural monuments or objects, and bearing trees described in the field notes, and surveyor should endeavor to retrace steps of person who made original survey.

2. Boundaries ⇨3(6)

In determining boundary lines, question is not where an entirely accurate survey would locate them, but where the original stakes located them.

3. Boundaries ⇨37(1)

In boundary line action, where there was no visible original government monument from which to begin survey, the trial court properly predicated its determination upon testimony of those having personal knowledge of the general conditions relative to the use and occupancy of the premises by the parties and their predecessors.

4. Boundaries ⇨37(3)

In boundary line action, evidence was sufficient to sustain trial court's findings that plow ridge was a permanent, visible, and substantial monument and that fence which had been erected thereon had been accepted as the boundary line.

◆

Griffin & Cardozo, Modesto, for appellants.

Whitehurst & Logan, Patterson, for respondents.

PEEK, Justice.

Plaintiffs are the owners of the north half of Section 28, Township 6 South, Range 8 East, M. D. B. & M. Defendants are the owners of the south half of the same section. A dispute arose between them concerning the boundary of their respective properties and the ownership of a narrow strip of land along said boundary. The strip in question is approximately 12 feet wide at the westerly end and approximately 16 to 20 feet wide at the easterly end. As a result of the controversy plaintiffs filed a complaint by which they sought to restrain defendants from using the land embraced in said strip. Defendants answered denying the material allegations of the complaint, and by a cross-complaint sought to quiet title to the land included within the strip and to have the boundary line established. The case was twice tried. The first trial was before the late Judge

Hjelm, who died while the matter was under submission. The second trial resulted in a judgment for defendants on their cross-complaint. Plaintiffs have now appealed from that judgment, contending (1) that the boundary line as found by the trial court is not supported by the evidence, and (2) that the court in reaching its conclusion followed an inappropriate rule of law. From our examination of the voluminous record and the briefs of the parties it appears that neither contention is well founded.

Apparently because of litigation involving an early Spanish Land Grant (the Orestimba Rancho) which included part of the easterly portion of Township 6, two government surveys were made, the first by one Terrell in 1859, which covered all of section 28, and the second by one Dyer in 1861. The second survey included only that portion of the township wherein said Rancho was situated but did not include any part of said section 28.

The evidence disclosed by the record before us shows that between the two properties there was, and still is, a well-defined plow ridge and that until the same was removed in 1935 a fence had always been maintained along the west half mile of the ridge. It was also shown that the fence was in line with other fences in that area. When said fence was removed a post was placed at the midsection end. The parties continued to use the ridge as a roadway for the full distance between their properties, and in 1941 shared the cost of oiling it. From the date of the issuance of the first patents the record shows continual diverse ownership between the north and south halves of said section. The record also shows, without contradiction, that there is no trace presently visible of any of the monuments placed in said section 28 by Terrell nor can any monument be established as having been placed anywhere in said township prior to the issuance of patents. In fact, as the court observed in its memorandum opinion, there is no visible original government monument, the original location of which is definitely known, within miles of the township to which any "tie" can be made which would be of any assistance in this matter. This fact, the court observed, was not surprising in view of the temporary nature of the original monuments and the long lapse of time before subsequent surveys were made. The record in this regard shows that it was not until 1908, nearly fifty years after the original survey, one Finney set what is referred to as post 212, which post has been accepted by some as a starting point for recent surveys in this area. However, the evidence shows that said post was set at a point which Finney merely believed to be the location of the original post 212. There is no evidence indicating that it was at the true location of the original monument nor has it been universally accepted as such. The testimony further discloses that due to the lack of any fixed monuments it is necessary, and all of the surveyors who testified followed the same practice, to attempt to locate the true lines of the property in question by proportioning the distances in a north and south direction between present monuments. But again none of such monuments were shown to be at the points of any of the original government monuments. The evidence only shows that they were placed by surveyors at the points where the particular surveyor personally calculated the original monuments might have been set or in close proximity thereto. Illustrative of the wide discrepancy resulting from such practices is the testimony of plaintiffs' witnesses which shows that at the southeast corner of section 34, the section adjoining said section 28 at the southeasterly corner thereof, there are two monuments, the first set by one Sloan and the second set by one Townsend. Although these monuments are twelve feet apart in one direction and approximately four feet apart in another it appears from the record that surveyors have indiscriminately used one or both. Also this point is approximately two and one-half miles distant from said post 212. It must be noted further that one of the surveyors, called as plaintiffs' witness, testified that said post 212 cannot be used to apportion the east-west lines, which are the ones here in issue, but can only be used to apportion the north-south lines, which are not in dispute.

[1] It is the general rule that in situations such as is presented herein recourse must be had first to the monuments placed in the original surveys. Secondly, if such corners cannot be established the field notes should be taken and "from the courses and distances, natural monuments, or objects and bearing trees described therein, the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He should endeavor to retrace the steps of the man who made the original survey", County of Yolo v. Nolan, 144 Cal. 445, 448, 77 P. 1006, 1007, and if by doing so the line can be located it must be done, and when so located "it must control."

[2] The record in the instant case, however, shows that plaintiffs' witnesses, rather than testifying to attempts to retrace the original surveys (since the monuments were not visible) merely endeavored to prove the location of the starting point of the Terrell survey at the east quarter corner of section 28 by the "proportionate method", that is, by dividing the distance between northerly and southerly points according to their own ideas as to where that corner should be. However, it appears from the testimony of each of the several surveyors who testified as experts that none were in agreement as to any starting point or line which they ran. In light of the total lack of any established boundaries from which to begin, it is readily apparent that any line, the result of such proportionate method, can be no more correct that the point from which the apportionment is made. As Judge Cooley said in Diehl v. Zanger, 39 Mich. 601: "The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them." Otherwise, as he stated, "the visitation of the surveyor might well be set down as a great public calamity."

[3, 4] Under such circumstances the trial court quite properly predicated its determination upon testimony of witnesses having personal knowledge of the general conditions relative to the use and occupancy of the premises by the parties to this proceeding and by their predecessors in interest. It would seem unnecessary to summarize the testimony of the many witnesses who testified to the long usage of the strip in question as a plow ridge and the maintenance of fences thereon long prior to the memory of any of the witnesses. Rather than summarize such testimony, which adequately supports the findings of the trial court, we borrow the words used by the trial judge in his memorandum opinion who, in discussing this phase of the case said, "The courtroom was full of whiskers and rheumatism for several days."

The situation thus presented is precisely the same as was presented in the case of Hannah v. Pogue, 23 Cal.2d 849, 856, 147 P.2d 572, 576. There it was held that "the court may infer that there was such an agreement ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between the lands of two owners." Such boundaries, the court said, have been recognized for the same reason as is presented here, the uncertainty of the original surveys and the destruction or loss of monuments and other landmarks.

For the foregoing reasons we conclude that the record amply substantiates the findings of the trial court that the plow ridge between the properties was a permanent visible and substantial monument and that the fence which had been erected and used for more than seventy years prior to the commencement of this action had been accepted and agreed upon as the recognized and acquiesced boundary line between the north and south halves of said section.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

112 Cal.App.2d 358

NORTON v. NORTON et al.

Civ. 18699.

District Court of Appeal, Second District,
Division 1, California.
July 22, 1952.

Rehearing Denied Aug. 18, 1952.

Hearing Denied Sept. 18, 1952.

Action by father to change the legal custody of a minor son from that of divorced mother. The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered an order changing the custody and the mother appealed. The District Court of Appeal, Hanson, J., held that the evidence sustained finding that the best interest and welfare of the boy required that he stay with his father with whom he had been living by agreement of parties for some fifteen months.

Affirmed.

Hanson, J., Pro tem., dissented.

Divorce 🔑303(3)

In proceedings to change legal custody of minor boy from that of divorced mother to that of father, evidence sustained finding of trial court that the best interest and welfare of the boy required that he stay with father with whom he had been living by agreement of the parties for some fifteen months.

Marvin M. Chesebro, Los Angeles, for appellant.

Joseph Scott, J. Howard Ziemann, Gordon L. McFarland, Los Angeles, for respondent.

DRAPEAU, Justice.

Richard J. Norton and Mary S. Norton were married August 16, 1941. Two children were born of the marriage: Michael, now about nine years old, and Genevieve, now about four years.

Mr. and Mrs. Norton were divorced, by an interlocutory decree August 9, 1949, and by a final decree August 18, 1950.

By the interlocutory decree the mother was awarded custody of both children. But, in September, 1949, one month after the entry of the interlocutory decree, by agreement of the parties Michael was turned over to the father.

The mother remarried in December, 1950. The father also remarried; to a lady with two children by a former marriage.

The father sent the boy to the mother, to be present at her second marriage. After her marriage the mother sent word to the father that she was going to keep the boy in her home.

So the father presented his motion to the Superior Court for modification of the original order of custody. After a somewhat protracted trial the trial judge ordered that the father be given custody of the boy. From this order the mother appeals.

Reference is made to a further and more detailed statement of the facts in a dissenting opinion in this case by Mr. Justice pro tem. HANSON.

When one gets through with this case, it boils down to this: The mother was awarded custody of the boy, but was unable for financial reasons to take care of him. So the father took him and placed him in the boy's grandmother's (the father's mother's) home. Then the father moved into his mother's home and paid a lot of attention to the boy, taking him on trips, on outings, and elsewhere. Then the father married a woman with two children. And the boy's mother remarried. Each parent now has a home of his own where the boy may live.

Assuming, as this Court thinks the trial court properly did, that both homes were with proper persons; taking into consideration, as we think the trial court did, the principle that other things being equal the mother should be given first consideration; nonetheless this Court is of the opinion that there is substantial evidence supporting the findings of the trial court that the best interests and welfare of the boy require that he stay with his father.

The order so made was within the discretion of the trial court, and we are unable to say that there was any abuse of discretion. The tragedy in this—as in so many divorce cases—is to be found in the hurt done to a child. When parents will not go along together, or by the conduct of either or both of them make it impossible to go along together; when they cannot or will not maintain a home in which their child may grow to manhood and have the benefit of the love and protection of both father and mother, such parents will never know what they have done. The hurt to them in after years of being deprived of custody will never equal the hurt inflicted by them themselves upon a helpless child.

So this Court agrees with the trial judge that this boy should not be moved around any more. He has been domiciled with the father for some time. It may be assumed that he told the trial judge that he did not object to being with his father, and that the trial court believed that it would be a mistake to change the boy's residence and manner of living, at least for the present. Some doubt may be expressed as to whether the boy will be as welcome in his father's new home, along with two children of a former marriage of the stepmother, as he was with his grandmother. But in the circumstances of this case at this time this Court is bound by a fair exercise of the discretion of the trial court.

The order is affirmed.

DORAN, Acting P. J., concurs.

HANSON, Justice pro tem. (dissenting).

I am compelled to dissent from the majority opinion for two reasons. First, I am unable to find any substantial evidence to support the order of the trial court. Second, the majority opinion assumes, as the trial judge did, that as a matter of law the custody provisions of a final decree, may be changed upon the sole ground that such change is for the child's welfare even though there is no showing of any adverse facts or circumstances rendering it essential or expedient for the welfare of the child that there should be a change.

To point up this dissent it is necessary to enlarge somewhat upon the facts as they are recited in the majority opinion. In January, 1951, four months after the final decree of divorce was entered in this case awarding the mother the custody of her son aged seven, and her daughter aged one and a half, the father sought and was granted a change of custody of the boy upon the sole ground that it was in the best interest of the boy to live with his father in the latter's new home, although both parents were found to be perfectly fit and proper to have his custody. Nevertheless it should perhaps be stated that the boy's father was arrested and plead guilty to a charge of drunk driving as recently as in October, 1950, when the boy was living with him. The divorce decree had ordered the husband to pay his wife $50 per month for her support and $25 per month for the support of each child.

As the divorce decree gave the wife a total of only $100 per month for her support and that of her two children and as the defendant told her he could not increase the payment she asked him if his mother could not care for the boy so appellant could procure a job and amplify her income. This proposal was accepted and thereafter the boy lived in the paternal grandmother's home for 15 months along with his father who moved in with him, until his mother married a man (who had not been married before) on December 30, 1950. Less than two weeks later the defendant married a divorcee with two children, and thereupon sought the actual and legal custody of his son.

The trial judge as a result of an interview with the boy in chambers found he was very fond of both parents, but personally wished to be with his father, undoubtedly due in large part to the fact that the father during the 15-month period took him on week-end trips, on hikes, to movies, and provided other amusements for him. There appears to be no question but that the boy has at all times been well treated by both parents.

Originally the father was in the heating and cooling business, but at and prior to the hearing he was engaged in the retail liquor business which he testified would shortly yield him $400 a month although at the time he was receiving therefrom only $100 per month. The boy's stepfather is in the mortgage loan business. At the time of the hearing, the latter, his wife, the boy and her little daughter were living in Brentwood in a home which he and his wife had purchased. The latter was no longer working, but devoting her entire time to her new home, the children and the husband. Appellant's husband it appears is very fond of the boy, is entirely companionable with him, and appears to be proceeding to interest him in worthwhile activities. The advantages the mother and her new husband are able to and do give the boy are equal to those he would be able to enjoy in the home of the father. In his mother's home he has the companionship of two blood relatives, his mother and sister; in his father's home, but one.

In Bemis v. Bemis, 89 Cal.App.2d 80, 200 P.2d 84, 86, in an opinion by Presiding Justice Shinn, it is said: "* * * if the evidence clearly establishes that the children will have equal advantages in the home of the mother and that the mother has demonstrated her ability and willingness to perform her maternal duties properly, the law requires that young children be placed with her.

* * * * * *

"* * * Where the court finds that 'other things' are equal, young children are invariably given into the custody of their mother. We say 'invariably' because we have not found in our reported cases a single instance in which the custody of young children has been awarded to their father upon evidence that the mother was a fit and proper person to have their custody and was able to give them advantages equal to those that they would enjoy in the home of the father. We need not elaborate upon the reasons which underlie this sound policy of the law. They are stated with great clarity and completeness in many cases, and we shall therefore refer only to Juri v. Juri, 69 Cal.App.2d 773, 160 P.2d 73, and cases therein cited."

In the instant case the trial court in rendering its decision at the conclusion of the hearing said: "Of course, *the sole question* here is what is for the best interests of the child, there being no showing that either parent is actually unfit." (Italics supplied.) Contrary to the statement of the court the rule is not so limited as was announced by it. The true rule is as stated in Washburn v. Washburn, 49 Cal.App.2d 581, at page 587, 122 P.2d 96, at page 100: "In custody cases the underlying principle, paramount to all others, is the welfare and best interest of the child. In no way in conflict with this rule is another, equally well established, that once a court has decreed it there may be no change in the child's custody except where adequate cause therefor arises out of *changed conditions.* (Italics supplied.) This principle is based on the idea not only that the stability of the home life of the children is an important and vital factor, but also that the turmoil of litigation must somewhere end. Short of a modification based upon adequate grounds, the decree awarding custody is conclusive and settled beyond recall other than by appeal." See also Foster v. Foster, 8 Cal.2d 719, 726–727, 68 P.2d 719.

Under the factual circumstances of this case there would have been involved as great a change and a want of stability for the boy to be transferred from the grandmother's home to his father's new home as there was to his mother's new home. In fact, the boy on the date the order was made had been in his mother's new home for a month and a half, and accordingly his contemplated transfer was not from the grandmother's home but from the mother's home to the father's new family and home. Presumably the boy is still in his mother's home as the appeal herein acted as a stay, In re Barr, 39 Cal.2d 26, 243 P.2d 787, and accordingly an affirmance will now involve a transfer of the boy from his mother's home where he has been since December 30, 1950.

The law of nature as well as the law of man rebels at the separation of a brother and sister from one another and—doubly so—from a mother unless indeed very good cause is shown of which there is none here. The exercise of the legal discretion confided to trial judges may be exercised only when it is bottomed upon basic facts. Upon this record there is nothing to indicate that the boy was not happy in his mother's home and nothing to indicate, as the majority opinion concedes, that he will be happy or his welfare promoted in his father's home living with a stepmother, a stepbrother and a stepsister. For the reasons indicated I think there should be a reversal.

112 Cal.App.2d 353

KRIM v. SEVERANCE.

Civ. 18810.

District Court of Appeal, Second District, Division 3, California.

July 21, 1952.

Rehearing Denied Aug. 8, 1952.

Hearing Denied Sept. 18, 1952.

Action by Charles F. Krim against Emma A. Severance to recover alleged rent overcharges. Maximum rental for the dwelling, unfurnished, had been $125 per month, but, after decontrol, it was leased for $250 per month as furnished dwelling with gardening services provided. The Superior Court of Los Angeles County, Philip H. Richards, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Wood, J., held that under Housing and Rent Control Act amendment which became effective during term of lease, maximum rent became $125 per month plus rental value of furniture and gardening services, and collection of the $250 per month, subject to readjustment, was not unlawful.

Judgment affirmed.

1. War and National Defense ⟹210

Where maximum rental for unfurnished dwelling had been $125 per month, but, after being decontrolled, dwelling was leased for $250 per month as furnished dwelling with gardening services, under Housing and Rent Act amendment which became effective during term of lease, maximum rent became $125 per month plus rental value of furniture and gardening service, and collection of the $250 per month subject to readjustment was not unlawful. Housing and Rent Act of 1947, §§ 1 et seq., 204(h), 205, as amended, 50 U.S.C.A.Appendix, §§ 1881 et seq., 1894 (h), 1895.

2. War and National Defense ⟹210

Under Housing and Rent Act amendment which set maximum rent at rent last in effect for such accommodation under Federal Rent Control "plus or minus applicable adjustments," maximum rent would not be merely rent last in effect, but act would allow rental adjustments necessary where owner, during decontrol, became legally obligated to provide additional benefits for tenant. Housing and Rent Act of 1947, §§ 1 et seq., 204(h), 205, as amended, 50 U.S.C.A.Appendix §§ 1881 et seq., 1894(h), 1895.

◆

McGinley & Hanson and Howard D. Hanson, Los Angeles, for appellant.

Barry M. Woodmansee, Beverly Hills, for respondent.

WOOD, Justice.

Action, under the provisions of the Federal Housing and Rent Act, 50 U.S.C.A. Appendix, § 1881 et seq., to recover alleged overcharges paid as rental for residential property. Plaintiff appeals from the judgment for defendant.

On July 12, 1948, the plaintiff and defendant entered into a written lease whereby plaintiff leased from defendant a nine-room *furnished* dwelling house at 10734 Lindbrook Avenue, Los Angeles, for 18 months, commencing July 24, 1948, and ending January 24, 1950, at a monthly rental of $250. The lease also provided that defendant (owner) would pay for gardening service. Plaintiff occupied the property until March 24, 1950, and paid said agreed amount of rental.

Under the provisions of the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 901 et seq., the maximum rental fixed by the rent director for said house, unfurnished and without gardening service, was $125 per month. An amendment of said Price Control Act of 1942, being section 202(c)(3), provided in effect that housing accommodations which were not rented for 24 consecutive months during the period commencing February 1, 1945, were not controlled housing accommodations. The house involved here was owner-occupied from December 3, 1943, to December 1, 1947. On December 18, 1947, the rent director, upon application by the owner, made an order approving decontrol of the house. (The Emergency Price Control Act of 1942 was superseded by the Housing and Rent Act which became effective July 1, 1947.)

At the time the lease was made (July 12, 1948), the renting of said property was not controlled by the provisions of the

Housing and Rent Act, and the defendant was not restricted by law as to the amount of money that she might charge for the use of the property. On April 1, 1949, the Housing and Rent Act of 1949 became effective, and under the provisions thereof the renting of said property was recontrolled.

In January, 1950, plaintiff asked defendant why she had not applied for "a ceiling on the *furnished* price of the house." Defendant replied that the house was not under control and there was no ceiling on it. In January and in February, 1950, plaintiff sent a letter to defendant asking her to apply for an adjustment of the rental of said premises as a furnished housing accommodation. Defendant testified (on cross-examination by plaintiff's counsel) that she attempted to get a ceiling on the *furnished* house, and that two men in the rent control office told her "not to set any ceiling on it."

Appellant (plaintiff) contends that, upon recontrol, the maximum rental of $125 per month for the unfurnished house was re-established as the maximum rental for the housing accommodations as of April 1, 1949; that since defendant did not obtain an order from the rent director increasing said maximum rental by reason of the change to a furnished unit, the maximum rental of $125 per month *unfurnished* is the maximum rental for said premises whether furnished or unfurnished; that plaintiff is entitled to judgment for three times the amount by which the twelve rental payments of $250 per month (made after recontrol on April 1, 1949, for the *furnished* house and gardening service) exceed the fixed maximum rental of $125 per month for the *unfurnished* house. The total amount of treble damages sought by him is $4,500. He also asks for $500 as attorney's fees.

Respondent (defendant) contends that the housing accommodations provided for plaintiff were of the reasonable value of $250 per month, and that the collection of said amount after recontrol on April 1, 1949, was tentative and subject to readjustment by the rental director but the collection was not unlawful. She also asserts that said accommodations were luxury accommodations and that by reason of an amendment to the Housing and Rent Act on January 15, 1950, which removed accommodations in the "luxury class" from rent control, the said premises were decontrolled again on said date.

On April 1, 1949, subsection (h) was added to section 204 of the Housing and Rent Act, 63 Stats. 25, 50 U.S.C.A.Appendix, § 1894, which subsection provided as follows: "(h) For controlled housing accommodations which were not included within the definition of 'controlled housing accommodations' as such definition read prior to the effective date of the Housing and Rent Act of 1949, the maximum rent shall be the maximum rent last in effect for such housing accommodations under Federal rent control, plus or minus applicable adjustments; or, if no maximum rent was ever in effect for such housing accommodations, the maximum rent shall be the rent generally prevailing in the defense-rental area * * * plus or minus applicable adjustments. * * *"

[1, 2] The housing accommodations herein, which became controlled under the 1949 Act, were not included within the definition of "controlled housing accommodations" as such definition read prior to the effective date of said act, April 1, 1949. The house herein had not been under rent control for more than a year prior to the effective date of the 1949 Act. No maximum rental had ever been fixed upon the house as a furnished housing accommodation. The "maximum rent last in effect" for the house (unfurnished) was $125 per month. There was no "maximum rent last in effect" for the house as a furnished housing accommodation—including gardening service. It appears, therefore, under said subsection (h) of section 204, that the maximum rent for "such housing accommodations" herein (which were not "controlled housing accommodations" as defined prior to said effective date of the 1949 Act) is the $125 per month "plus or minus applicable adjustments." As above stated, the lease of the furnished house

(including gardening service) was made when the house was not under rent control. By the use of the words "plus or minus applicable adjustments", in stating what the maximum rent should be after recontrol, it is clear that the Congress did not intend that the maximum rent should be merely the rent last in effect regardless of any legal obligation on the part of the owner, created during decontrol, to provide additional benefits for the tenant. Those words indicate that the Congress contemplated that rental adjustments necessarily would be required in situations similar to the one here, where an existing lease, made when rent control was not in effect, covers furniture and services not provided when the rent last in effect was fixed. If it had been intended that the rent last in effect should be the maximum rent until the rent director had approved an adjustment of the rent upon application of the owner, and that the receipt of additional rent by the owner prior to such approval would be unlawful, such an intention would have been stated clearly in the statute. Certainly the addition of the words "plus or minus adjustments" in said subsection (h) of the statute was not intended merely to be the statutory authority for the rent director to make applicable rent adjustments. He has always had that authority. The enactment of the recontrol amendment did not make it necessary to include a provision that the director had permission to make applicable rent adjustments. The maximum rent after recontrol, under said section (h) of section 204 of the 1949 Act, for "such housing accommodations" as those involved here was the combination or aggregate of the "rent last in effect" for the unfurnished house, namely, $125 per month, and the amount that should be allowed for the rental of furniture and for gardening service. The parties had agreed in July, 1948, during decontrol, upon the amount of $250 per month as the reasonable and proper amount, and the tenant (plaintiff) had paid that amount for 9 months prior to recontrol (April 1, 1949) without any complaint as to the amount. After recontrol the tenant continued to pay, and the owner continued to accept, the same amount for 12 months (until 2 months after the expiration of the lease term). It is the accepting and receiving of payment of rent in excess of the maximum rent provided by statute that is unlawful. Housing and Rent Act of 1947, sec. 205, as amended. In the present case the amount of maximum rent, that is, the amount of the rent last in effect plus applicable adjustments, has not been fixed by the rent director. It is not known to what extent, if any, the rental accepted exceeds the maximum rent provided by statute. Appellant (plaintiff) asserts that $125 per month, which was the last rent in effect for the unfurnished house, is the maximum rent until the owner petitions for and obtains an order of the rent director increasing that amount on the basis that furniture and gardening services are provided. He cites certain cases wherein it is held that an owner, in order to lawfully collect increased rental, must petition for and obtain an order from the rent director allowing such increase. In those cases a maximum rental for certain accommodations had been fixed by the director and, as above stated, the holdings therein were to the effect that maximum rents once fixed can be increased only by an order of the director upon petition of the owner. In the present case, as above stated, the maximum rent prescribed by said section (h) has not been fixed. The circumstances in the present case, with respect to accepting rent after recontrol, are similar to the circumstances with respect to accepting rent when property is first rented and before a maximum rent has been fixed by the rent director. In Woods v. Stone, 333 U.S. 472, 68 S.Ct. 624, 626, 92 L.Ed. 815, wherein the owner had rented the property and collected rent without having registered the property, it was held that he had a right to collect the rental agreed upon "subject to readjustment," that the "statute and regulations made his rentals tentative but not unlawful." A similar ruling was made in Parshalle v. Curl, 90 Cal.App.2d 641, 649, 203 P.2d 802.

By reason of the above conclusions, it is not necessary to determine other contentions of the parties.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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112 Cal.App.2d 261

BATES v. SCHUBERT et al.

Civ. 18945.

District Court of Appeal, Second District,
Division 2, California.
July 17, 1952.

Hearing Denied Sept. 11, 1952.

Action by Lucille Bates, tenant, against Edward F. Schubert and others for wrongful eviction. The Superior Court of Los Angeles County, Irvin Taplin, J., sustained a demurrer to the third amended complaint and entered judgment in favor of defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that where landlord obtained favorable judgment in unlawful detainer action and tenant surrendered possession without issuance of process, though judgment was reversed on appeal, tenant could not maintain the action.

Judgment affirmed.

Landlord and Tenant ⚿292

Where landlord without malice prosecuted unlawful detainer action and obtained favorable judgment, and tenant surrendered possession without issuance of legal process, though judgment of eviction was reversed on appeal, tenant was not entitled to maintain action for damages for wrongful eviction.

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John F. Poole, Los Angeles, for appellant.

Larwill & Wolfe, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants, predicated upon the sustaining of a demurrer to their third amended complaint without leave to amend, in an action to recover damages for wrongful eviction, plaintiff appeals.

Facts: On February 21, 1948, plaintiff filed a complaint for wrongful eviction. Subsequently, after various proceedings, a third amended complaint was filed December 5, 1949. In this pleading it was alleged:

1. Plaintiff had occupied the premises for more than three years prior to October 8, 1943;

2. November 16, 1944, defendant Schubert filed suit for eviction against plaintiff;

3. December 14, 1944, the municipal court rendered judgment in the eviction action in favor of plaintiff [defendant herein];

4. December 26, 1944, pursuant to the judgment of eviction and the refusal of the court to stay execution thereof, plaintiff was compelled to leave said premises;

5. Thereafter the judgment of eviction was reversed by the appellate department of the superior court and the action was subsequently dismissed by defendant Schubert.

Defendants never obtained the issuance of process for the restoration of the premises to them upon the judgment of eviction which they had obtained in the municipal court.

Question: Did plaintiff's third amended complaint fail to state a cause of action for the reason that it affirmatively appeared therein that plaintiff voluntarily surrendered the premises without defendants' having issued any legal process to obtain possession of the property?

Yes. When a landlord without malice prosecutes an unlawful detainer action to a judgment which, by its terms, requires the tenant to deliver possession of the premises, and the tenant thereupon surrenders the possession without the issuance of process, and the judgment is reversed on appeal, the tenant is not entitled to maintain an action for damages for wrongful eviction. Black v. Knight, 176 Cal.

722, 724 et seq., 169 P. 382, L.R.A.1918C, 319.

In the instant case the questioned pleading discloses that plaintiff voluntarily vacated the premises and was not removed therefrom pursuant to a writ of execution or other process predicated upon the judgment in the unlawful detainer action instituted by defendant Schubert. There is nothing in Schubert v. Bates, 30 Cal.2d 785, 185 P.2d 793, contrary to the foregoing rule. Such case merely holds so far as material here that where judgment in favor of plaintiff in an unlawful detainer action has been reversed on appeal, the trial court has a right to issue an order repossessing the tenant even though such tenant was not evicted forceably or pursuant to eviction process. Schubert v. Bates, supra, 792.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

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112 Cal.App.2d 183

GREENWALD et al. v. ROYAL INDEMNITY CO. et al.

Civ. 18844.

District Court of Appeal, Second District, Division 1, California.

July 7, 1952.

Action by Eugene J. Greenwald and wife and others against the Royal Indemnity Company and the Lee Construction Company and another for credits for work which should have been done by the construction company under construction contract. The construction company filed a cross-action for the value of alleged extra work. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., after offsetting a certain sum for extra work, entered judgment for plaintiffs, and the construction company and another appealed. The Court of Appeal, White, P. J., held that the evidence supported the trial court's determinations.

Affirmed.

1. Contracts 🔑350(1)

In action by landowners against general contractors who undertook to construct building in accordance with plans and specifications for recovery under contract provision that credit would be given landowners for value of any work eliminated, evidence supported finding that landowners were entitled to recover $5,171.69 as credits for work which should have been done under the contract but which contractor failed to do, and for contractors' failure to perform plastering work in a good and workmanlike manner.

2. Contracts 🔑234

Where contractor was required under building contract to re-do any improper work and he refused to do so, allowance to building owners for sum reasonably required to have work corrected and repainted was proper, though building owners did not, in fact, have the work corrected.

3. Contracts 🔑322(5)

In cross-action by building contractor to recover for payment of continuous inspections for bond beam, evidence failed to establish that contractor had actually paid for such item.

4. Contracts 🔑322(5)

In cross-action by contractor for extra labor and material on steel canopy allegedly necessitated by unobtainability of decking called for in specifications of building contract, evidence established that specified decking was available but that contractor failed to obtain it, and that the substituted canopy and decking were inferior and less expensive than the specified decking.

5. Contracts 🔑232(2)

Where brick pier failed to meet requirements of contract specifications or of city ordinance, and six bars of steel were used where eight were required and bars used were of a smaller size than those called for by building plans, allowance for brick pier as extra work would be denied.

6. Contracts ⚷322(5)

Evidence was insufficient to support contractor's additional claim for alleged extra work.

7. Appeal and Error ⚷671(6)

In determining appeal on settled statement, court would be guided by evidence and facts narrated in settled statement transmitted to it. Rules on Appeal, rule 12(b).

8. Appeal and Error ⚷671(6)

Settled statement failed to support any of contractor's assignments of error relating to denial of allowances for alleged extra construction work.

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Willard G. Cram, Robert M. Bushnell and Myron W. Silverton, Los Angeles, for appellants.

Teschke, Rohe, Willis & Cramer, Robert A. Rohe, Beverly Hills, for respondents.

WHITE, Presiding Justice.

This is an appeal upon a settled statement from a judgment in favor of plaintiffs after trial before the court sitting without a jury.

Respondents and appellants entered into a written agreement whereby appellants as general contractors undertook to construct for respondents as owners an automobile sales and service building in accordance with plans and specifications prepared by an architect. In the course of construction and afterwards disputes arose involving claims of faulty workmanship, failure to perform work called for by the contract, claims by the contractors for "extras", and the filing of mechanics' liens by subcontractors. Respondents brought an action against appellants and the Royal Indemnity Company which had furnished the mechanics' lien bond. Appellants cross-complained for alleged "extras". The Royal Indemnity Company having paid all mechanics' lien claims, the action was dismissed as to it. The trial court found that respondents were entitled to recover $5,171.69 as credits for work which should have been done under the contract but which appellants failed to do and for appellants' failure to perform the plastering work in a good and workmanlike manner; that appellants were entitled to offset the sum of $4,675.34 as the reasonable value of extra labor and materials, and that respondents were entitled to judgment for the difference of $496.35.

The settled statement contains ten assignments, numbered from I to X, in each of which it is claimed that the trial court's finding as to a specific item in dispute is predicated upon insufficient evidence. In their brief appellants have abandoned assignment V.

[1] By assignment I, appellants contend that the court erred in allowing respondents a credit of $1,840 by reason of the elimination of the heating and ventilating system from the contract (the contract provided that if any work was eliminated the value thereof would be computed by the architects and the owners given credit therefor). A qualified expert testified that the value of the work eliminated was $1,840. Appellants' assertion that this testimony was admitted over objection is not borne out by the settled statement. Appellants attempted to show that the value of the work was $750 by introducing a bid of La Brea Heating Company, but this bid covered a heating system only and did not include any ventilating items. Assuming that appellants' evidence created a conflict, the conflict was resolved by the trier of fact and its finding in this regard is supported by substantial evidence. The same may be said of all the remaining assignments of error.

[2] Under assignment II it is contended that the evidence is wholly insufficient to support the allowance of $2,732 as damages for faulty plastering. It is true that appellants' witness testified that the cracks in the plaster could be filled for $125 or $150; but there was also expert testimony (including that of appellants' own witnesses) that merely filling the cracks would not produce a satisfactory job, that in some places the outer coat had pulled away from the rough coat, and that it would cost as much to remove the poor plaster and replaster the walls as it had cost to do the actual plastering itself. The court's allow-

ance was for the sum reasonably required to have the work corrected and repainted. The fact that respondents did not have the work corrected affords no basis for denying them recovery for admittedly unsatisfactory work. The contractor was required under the contract to do over any improper work, which he failed to do although repeatedly requested.

Under assignment III it is urged that appellants were erroneously denied an allowance for alleged extra electrical work of the reasonable value of $1,242.79. Again, the settled statement refutes appellants' claims in this regard. There was credible testimony that the electrical revisions were minor in nature and that while appellant Lee was repeatedly requested in writing to advise whether such revisions would entail any change in contract prices he failed to do so, and further failed upon demand to itemize the claimed extras. Although the contract provided that all extras should be authorized in writing for an agreed price, Lee never sought authorization for the alleged extra items and made no claim therefor until February, 1947, some months after the work was done.

[3] Under assignment IV it is contended that the uncontradicted testimony of appellant Lee was that he had paid $24 for "continuous inspection for bond beam" and that the court erred in disallowing this item. The settled statement in this respect reads as follows:

> "Defendant Lee testified that he thought he paid the Young Construction Company $24.00 for this item.
>
> "Superintendent Holmes testified that this would be an allowable extra, if, in fact, Lee actually paid this item. While Lee testified he thought he paid it, he had no further evidence or proof that it actually was paid."

Appellant asserts that a receipt was produced for this item, but the record does not support this assertion.

[4] By assignment VI it is contended that the evidence is uncontradicted that appellants paid out $987.04 in addition to the contract price for "extra labor and material on steel canopy". It is asserted that the "Robertson Decking" called for in the specifications was unobtainable, and that appellants paid the additional sum for a satisfactory substitute decking. The settled statement, however, summarizes testimony that "Robertson Decking" was available, that Lee was told where he could obtain it but failed to do so, and the substituted canopy and decking finally installed were inferior and less expensive than the specified decking; and further, that Lee made no claim in this regard until he submitted his general list of claimed extras in February, 1947, and declined upon demand to itemize or otherwise substantiate his claim in this regard.

Under assignment VII appellants assert that they were erroneously denied an allowance claimed as an extra for "plastering on concrete block on northwest wing, $808.30". It is stated in their brief that subcontractor Shaw testified that he did this work as an extra after informing the respondents directly that it would be an extra and receiving their oral authorization; that appellants paid him $808.30 in addition to the original contract price. The settled statement contains no such testimony. The plans called for this work as part of the original contract at no extra cost. The city ordinance required that a wall of this area be plastered. Appellant Lee admitted receiving written directions to plaster the wall at no extra cost and that he never made any objection thereto.

[5] Under assignment VIII appellants "respectfully submit that a fair consideration of the recital in the Settled Statement as to this particular item can lead to no other conclusion than that this item was an extra, * * *" and that therefore the court's finding disallowing the item is not sustained by the evidence. Appellants offer no further argument or discussion of the matter. The settled statement discloses that appellants' subcontractor installed a brick pier which failed to meet the requirements of the contract specifications or the city ordinance, that he never examined the structural plans; that he installed a pier with six bars of steel where eight were re-

quired, and the bars he installed were of a smaller size than those called for by the plans.

[6] Again, under assignment IX, appellants "submit that a fair consideration of the recitals in the Settled Statement" requires that the claimed extra ("additional concrete and drilling caisson holes under building for foundation, $900.00") should be allowed, and make no further argument. Reference to the settled statement discloses that upon the discovery of filled ground the parties entered into a supplementary written agreement whereby the additional foundation work thereby necessitated was to be paid for in the sum of $1,239 plus 83¢ per foot for the depth of each caisson hole in excess of thirteen feet. No basis whatever for an additional claim can be found in the settled statement.

Assignment X is wholly without support in the settled statement. As in some of the assignments previously discussed, appellants simply "submit that a fair and reasonable evaluation of the evidence" supports their bare statement that the item should have been allowed.

It is stated in the brief of appellants that the trial court adopted and settled, "without permitting any change therein", the statement on appeal as proposed by the *plaintiffs* (respondents). No attempt is made, however, to impeach the verity of the statement, nor is any showing made that any effort was made in the trial court to propose corrections of, additions to, or deletions from the statement on appeal as settled by the trial court. Furthermore, assuming appellants were denied such relief in the court below, they have failed in this court to avail themselves of the provisions of Rule 12, subdivision (c) of the Rules on Appeal, which provide a procedure for settlement of any differences of the parties "with respect to alleged omissions or errors in the record".

[7, 8] Manifestly, in determining the appeal herein, this court must be guided by the evidence and facts narrated in the settled statement transmitted to us. Such statement supports none of appellants' assignments of error. Further, so many statements of fact contained in appellants' brief are not only without support in, but contradicted by, the record as contained in the settled statement, as to indicate that the writer of the brief, in his preparation thereof, relied upon his recollection of what occurred or should have occurred at the trial rather than the record upon which the decision of this court must be based.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

112 Cal.App.2d 319

RAMIREZ et al. v. ROMERO.

Civ. 18943.

District Court of Appeal, Second District,
Division 1, California.
July 21, 1952.

Action to establish paternity of child born out of wedlock. The Superior Court of Los Angeles County, Alfred E. Peoness, J., rendered judgment establishing paternity of child and providing for her support and entered an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Drapeau, J., held that finding as to paternity of child was supported by substantial evidence.

Appeal from order dismissed and judgment affirmed.

1. Bastards 🔑65

In action to establish paternity of child born out of wedlock, finding that defendant was the father of child was supported by substantial evidence.

2. Appeal and Error 🔑1010(1)

A finding based upon substantial evidence may not be disturbed on appeal.

◆

David C. Marcus, Los Angeles, for appellant.

Miller, Beck & Stillwell, San Fernando, for respondents.

DRAPEAU, Justice.

Plaintiff, Dolores Ramirez, testified that on several occasions she had had sexual intercourse with defendant, Jess Romero; that she consented to it upon his promise to marry her; that she had never had intercourse with any other man; that when she told Jess she was pregnant he said, "Get rid of the baby or do something." When she told him she would not do that, he told her he would call her up in a day or two and tell her what he had decided. But the call never came. Then she wrote him two letters which were never answered.

After plaintiff's baby girl, Cecelia Romero, was born, she talked with defendant, and asked him to help support the child. He told her this he would not do. But he never denied that he was the father. Then defendant married another woman.

Defendant testified, and denied plaintiff's testimony in whole and in part, except that he said he had been out with her socially on occasions, but never alone.

On rebuttal plaintiff's sister testified that she saw plaintiff get into a car with defendant on Christmas day, 1948. Defendant had specifically denied that he had seen or been with plaintiff or had had anything to do with her on that date.

The trial court found for plaintiff's infant girl, rendered judgment accordingly, and ordered defendant to pay support money, doctor bills, and counsel fees.

Defendant appeals from the judgment, and from an order denying his motion for a new trial.

[1, 2] No matters of law are presented in the briefs. The argument turns solely upon the weight, value and effect of the evidence. Again the old, old story as told by the evidence is as poignant and moving as it ever was. It is a tragedy as old as the family relation, with something to be said, as always, for the woman and for the man, and for the baby girl too. But it was the province of the trial judge to decide. He saw the baby and the man. He heard the testimony. It cannot be said that his decision was error. This is the time-honored substantial evidence rule in this state. Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163; Sweet v. Hamilothoris, 84 Cal.App. 775, 258 P. 652; Andrade v. Newhouse, 54 Cal.App.2d 339, 128 P.2d 927; Berry v. Chaplin, 74 Cal.App.2d 652, 169 P.2d 442.

The judgment is affirmed; the appeal from the order denying defendant's motion for a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

112 Cal.App.2d 210

EVARTS et al. v. MYERS et al.

Civ. 18928.

District Court of Appeal, Second District, Division 3, California.

July 14, 1952.

Action by Eugene F. Evarts, and another, against R. Reese Myers, Title Service Co., and another, to set aside realty sale made on foreclosure of deed of trust after default. The company filed a cross-complaint seeking instructions and declaratory relief. The Superior Court of Los Angeles County, Joseph M. Maltby, J., found that foreclosure proceedings were lawful and that plaintiff trustors had no interest in property, and directed delivery of trustee's deed to purchaser, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to establish that trustee gave plaintiffs statement of amount necessary to pay delinquency.

Affirmed.

1. Continuance ⚷19

Where proceeding for foreclosure of deed of trust after default was called for trial and continued until that afternoon, and trustors' attorney then appeared and moved for continuance and, in support thereof, presented trustors' telegram to effect that they were detained in another state on loan and bankruptcy matters, but stated that trustors had been in his office the previous Friday and he was unable to persuade one of them to remain in state, no legal cause was shown for continuance.

2. Mortgages ⚷356

In proceeding to foreclose deed of trust after default, mailing of notice of default and election to sell to each of the trustors by registered mail was sufficient even though notices were not accepted by trustors and were returned to trustees marked "refused and unclaimed".

3. Mortgages ⚷369(7)

In action to set aside realty sale made on foreclosure of deed of trust after default, evidence was sufficient to establish that trustee gave trustors a statement of amount necessary to pay the delinquency.

4. Mortgages ⚷369(7)

In action to set aside realty sale made on foreclosure of deed of trust after default, evidence was not sufficient to establish that trustee and beneficiary claimed nonexistent a deficiency and refused to continue sale until trustors could be furnished with statement of total cost of reinstatement, or that there was a collusive agreement between beneficiary and third person to deprive trustors of their rights.

5. Constitutional Law ⚷305

In action to set aside realty sale made on foreclosure of deed of trust after default, where cause was tried and determined under same rules of procedure as are applied to other similar cases, trustors were not denied due process of law.

6. Appeal and Error ⚷712

The District Court of Appeal may not consider matters outside the record.

◆

Eugene F. Evarts and Monrova S. Evarts, in pro. per.

Brown & Garrie, Alhambra, Lyman B. Sutter, Long Beach, for respondents.

VALLÉE, Justice.

Plaintiffs brought this action to set aside the sale of a parcel of realty made on foreclosure of a deed of trust after default. Plaintiffs are the trustors, defendant Title Service Company, the trustee, and defendant R. Reese Myers, the beneficiary, named in the deed of trust. Defendants answered, Title Service Company filing a cross-complaint seeking instructions and declaratory relief. The court found the foreclosure proceedings were fairly and lawfully conducted, that plaintiffs have no interest in the property, and directed delivery of the trustee's deed to the purchaser. Plaintiffs, appearing *in propria persona*, appeal. They were represented below by R. C. W. Friday, Esq., now deceased.

The deed of trust was executed March 14, 1947, and recorded May 23, 1947. On September 22, 1947, plaintiffs being in default, foreclosure proceedings were commenced. They were canceled in February, 1948. On July 29, 1948, plaintiffs again being in default, new foreclosure proceedings were commenced. These were canceled in March, 1949. On October 13, 1949, plaintiffs again being in default, the trustee, at the request of the beneficiary, recorded a notice of default and election to sell. The notice of default and election to sell was sent to each of the plaintiffs by registered mail on October 15, 1949. Plaintiffs refused to accept the notices and they were returned to the trustee marked "Refused and unclaimed." On January 12, 1950, the trustee gave plaintiffs a statement of the amount of money necessary to pay in full the note secured by the deed of trust. No payment was made and no tender of any amount has been made. Notices that the sale would take place at 11:00 a. m. on February 20, 1950, were posted and published as required by law and the deed of trust. Plaintiffs had knowledge of the time and place of the sale. On February 20, 1950, at 11:00 a. m., the sale was called at the place designated in the notices, and continued for one-half hour to give plaintiffs full opportunity to attend and submit bids. At 11:30 the sale was had.

The action was originally set for trial on January 22, 1951; and on December 21, 1950, notice of trial was given to plaintiffs and their attorney. On January 22 the trial was continued to February 26, 1951, and on that date notice thereof was given to plaintiffs and their attorney. On February 26, 1951, no court being available, the trial was continued to March 13, 1951, and notice thereof was given to plaintiffs and their attorney on March 5, 1951.

On Tuesday, March 13, 1951, the cause was called for trial. Neither plaintiffs nor their attorney were present. The court stated he had a telegram from Mr. Friday stating he was on trial in a three-day case, that he could not go to trial in the present case until March 20 or 21, and that he also had a telegram from one of the plaintiffs stating they were unavoidably detained in Arizona. The trial was continued until 1:30 that afternoon.

At 1:30 Mr. Friday appeared, moved for a continuance, in support thereof presented a telegram from plaintiffs to the effect that they were detained in Arizona on bankruptcy matters, and said they were attempting to get a new loan. He stated that plaintiffs had been in his office the previous Friday and "to my surprise they wanted to go to Arizona. I said, 'It certainly ought not to be necessary for both of you to go over there to Arizonna.' I figured if one were here and we were in a circumstance that had to be taken care of, at least one of them would be here to give some evidence." The motion for continuance was denied. Mr. Friday introduced evidence on behalf of plaintiffs and cross-examined the witnesses for the defendants.

[1-4] Plaintiffs first urge that the court erred in denying their motion for a continuance. There was no error. No legal cause was shown for a continuance. The second point urged is that the trustee failed to notify plaintiffs of the default and sale. The record is to the contrary. The third point urged is that the trustee refused to give plaintiffs a statement of the amount necessary to pay the delinquency. The uncontradicted evidence is that the trustee gave plaintiffs such a statement. The fourth point urged is that defendants claimed a deficiency which, in fact, did not exist, and refused to continue the sale until plaintiffs could be furnished with a statement of the total cost of reinstatement. There is no evidence to support this contention.

Plaintiffs next urge that there was some sort of a collusive agreement between the beneficiary and one Ward to deprive them of their rights. Ward had contracted with them for purchase of the property. There is no evidence whatever to support this claim.

[5] It is next asserted that plaintiffs were denied due process of law. Plaintiffs were entitled to have the cause tried and determined under the same rules of procedure as are applied to other similar cases. This they were accorded, and they have no ground to complain that due process of law was not observed.

[6] The briefs of plaintiffs, no doubt because they appear *in propria persona*, are largely made up of matters outside the record. This court may not consider such matters.

No error or ground for reversal is shown.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

112 Cal.App.2d 196

MARKS v. WATSON, Real Estate Commissioner.

Civ. 18806.

District Court of Appeal, Second District, Division 2, California.

July 11, 1952.

Hearing Denied Sept. 4, 1952.

Mandamus proceedings against D. D. Watson, Real Estate Commissioner of the State of California, to review an administrative order revoking plaintiff's license to act as a real estate broker. Plaintiff had sued on a written exclusive listing contract which he had allegedly represented to vendor as an open listing contract. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Fox, J., held that revocation of plaintiff's license was not an abuse of discretion.

Judgment affirmed.

1. Brokers ⚷3

Where real estate broker orally agreed with vendor to attempt to sell motel under open listing, but had vendor execute written agreement providing broker with five per cent commission regardless of who sold the property, and brought action for such commission when property was sold by another broker, the alleged fraud and dishonest dealing came within purview of the Real Estate Act, as respects revocation of broker's license. Business and Professions Code, §§ 10176(a, i), 10177(f); Code Civ.Proc. § 1094.5.

2. Brokers ⚷42

One who is not a licensed real estate broker cannot maintain an action for collection of real estate commission.

3. Mandamus ⚷168(4)

In mandamus proceeding by real estate broker to review order revoking his license, where broker allegedly orally represented written exclusive listing contract as an open listing contract, evidence was sufficient to establish broker's fraudulent intent. Business and Professions Code, §§ 10176(a, i), 10177(f); Code Civ.Proc. § 1094.5

4. Mandamus ⚷174

In mandamus proceeding by real estate broker to review Real Estate Commissioner's order revoking broker's license, broker's prior unsuccessful action for commission on written exclusive listing contract, which broker had represented as being an open listing contract, did not establish, as a matter of law, that fraud did not exist in view of fact that question of fraud was not an issue therein. Business and Professions Code, §§ 10176(a, i), 10177(f); Code Civ.Proc. § 1094.5

5. Brokers ⚷3

Where broker fraudulently represented written exclusive listing contract as an open listing contract, fact that vendor could have struck out that part of written agreement which was repugnant to an open listing did not excuse broker's violation of Business and Professions Code. Business and Professions Code, §§ 10176(a, i), 10177(f); Code Civ.Proc. § 1094.5.

6. Brokers ⚷3

Where broker unsuccessfully sued on exclusive listing contract, which he had fraudulently represented as an open listing contract, and vendor expended time and money in defense of suit and had attachment levied on his property, revocation of license of broker, who had recovered commission in prior, similar transaction, was not abuse of Real Estate Commissioner's discretion. Business and Professions Code, §§ 10176(a, i), 10177(f); Code Civ.Proc. § 1094.5

7. Brokers ⚷3

The basic reason for disciplinary action under the Real Estate Act is to protect the public against unethical and dishonest conduct on the part of those engaged in the real estate business, and the degree of harm to the victim is not a matter of controlling importance in fixing the penalty in such proceedings, but is simply one of the facts to be taken in the consideration. Business and Professions Code, §§ 10176(a, i), 10177(f); Code Civ.Proc. § 1094.5.

◆

Macbeth & Ford, Norman Macbeth, Los Angeles, John E. Howard, Glendale, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for respondent.

FOX, Justice.

This is a mandamus proceeding to review an administrative order of the Real Estate Commissioner revoking plaintiff's license to act as a real estate broker. From an adverse judgment plaintiff appeals.

In September, 1948, one Rowley owned a motel in Santa Monica. Marks had learned from others that Rowley had listed the motel for sale. On September 24 Marks telephoned Rowley requesting a listing of the property. Rowley told him it was already on an "open listing" with several other real estate brokers. After some discussion Rowley agreed to give Marks also an open listing. Following this telephonic conversation Marks took two Los Angeles Realty Board's printed forms of "exclusive listing" for sale of realty and altered them by printing in his own handwriting at the top, the words "Open Listing" and by crossing out the word "exclusive" from the body of the instruments where it twice appeared. However, the language appearing later in the listing whereby the seller agreed to pay the agent a five percent commission whether the property was sold by the agent or someone else including the owner was not stricken. These printed forms, thus altered, were then mailed to Rowley, accompanied by a note from Marks reading in part: "Please sign open listing, both copies enclosed. Return original * * *." Rowley marked out the provision requiring a termite report, signed the listing and returned it to Marks. Thereafter, when the motel had been sold by another broker, Marks, without making any demand for payment of a commission, filed an action for the collection thereof. The first knowledge Rowley had of Marks' claim was the service of a writ of attachment. Marks, however, was unsuccessful in his suit in both the trial court and on appeal. See Marks v. Rowley, 102 Cal. App.2d 619, 228 P.2d 29. Prior to the Rowley transaction Marks had made the same altered listing agreement with a Mrs. Bremberg, had sued her for a commission under similar circumstances, and had recovered judgment therefor in the Santa Monica Municipal Court.

The court found that an "open listing" has, by usage and custom between the general public and the members of the real estate business, been accepted as a listing wherein the commission is considered to be earned by the broker who first finds a buyer who meets the terms of the listing or whose offer is accepted by the seller, and that there is no obligation on the part of the seller to notify any of the brokers of the sale of the property and that the seller is not obligated to pay a commission to any broker except the broker who secured the buyer for the property. Marks' testimony indicates he understood the term "open listing" in accordance with this finding.

Marks testified he placed the words "Open Listing" on the forms so that the other brokers could sell the motel after contacting him, and they would be entitled to half the commission. However, Marks sued for the full five percent, not for just half of it. Marks knew when he procured the listing several other brokers were making efforts to sell the property.

An accusation against Marks based on the Rowley transaction was signed and filed by a Deputy Real Estate Commissioner. Disciplinary action was requested against Marks on the grounds that in securing and attempting to enforce a listing agreement for the sale of certain real estate he (1) made substantial misrepresentations in violation of section 10176(a) of the Business and Professions Code; (2) conducted himself in a manner which constituted fraud and dishonest dealings contrary to the provisions of subdivision (i) of that section; and (3) violated section 10177(f) of the Business and Professions Code by acting and conducting himself in a manner which would have warranted the denial of his application for a license.

After a hearing the Real Estate Commission found the allegations of the accusation to be true, and revoked Marks' license. He sought review by the Superior Court under section 1094.5 of the Code of Civil Procedure. After a review of the administrative record the court sustained the action of the commissioner.

[1] Plaintiff's first contention is that his conduct was not within the purview of the Real Estate Act because the claimed fraud and dishonest dealing occurred prior to the creation of any broker relationship between the parties. This position is not well taken. The representations and conduct on the part of plaintiff in securing Rowley's signature to the listing is only the first part of the fraud. The attempt to consummate it occurred after the "open listing" had been signed by the seller through the institution by Marks of court action to enforce it as an exclusive listing agreement. The attempted fraudulent enforcement of such a listing may constitute grounds for revocation of a realtor's li-

cense. See Castleman v. Scudder, 81 Cal. App.2d 737, 185 P.2d 35.

[2] It is difficult to conceive of an action which comes more within the purview of the Real Estate Act than does a lawsuit for the collection of a real estate commission. In fact, if Marks had not been a licensed real estate broker, he could not even have maintained the action. Sheble v. Turner, 46 Cal.App.2d 762, 117 P.2d 23.

[3] Plaintiff's second contention is that the findings of fact fail to show more than a possible fraudulent intent. The conduct of Marks goes further than this. He not only negotiated by telephone for an "open listing" with Rowley well knowing what that term meant but then purposely changed parts of an exclusive listing form, representing it in his note to Rowley to be an open listing while he fully intended to enforce it as an exclusive listing in the event someone else sold the property. He later tried to carry out this fraudulent intent by court action against Rowley as he previously had done against Mrs. Bremberg. This constituted the overt act and resulted in damage to Rowley since it was necessary for him to employ counsel to handle his case both in the trial court and on appeal.

[4] Plaintiff's third contention is that as a matter of law there was no fraud. In support of this proposition he argues that the case of Marks v. Rowley, supra, "in legal effect, destroys the possibility of fraud upon the part of Marks." In that action Marks was simply trying to enforce the contract and collect the commission. The question of fraud was not in issue. The court merely held that the written portion of the "Opening Listing" contract should prevail over the printed portion. 102 Cal.App.2d at page 621, 228 P.2d 29.

[5] The fraud was in the false representation by Marks that the agreement was an open listing and that he only intended to enforce it as such, and his subsequent action in attempting to enforce it as an exclusive listing in violation of the prior representations as to its character which he had made to Rowley both orally and in writing. The fact that Rowley could have frustrated Marks' scheme by striking out the printed matter in the agreement which is repugnant to the accepted definition of an open listing does not lessen the culpability of Marks' conduct nor does it relieve him from disciplinary action for his attempt to consummate his fraudulent plan. He cannot excuse his violation of the cited sections of the Business and Professions Code by charging his client with negligence.

[6] Plaintiff's final point is that the severity of the punishment establishes abuse of discretion. In support of this plea Marks argues he "was found guilty of questionable conduct that in fact hurt no one," and that the "degree of harm to Rowley should be of controlling importance to the punishment and revocation would seem disproportionate for an act harmful to no one." Plaintiff clearly misconceives the detrimental effect of his conduct in this transaction on Rowley. It was not only necessary for Rowley to employ an attorney to represent him in court and pay for such services but he also had an attachment levied on his property, and undoubtedly was required to spend considerable time in connection with the various phases of this litigation. It therefore cannot properly be said that Marks' conduct "hurt no one."

[7] The "degree of harm" to the victim is not a matter of controlling importance in fixing the penalty in disciplinary proceedings. It is simply one of the facts to be taken into consideration. The basic reason for disciplinary action in matters of this kind is the protection of the public against unethical and dishonest conduct on the part of those engaged in the real estate business. In view of this purpose we cannot say that the revocation of plaintiff's license establishes, as a matter of law, an abuse of discretion on the part of the real estate commissioner.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

112 Cal.App.2d Supp. 903

PEOPLE v. KISER.

Cr. A. 2870.

Appellate Department, Superior Court,
Los Angeles County, California.
July 2, 1952.

Defendant was convicted in the Municipal Court, City of Los Angeles, Lewis Drucker, J., of violating a provision of the Vehicle Code, and he appealed. The Appellate Department of the Superior Court, County of Los Angeles, held that where defendant's truck was equipped with rolled up flaps, the truck was not equipped as required by provision of Vehicle Code forbidding operation of a vehicle of the described class unless the body of the vehicle or attachments thereto afforded adequate protection to effectively minimize the spray or splash of water or mud to the rear of the vehicle.

Judgment affirmed.

1. Constitutional Law ⇐48

It is the duty of the court to give to a statute such a construction as will make it valid and operative if such a construction is reasonably possible.

2. Statutes ⇐47

A statute cannot be held void for uncertainty if any reasonable and practicable construction can be given to its language.

3. Statutes ⇐47

Statute forbidding operation of a vehicle of described class unless body of the vehicle or attachments thereto afford adequate protection to effectively minimize spray or splash of water or mud to the rear of the vehicle does not forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application and therefore is not void for uncertainty. Vehicle Code, § 678.5.

4. Statutes ⇐47

It is not required that even a penal statute, to be valid, has that degree of exactness which inheres in a mathematical theorem.

5. Automobiles ⇐327

Provisions of the vehicle code stating that it is unlawful to operate on a highway a vehicle which is not equipped as required by code and that it is a misdemeanor for any person to drive upon any highway any vehicle which does not contain those parts or is not equipped with such lamps and other equipment as are required by the code does not excuse the presence of required equipment on a vehicle because at some particular time it may not be needed. Vehicle Code, §§ 615, 678.5, 679.

6. Automobiles ⇐327

Where defendant's truck was equipped with rolled up flaps it was not equipped as required by provision of vehicle code stating no person shall operate on any highway any motor vehicle unless equipped with fenders, covers, or devices including flaps or splash aprons, or unless the body of the vehicle or attachments thereto afford adequate protection to effectively minimize the spray or splash of water or mud to the rear of the vehicle. Vehicle Code, § 678.5.

Bailey & Poe, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., Dan J. Whiteside, Dep. City Atty., Los Angeles, for respondent.

SHAW, Presiding Judge.

The defendant was convicted on a charge of violating section 678.5 of the Vehicle Code, and appeals from the judgment. On appeal he contends that he did not violate this section, and further, that it is void for uncertainty.

Section 678.5 was added to the Vehicle Code in 1951, and so far as material here reads as follows: "No person shall operate on any highway any motor vehicle, trailer, or semitrailer unless equipped with fenders, covers, or devices, including flaps or splash aprons, or unless the body of the vehicle or attachments thereto afford adequate protection to effectively minimize the spray or splash of water or mud to the rear of the vehicle."

[1, 2] This provision is far from being a model of legislative draftsmanship. It has the appearance of stating two alternatives. If this is so, obviously the first one, requiring the vehicle to be "equipped with fenders, covers, or devices, including flaps or splash aprons" is practically meaningless and too uncertain to serve as a definition of a crime. But it is the duty of the courts to give to a statute such a construction as will make it valid and operative if such a construction is reasonably possible. County of Los Angeles v. Legg, 1936, 5 Cal.2d 349, 353, 55 P.2d 206; Kipp v. Billingham, 1933, 217 Cal. 527, 530, 20 P.2d 318; In re La Belle, 1940, 37 Cal.App.2d 32, 38–39, 98 P.2d 778; People v. Steel, 1939, 35 Cal.App.2d 748, 751, 92 P.2d 815. A statute "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." Lockheed Aircraft Corp. v. Superior Court, 1946, 28 Cal.2d 481, 484, 171 P.2d 21, 24, 166 A.L.R. 701; Pacific Coast Dairy Co. v. Police Court, 1932, 214 Cal. 668, 676, 8 P.2d 140, 80 A.L.R. 1217. One not impossible mode of doing this would be to import into the purported first alternative the definitive words of the second alternative. But we need not decide whether this is to be done, for the second alternative is complete in itself and sufficiently certain. It forbids operation of a vehicle of the described class "unless the body of the vehicle or attachments thereto afford adequate protection to effectively minimize the spray or splash of water or mud to the rear of the vehicle."

[3, 4] Defendant points to the words "adequate," "effectively" and "minimize" as introducing fatal uncertainty into the statute, citing People v. Saad, 1951, 105 Cal.App.2d Supp. 851, 234 P.2d 785, 787. This court there held that "there is no ascertainable standard of guilt in 'practices inimical to the public interest.'" Here the words are quite different. Many definitions of the word "adequate" appear in cases cited in 1 C.J.S. 1462–1463. All of them which could be applied here may be summarized in these: "able; * * * fully competent; fully sufficient". "Effectively" does not appear to have received judicial definition; but it is the adverb of "effective," which means "operative; producing or adapted to produce its proper result." 28 C.J.S. 839. "Minimize" means "to make as little or as slight as possible". 58 C.J.S. 806. Taking these meanings of the words criticized, we do not find that this statute "'"forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"'" and hence it is not within the rule of condemnation followed in People v. Saad, supra. "It is not required that even a penal statute, to be valid, have that degree of exactness which inheres in a mathematical theorem." Smulson v. Bd. of Dental Examiners, 1941, 47 Cal.App.2d 584, 587, 118 P.2d 483, 484; see also People v. Smith, 1939, 36 Cal.App. Supp.2d 748, 752, 92 P.2d 1039.

Coming to defendant's contention as to the evidence, it appears that the case was submitted to the trial court on an oral stipulation from which the following facts appear. At the time charged the defendant was operating a dump truck on a public highway; the truck did not have attached any fenders, covers or devices, flaps or splash aprons in place or position to cover the rear wheels or in back thereof, but there were two rolled-up flaps attached to the body and slightly to the rear of the rear wheels which were secured in a fixed position in rolls by means of wire; and the truck body and attachments, including the rolled-up flaps, "afforded no adequate protection to effectively minimize the spray or splash of water or mud to the rear of the vehicle." But the rolled-up flaps, it was further stipulated, could be unsecured and unrolled readily, and if this had been done the truck would have been equipped as required by Vehicle Code section 678.5. Photographs of the truck introduced in evidence show that to do this it would have been necessary for the driver to dismount from the truck, go around to the rear end of it, untwist wires which held the flaps in a rolled-up position, and unroll the flaps. It was also stipulated that at the time the weather was clear and the highway was dry; and defendant founds his claim that he did not violate the statute on these conditions of the weather and the highway.

His contention, though not so stated, is in effect that since the only purpose of the section appears to be to prevent or reduce the spray or splash of water or mud to the rear of the vehicle, and this can happen only when the highway is wet, the statute must be construed as requiring the described equipment only in that case; and since the highway on which he drove his truck was dry, he did not violate the statute.

[5] But section 678.5 contains no such limitation of or exception to its provisions. Furthermore, section 679 of the Vehicle Code provides that "It is unlawful to operate on any highway any vehicle * * * which is not equipped as required by this code"; and section 615 of the Vehicle Code provides that "It is a misdemeanor for any person to drive or move * * * on any highway any vehicle * * * which does not contain those parts or is not at all times or at those times specifically stated herein equipped with such lamps and other equipment as are required in this division". Section 678.5 is a part of "this division." These provisions do not excuse the presence of required equipment on a vehicle because at some particular time it may not be needed.

[6] Defendant's contention, however, goes farther, and includes the claim that his truck was equipped as required because of the flaps which if unrolled would satisfy the statute. Here is suggested an analogy to brakes, lights and windshield wipers, which, while required to be on a vehicle, are not required to be in operation at all times. But as to all these items on a vehicle, the Vehicle Code, while not requiring them to be always in operation, does require that they have specified operational capacities—stopping distance, as to brakes, (sec. 670); intensity and position, as to lights (sec. 648); clear vision, as to windshield wipers (sec. 676). We think it could not be said that any of these items complied with the statute if any part necessary to their required capacity of operation was detached and carried in the driver's pocket, or loose in his car, even though it was possible for him to re-attach it so that the particular apparatus could function. Here the flaps on defendant's truck, at the time in question, could not do what the statute requires, that is, minimize the spray or splash of water or mud. The truck was, therefore, not equipped as required by section 678.5.

It is true that brakes, lamps, windshield wipers and various other devices placed on vehicles do not operate themselves. They all require some action by the driver of the vehicle to put them into operation, and are not for that mere reason to be held insufficient to comply with the statutory requirements. But we may take notice of the fact that, as motor vehicles are constructed, these various devices all have buttons, handles, levers or other actuating means within the driver's compartment and readily accessible and easily and quickly operated by him. No doubt the legislative requirement of these various devices was made with this fact in mind and is satisfied by it. But here we have a new requirement, for which there cannot be any standard practice to be noticed. No doubt the legislature knew, as do we, that water and mud are often found on the surfaces of highways when the weather is clear, and that a highway dry at one place may be wet and muddy a short distance ahead, perhaps just around a curve. The requirement that a vehicle be equipped with devices to minimize the spray of water and mud must have been intended to require something like all the safety devices, something which can be put into immediate operation by the driver whenever the necessity arises—not something which will not operate unless he stops his vehicle, gets out and performs a mechanical operation on it to put it in operating condition.

The judgment is affirmed.

BISHOP and STEPHENS, JJ., concur.

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39 Cal.2d 161

CLARK v. STATE BAR.

L. A. 22166.

Supreme Court of California.
June 30, 1952.

Disciplinary proceeding against an attorney. The Board of Governors of the State Bar recommended that respondent be suspended from the practice of law for one year. On petition for writ of review, the Supreme Court, Per Curiam, held that the evidence sustained Board's finding.

Respondent suspended from the practice of law for six months.

Carter, J., dissented.

1. Attorney and Client 🔑57

Findings of fact by local administrative committee and Board of Governors of the State Bar are not binding upon Supreme Court, and upon review of a recommendation for suspension or disbarment, the Supreme Court will pass upon the sufficiency and weight of the evidence.

2. Attorney and Client 🔑57

On petition for writ of review, petitioner has the burden of showing that recommendation of Board of Governors of the State Bar for suspension or disbarment is erroneous or unlawful.

3. Attorney and Client 🔑45

As guardian of an incompetent person, an attorney occupied a position demanding of him the highest degree of diligence and good faith. Probate Code, § 1400.

4. Insane Persons 🔑35, 40

Guardian of the estate of an incompetent person must take an oath to execute the duties of his trust and he is an officer of the court until discharged from his guardianship. Probate Code, §§ 1400, 1480.

5. Attorney and Client 🔑45

Where an attorney assumes a fiduciary relationship, such as guardian of the estate of an incompetent person, and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct. Business and Professions Code, § 6106.

6. Attorney and Client 🔑38

An attorney must perform his duties to the best of his individual ability.

7. Attorney and Client 🔑44(2)

A client's money is "commingled" with attorney's in violation of Rules of Professional Conduct if client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for attorney's personal expenses or subjected to claims of his creditors. Rules of Professional Conduct, rule 9.

See publication Words and Phrases, for other judicial constructions and definitions of "Commingle".

8. Insane Persons 🔑41

Prior to 1951 amendment of Probate Code with respect to compensation of guardians, an attorney as guardian of the estate of an incompetent person could properly compensate himself from guardianship estate without prior court approval, subject to the condition that any amount of such compensation found by the court to be excessive must be returned to the estate. Probate Code, § 1556.

9. Insane Persons 🔑65

Prior to 1951 amendment of Probate Code with respect to compensation of guardians, guardian of the estate of an incompetent person could properly compensate attorney for the estate from guardianship funds without prior court approval, subject to condition that any amount of such compensation found by the court to be excessive must be returned to the estate. Probate Code, § 1556.

10. Insane Persons 🔑42(1)

A guardian of the estate of an incompetent person does not comply with statutory requirements as to an accounting by presenting an account so inaccurate that investigation by a referee becomes necessary. Probate Code, § 1553.

11. Insane Persons 🔑40

A guardian of the estate of an incompetent person may properly employ an accountant to perform acts involving professional skills not possessed by guardian, but he may not delegate all responsibility. Probate Code, §§ 1400, 1480.

12. Insane Persons 🔑42(1)

A guardian of the estate of an incompetent person, before submitting his final account as prepared by an accountant, had the duty to make a reasonable check on the entries in such account. Probate Code, §§ 1400, 1480.

13. Attorney and Client 🔑38

The purpose of keeping proper books of account, vouchers, receipts, and checks is to be prepared to make proof of the honesty and fair dealing of attorneys when their actions are called in question, either in litigation with clients or in disciplinary proceedings, and failure to keep proper books is in itself a suspicious circumstance. Business and Professions Code, §§ 6067, 6103, 6106.

14. Attorney and Client 🔑42

Presentation to court by an attorney of his final account as guardian of the estate of an incompetent person, which accountant knows to be misleading, is a ground for disciplinary action. Business and Professions Code, § 6068(d).

15. Attorney and Client 🔑58

An attorney's prior disciplinary record may be considered in determining the proper degree of discipline for misconduct.

16. Attorney and Client 🔑58

Findings of Board of Governors, warranted suspension of attorney from the practice of law for six months. Business and Professions Code, §§ 6067, 6068(d), 6103; Probate Code, §§ 1400, 1480.

John W. Preston, Los Angeles, for petitioner.

Edward Hervey, Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

Petitioner Oliver O. Clark is charged in six counts with violation of his oath and duties as an attorney (Bus. & Prof. Code, §§ 6067, 6103), with violation of Rule 9 of the Rules of Professional Conduct of the State Bar of California (commingling of funds), and with commission of acts involving moral turpitude and dishonesty. (Bus. & Prof. Code, § 6106.) After a hearing, the local administrative committee found, except as to Counts One and Five, that the acts alleged to have been committed or omitted were in fact committed or omitted. The committee found, however, that there was no intentional commission or omission, that petitioner was simply guilty of "oversight," "carelessness," and "neglect," and recommended that the matter be dismissed. The Board of Governors of the State Bar held a hearing at which petitioner addressed the board and answered questions. The board admitted in evidence a letter submitted by petitioner, reviewed the record before the local administrative committee, and found petitioner guilty as charged on all six counts. The board recommended that petitioner be suspended from the practice of law for a period of one year. Three members dissented on the ground that the degree of discipline recommended was insufficient. In fixing the degree of discipline to be recommended, the board took into consideration petitioner's past record, which included a disciplinary proceeding entitled "L.A. 1276—In the Matter of Oliver O. Clark, Attorney at Law (Dr. L. C. Burwell, complaining witness)," in which the board on August 5, 1949, publicly reproved petitioner.

[1, 2] Petitioner contends that there is no evidence to support the findings of the board. The findings of fact by the local administrative committee and the board are not binding upon this court, and upon review of a recommendation for suspension or disbarment we pass upon the suffi-

ciency and weight of the evidence. Fleming v. State Bar, 38 Cal.2d 341, 239 P.2d 866; Fall v. State Bar, 25 Cal.2d 149, 159, 153 P.2d 1. The burden is on petitioner, however, to show that the recommendation of the board is erroneous or unlawful. Alkow v. State Bar, 38 Cal.2d 257, 239 P.2d 871.

The six counts in this proceeding all arise from petitioner's conduct as guardian of the estate of one George W. Bigelow, an incompetent. Petitioner was appointed guardian on August 30, 1943, and continued in that capacity until the death of his ward, December 21, 1948. Petitioner was subsequently appointed executor of Bigelow's estate.

Petitioner filed his first annual account on December 16, 1944, and the account was approved by the court. Thereafter no accounts were filed, and on April 13, 1948, the surety on petitioner's bonds petitioned the court for an accounting. Petitioner thereafter filed his second account on July 28, 1948, which was not approved. An amended second account was filed on November 22, 1948, but was ordered off calendar following Bigelow's death. On March 1, 1949, petitioner filed a final account, approval of which was denied by the court with instructions to file a new account for the entire period of the guardianship. On May 23, 1949, a certified public accountant was appointed as a referee to examine petitioner's records. On August 29, 1949, the referee reported a cash shortage of $2,131.12 in the guardianship funds.

The court found that petitioner had overcompensated himself and the estate's attorney (petitioner's son-in-law), and had made other unauthorized expenditures, totalling $5,145. The court also ordered petitioner to bear the costs of appointing the referee, $1,100. Petitioner was thus surcharged for the cash shortage of $2,131.12, the unauthorized expenditures of $5,145, and the costs of appointing the referee, $1,100, or a total of $8,376.12. The final account was approved on that basis. The amount surcharged was repaid by petitioner and not by the bonding company.

[3-5] It should be noted at the outset that the fact that petitioner and Bigelow occupied the relationship of guardian and ward, and not that of attorney and client, would not preclude disciplinary action. As guardian petitioner occupied a position demanding of him the highest degree of diligence and good faith. Probate Code § 1400; Guardianship of Carlon's Estate, 43 Cal.App.2d 204, 208, 110 P.2d 488. He was an officer of the court until discharged from his guardianship. Guardianship of Reynolds, 60 Cal.App.2d 669, 677, 141 P.2d 498. He took an oath that he would execute the duties of his trust. Probate Code § 1480. When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct. Bus. & Prof. Code § 6106; Petersen v. State Bar, 21 Cal.2d 866, 870, 136 P.2d 561; Flaherty v. State Bar, 16 Cal.2d 483, 489, 106 P.2d 617; Lyders v. State Bar, 12 Cal.2d 261, 265, 83 P.2d 500; Jacobs v. State Bar, 219 Cal. 59, 64, 25 P.2d 401; see 7 C.J.S., Attorney and Client § 19.

Count One. The board found that petitioner "commingled money belonging to George W. Bigelow, an incompetent person, with his own money or personal effects." The money referred to, at least $1,400, was received by petitioner in May, 1946, after sale of a lot owned by the ward. After the referee completed his audit and reported a discrepancy in the guardianship accounts, petitioner produced the money. According to petitioner, the money, in fifty and hundred dollar bills, had been placed in a large envelope with the words "Bigelow Estate" in pencil across the front. The envelope was placed in a locked metal box in petitioner's office, which also contained documents and money of clients in separately marked envelopes and petitioner's own money and documents. Petitioner did not have a personal bank account. The envelope remained in the box, and the money was not deposited in the guardianship account for Bigelow. Petitioner explains his failure to deposit the money on the ground that he forgot to leave his secretary a memorandum instructing her to deposit the funds and that the money remained in the box for over three years through his oversight. He states that he found the missing money "after the report of the referee in this matter, approximately two weeks later when it became plain to me that the discrepancy was due to the accounting of the money received from the Maywood lot."

Petitioner's explanation does not set at rest suspicions aroused by his conduct. He was requested to produce the envelope in which he stated that the money was placed, but did not do so. He did not call his secretary as a witness to corroborate his testimony. He could not account at the hearing for the amount of money that he allegedly found in the envelope, yet he knew when he found the money that he was under investigation, that a shortage had been discovered in his accounts, and that he would undoubtedly be called upon to show that he had not misappropriated the missing money.

[6] These facts must be viewed in the light of petitioner's background. As a fiduciary, the law imposed upon him the strictest duty of prudent conduct. Petitioner has practiced law in California since 1907. Because he is a man of superior intellect and wide experience,[1] his conduct is less excusable than might otherwise be the case. An attorney "must perform his duties to the best of his individual ability". Friday v. State Bar, 23 Cal.2d 501, 505, 144 P.2d 564, 567. Against petitioner's version of the facts, we must balance evidence definitely showing that petitioner sold his ward's property for cash, that he failed to deposit the money in the guardianship account, that over three years later a referee's report divulged a shortage in funds, that the court and surety demanded that petitioner make up the shortage, and that then, but only then, petitioner produced the missing money with an explanation that tests credulity.

[7] The board contends that petitioner's testimony establishes commingling, on the theory that the offense was committed when petitioner placed the envelope containing his ward's money in the same safe with his own money. Rule 9[2] of the Rules of Professional Conduct, 33 Cal.2d 30, does not define commingling, but the decisions establish that commingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors. Bennett v. State Bar, 27 Cal.2d 31, 36, 162 P.2d 5; Griffith v. State Bar, 26 Cal.2d 273, 276–277, 158 P.2d 1; Narlian v. State Bar, 21 Cal.2d 876, 884–885, 136 P.2d 553; Peck v. State Bar, 217 Cal. 47, 51, 17 P.2d 112. When the client's money is kept apart from that of the attorney, Rule 9 is not violated. Townsend v. State Bar, 36 Cal.2d 631, 633, 226 P.2d 581. Accordingly, if petitioner at all times kept his ward's money in a separate envelope in his safe, with his ward's name plainly marked on the envelope, the money was not commingled with petitioner's own money, within the meaning of Rule 9.

Whether or not the charge of commingling can be sustained thus depends on whether or not we accept as true petitioner's testimony that he placed the money in his safe in a large envelope marked "Bigelow Estate." In view of the seriousness of the alleged offense and the lack of direct evidence of commingling, we have decided, as did the local committee, to give petitioner the benefit of doubts that might reasonably be entertained as to his credibility, and to accept his testimony as true. We therefore conclude that the charge of commingling has not been proved.

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[1] The record contains a letter from John W. Preston, formerly a member of this court, stating: "I think I can fairly appraise the mental make-up of Mr. Clark. He is in many respects a unique character. He has a trip hammer intellect and a superior power of expression. He is dynamic and overflowing with energy filled with hopeful enthusiasm. He is a sound lawyer of very wide experience. He daily over schedules himself and as a consequence oftentimes omits or neglects material acts. But he is not dishonest. On the contrary, he is thoughtful and considerate of the rights of others. If he could he would redeem every pledge he has made."

[2] "A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client."

Even though the offense of commingling was technically not committed, many of the dangers that accompany violation of Rule 9 are present here. The rule against commingling "was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money. Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him. However, inherently there is danger in such practice for frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney." Peck v. State Bar, 217 Cal. 47, 51, 17 P.2d 112, 114. Of course, an attorney may properly place his ward's money in his safe for a short period of time to safeguard it until he has time to deposit it in a bank. But when an attorney keeps a large sum of his ward's money in his safe for over three years and loses track of its whereabouts, the evils described in the Peck case are clearly present. Petitioner, according to his own version of the facts, was guilty of gross negligence in the handling of his ward's funds.

Count Two. The board found that petitioner failed "to include the sum of $1,851.29 in his accounting to the court, and that said omission was intentional and wilful."

The sum referred to is the money that petitioner stated that he found in the envelope shortly after the report of the referee. Of this sum, at least $1,400 was from the real estate transaction referred to in Count One. Petitioner stated at the hearing that he did not know the source of the balance of the money, but the report of the referee indicates that the money was derived either from the sale of the real property or from the sale of 18 shares of stock that belonged to the ward. The record contains petitioner's "Complete and Final Account of Guardian for Full Period of Guardianship—August 30, 1943 to December 22, 1948," filed on March 1, 1949. In his listing of estate assets, the only reference by which the money in question could be traced is an entry, "Accounts Receivable, $1,788.02." There is no further explanation of this entry, and the name of the debtor or debtors of the estate is not given. The only entries under "Total Cash" are deposits in three guardianship accounts totalling $4,430.28. In another part of the account, under the title "Monies Received During Guardianship," petitioner lists "net from sale of lot and water shares, $3,788.02."[3]

The account thus states the amount *for* which the ward's property was sold, but fails to reveal that part of this money was in the possession of petitioner and not deposited in the bank. If petitioner knew at the time he filed his final account in March, 1949, that the money had not been deposited in the bank, his defense to the charge of commingling, that he did not know the money had not been deposited until after the report of the referee in August, 1949, could not be true. If it is not true, and petitioner knew that the money had not been deposited, Count Two is supported by the evidence, for it was petitioner's duty to disclose in his final account that he was the debtor for the amount entered under "Accounts Receivable." See Civil Code, §§ 2228, 2229, 2233; Bone v. Hayes, 154 Cal. 759, 766, 99 P. 172. On the other hand, assuming, as we did under Count One, that petitioner was telling the truth when he told the administrative committee that he "assumed always that the deposit had been made,"[4] the evidence again supports Count Two. If the money had been deposited, it should have appeared in the account under "Total Cash" deposited in the bank. What then could petitioner have meant by his entry of $1,788.02 under "Accounts Receivable"? When pressed for an explanation before the administrative committee, he stated, "I thought that the difference represented by that account receivable was a difference that had probably occurred in the transmission of monies from the general account of the guardian to the trustee account of Mrs. Gosman [the nurse who cared for the ward]." This explanation is unacceptable since the slightest investigation would have revealed that the money was not in Mrs. Gosman's trustee account. If petitioner had lost track of the money, it was his duty to reveal that fact to the court. The entry of $1,788.02 under "Accounts Receivable," however, would naturally mislead the court into believing that that sum was due to the estate from some unnamed debtor, such as money due from the sale of the ward's property. We cannot escape the conclusion that the entry was made to make the books balance and conceal the fact that petitioner's gross negligence had caused him to lose track of a large sum of his ward's money.[5] The finding of the board under Count Two thus has adequate support in the evidence.

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[3] The amount of the shortage, $1,851.29, differs from the amount for which the ward's property was sold because $2,000 of the money received from the sale was paid immediately to the nurse that cared for the ward. From the referee's report it appears that the other $1,788.02 was placed in the envelope. The record does not disclose the source of the remaining $63.27 in the envelope. Petitioner

Count Three. The board found that petitioner "did without order or authorization of court withdraw as guardian fees on the dates and amounts as follows," listing nine withdrawals between December, 1944, and December, 1947, amounting to $3,350. Petitioner conceded that he made the withdrawals as compensation without prior court approval, stating that "it was my understanding that in a guardianship matter, the guardian, subject to the approval of the court later, had the right to compensate himself reasonably from time to time out of the guardianship funds."

[8] Section 1556 of the Probate Code provided at the times involved in this proceeding that a guardian "shall have such compensation for his services as the court in which his accounts are settled deems just and reasonable." In 1951 section 1556 was amended.[6] Before this amendment it was held that the guardianship fee could be claimed as an item of account and paid as such without the formality of a petition

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testified that he placed $1,400 of the money receive from the sale in the envelope. Under his version of the facts, he thus cannot account for $451.29 of the $1,851.29 in the envelope.

[4] In defending the charge of commingling, petitioner stated "I assumed always that the deposit had been made," and that he found the money in his safe "about two weeks" *after* the referee's report. The record, however, contains a letter written by petitioner to the referee on August 16, 1949, 13 days *before* the report, stating that the $1,788.02 accounts receivable entry represents proceeds from the sale of the real property "not deposited at the date of sale."

[5] The account was actually prepared by one Ralph Ritchie, an accountant who, of course, could prepare the account only from data supplied by petitioner. Further, the account contained the following affidavit of petitioner: "That he is the Guardian who makes the foregoing account and report; he has read the foregoing Complete and Final Account of Guardian for Full Period of Guardianship—August 30, 1943 to December 22, 1948; all the statements therein are true of his own knowledge, except as to those matters stated on information and belief and as to those matters he believes them to be true."

[6] "At any time after the filing of the inventory and appraisement, but not prior to the expiration of three months from the issuance of letters of guardianship, any guardian may petition the court for an order fixing and allowing his compensation for services rendered to that time * * *. Upon the hearing the court shall make an order allowing such compensation to the guardian for services rendered to the estate of his ward * * * as the court may deem proper, and compensation so allowed shall thereupon be charged to the estate of the ward." As amended section 1556 is substantially similar to Probate Code § 904, providing for allowance of commissions to executors and administrators. Under

to the superior court and a special order or decree. Estate of Eaton, 38 Cal.App. 2d 180, 184, 100 P.2d 813. The question whether guardianship fees were excessive could be determined upon settlement in the trial court of the guardian's account and reviewed upon appeal from the order settling the account. (Probate Code, § 1630.) Petitioner, therefore, could compensate himself from the guardianship estate without prior court approval, subject to the condition that the amount thereof found by the court to be excessive must be returned to the estate. Of course, if the withdrawals were in bad faith, and were misappropriations of estate funds instead of compensation, a different problem would be presented. The board does not contend that the withdrawals here were in bad faith.

We conclude, therefore, that the third count is unsupported by the evidence.

[9] *Count Four.* The board found that petitioner, without prior authorization of the court, withdrew attorney's fees amounting to $1,300. Petitioner's son-in-law was the attorney for the estate. The foregoing discussion regarding the third count is applicable here. (Cf. Probate Code, § 1556.1, enacted in 1951.)

Count Five. The board found that on October 18, 1949, petitioner testified before Judge Paonessa in the Superior Court of Los Angeles County and intentionally misled the court by not revealing that $1,800 in petitioner's safe belonged to the guardianship estate. The $1,800 referred to included the $1,400 involved in Count One and another $400 that was apparently the proceeds from another sale of estate property. The testimony before Judge Paonessa is in the record. It there appears that counsel for the bonding company was allowed to question petitioner "as to his ability to make up" the shortage in his accounts revealed by the referee's report. Petitioner said that "within three days I will pay it all in." He further stated that he had "other money" in his safe, "approximately $1800," and "when the Court makes the order, I will put in the full amount." Counsel for the surety replied, "I have had your word before, and I would rather have it before the Court, if it is possible." The charge in Count Five is based on the fact that petitioner did not expressly inform the court that the money in his safe belonged to the guardianship estate. The questions by the attorney for the surety, however, were directed only to the issue whether petitioner could repay the shortage in his accounts and thus relieve the surety of liability on its bond. Petitioner was never directly asked whether the money in the safe was his money or guardianship money. Accordingly, it cannot be said that petitioner intentionally misled the court, and the finding of the board does not have adequate support in the record.

Count Six. The board found that petitioner failed "to file within a reasonable time, or at all, until ordered to do so by the court, an account as guardian of the estate of George W. Bigelow, that the account filed by respondent was incomplete, inaccurate, and misleading. That the failure of respondent to file a proper account necessitated an independent audit to be made by the court; that said audit established that respondent did not entirely account for all moneys received and in possession of the respondent as guardian of the said estate."

[10] Petitioner did not file an inventory and appraisement of the guardianship estate until April 6, 1949, more than five years after his appointment, although Probate Code section 1550 requires the inventory and appraisement to be filed within three months of the appointment. Petitioner concedes that he did not comply with section 1550, but claims that he complied with section 1553, providing that "At the expiration of a year from the time of his appointment, and as often thereafter as he

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section 904 an executor or administrator is not entitled to his commissions until after court approval. Estate of Jones, 166 Cal. 147, 152, 135 P. 293; see Estate of Carter, 132 Cal. 113, 114, 64 P. 123, 484; In re Estate of Rose, 80 Cal. 166, 180, 22 P. 86.

may be required by the court, the guardian must present his account to the court for settlement and allowance." After petitioner filed his first account in December, 1944, more than one year after his appointment, he did not file an account until, following petition of his bonding company, he was cited to show cause why he should not file an accounting. Petitioner thereafter filed an unacceptable current account and an unacceptable final account. It became necessary to appoint a referee to audit petitioner's records. A guardian does not comply with section 1553 when he presents an account so inaccurate that investigation by a referee becomes necessary. See Purdy v. Johnson, 174 Cal. 521, 527, 163 P. 893.

[11–13] The finding of the board is clearly supported by the evidence. Petitioner testified that "I am not attempting to exculpate myself for being negligent, but I don't think it was gross negligence." We disagree. The money from the real estate transaction might never have been discovered without the investigation. Petitioner admitted that he completely lost track of the money for "about three and a half years." Petitioner justified his conduct by testifying, "I know previously I have been asked if it didn't strike me as rather peculiar that my account should be $1,800, or any amount, less than what it ought to be, but, you see, I have never personally handled the matters of deposit of my monies or keeping of records. Always that has been done by somebody else, and I am not an accountant and didn't presume to carry in my mind how much money the estate was supposed to have on hand. It is probably careless of me to have done that, but nevertheless that is the way the matter came to pass." A guardian may properly employ an accountant to perform acts involving professional skills not possessed by the guardian, but he may not delegate all responsibility. See Purdy v. Johnson, supra; Scott on Trusts, §§ 171.2, 172. Petitioner had the duty to make a reasonable check on the entries in the final account as prepared by the accountant. The account contains his statement that he had read the account and that the statements therein were either true to his own knowledge or that upon information and belief he believed them to be true. But the account, described under Count Two, above, was confused and incoherent. His submission of the account to the court, without any attempt to ascertain if it had revealed the true state of affairs, significantly demonstrates petitioner's general conception of his professional obligations. "The purpose of keeping proper books of account, vouchers, receipts, and checks is to be prepared to make proof of the honesty and fair dealing of attorneys when their actions are called in question, whether in litigation with their clients or in disciplinary proceedings, and it is a part of their duty which accompanies the relation of attorney and client. The failure to keep proper books * * * is in itself a suspicious circumstance." Matter of O'Neill, 228 App.Div. 518, 520, 240 N.Y.S. 183, 186; see Bruns v. State Bar, 18 Cal.2d 667, 672, 117 P.2d 327. In filing an incomplete, inaccurate, and misleading account petitioner was guilty of gross negligence in the performance of his duties as guardian and as an attorney.

[14–16] *Discipline.* A consideration of petitioner's conduct leads to the conclusion that this case reflects much more than the innocent inadvertence of a busy attorney, which petitioner suggests as an explanation justifying his actions. Petitioner intentionally included a large sum of money in his final account to the court under an entry designed to mislead the court (Count Two), and he was guilty of acts of gross negligence in his performance of his duties as guardian. (Counts One and Six.) The presentation to the court of an account that petitioner knew to be misleading was a ground for disciplinary action. (Bus. & Prof. Code, § 6068(d); Pickering v. State Bar, 24 Cal.2d 141, 144–145, 148 P.2d 1. Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. Stephens v. State Bar, 19 Cal.2d 580, 583, 122 P.2d 549; Waterman v. State Bar, 8 Cal. 2d 17, 20, 63 P.2d 1133. It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability. Bus. & Prof. Code §§ 6067, 6103; Stephens v. State Bar, supra; Trusty v. State Bar, 16 Cal.2d 550, 553, 107 P.2d 10; Waterman v. State Bar, supra. In determining the proper degree of discipline, petitioner's prior disciplinary record may be considered. Herron v. State Bar, 24 Cal.2d 53, 65, 147 P.2d 543. In arriving at its recommendation of a suspension for one year, the Board of Governors relied upon three counts (Three, Four and Five), which are not supported by the evidence, and upon Count One, which was proved in a lesser degree than that relied upon by the board. We have concluded that petitioner will be sufficiently punished if he is suspended from the practice of law for six months.

It is ordered that Oliver O. Clark be suspended from the practice of law for a period of six months, commencing 30 days after the filing of this opinion.

CARTER, Justice.

I dissent.

Although petitioner was charged with six separate counts of having violated his duties as an attorney, they all arose out of the same transaction, that is, his conduct as the guardian of the estate of George W. Bigelow, an incompetent. The local administrative committee found that his alleged misconduct amounted only to carelessness in handling and keeping records of the assets of the estate. The majority opinion determines that the third, fourth and fifth counts are not supported by the evidence. Counts one, two and six are held to establish "gross negligence" on petitioner's part, thus justifying discipline. I do not agree with this holding for three reasons: (1) Negligence, ordinary or gross, is not a proper ground for disbarment or suspension of a member of the State Bar. (2) Even if it is, it must be negligent conduct of an attorney toward his client in handling the client's business. It does not apply where there is no attorney-client relationship between the attorney and the one toward whom he is negligent as we have here. (3) The evidence does not establish gross negligence.

On the first point I have previously expressed myself in Stephens v. State Bar, 19 Cal.2d 580, 585, 122 P.2d 549; Trusty v. State Bar, 16 Cal.2d 550, 554, 107 P.2d 10 and In re McKenna, 16 Cal.2d 610, 612, 107 P.2d 258. In addition I wish to point out that negligence in the handling of his client's affairs is not grounds for disbarment of an attorney in a majority of the states. See cases collected 7 C.J.S., Attorney & Client, § 23, p. 744; 5 Am.Jur., Attorneys at Law, § 268, p. 423.

The majority in this case goes a step further, however, which brings me to the second point. It holds that the attorney may be suspended when the negligence occurs while he is acting in a capacity other than as an attorney; where he is negligent with respect to his dealings with a third party, not a client. In the instant case petitioner was the *guardian* of the estate of an incompetent. He *was not* the attorney for the estate or incompetent. The latter and petitioner had an attorney. It is true that a fiduciary relation exists between a guardian and his ward but his duty is only such as should be exercised by a man of ordinary prudence in the management of his own business. Estate of Wood, 159 Cal. 466, 114 P. 992, 36 L.R.A., N.S, 252; Estate of Boyes, 151 Cal. 143, 90 P. 454. And it has been held that mismanagement of another trust estate is not ground for removal as guardian of the estate under consideration. Heath v. Maddock, 81 N.J.Eq. 469, 86 A. 945, affirmed 82 N.J.Eq. 366, 91 A. 1069. Likewise an attorney should not be disbarred because, while acting as a guardian but not as attorney, he is guilty of mismanagement of his ward's estate. Because an attorney is a poor business man in his dealings with another's property, of which he has control, but not as an attorney, should not be ground for disbarment and the majority opinion cites no case so holding.

There are many ramifications to the rule stated by the majority. The husband is the manager of the community property and he and his wife's relations are fiduciary. Would it be said that whenever the husband happens to be an attorney, a careless handling of the community property will be a ground for his discipline as an attorney. The majority would say that it could be. Likewise, the secretary or treasurer of a club or corporation is careless in keeping its records and handling its funds, may be disbarred if he is an attorney; an attorney who borrows an automobile from a friend, not a client, and his grossly negligent operation of it results in its destruction, is subject to disbarment; a guardian who is also an attorney but not for his ward's estate, is grossly negligent in the care of the property of his ward in an automobile and it is consumed by fire, may be disbarred; an attorney who is the guardian of the person of his ward but not as attorney, would be exonerated as to damages for any conduct, short of wilfull misconduct or intoxication, in driving a vehicle causing injury to his ward, but he could be disbarred for such conduct. These and many more examples could be given which emphasize the vice of the holding of the majority opinion. The majority also point to the impracticability of requiring an attorney to be a superman, not only in his relations with his clients, but also with third persons.

Gross negligence conveys no connotation of intentional misconduct, wilfullness or intent to injure, Robertson v. Brown, 37 Cal.App.2d 189, 99 P.2d 288; Sumner v. Edmunds, 130 Cal.App. 770, 21 P.2d 159; Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Browne v. Fernandez, 140 Cal.App. 689, 36 P.2d 122, but it is "the want of that care and diligence which even careless, thoughtless, or inattentive persons are accustomed to exercise; the failure to take such care as a person of common sense and reasonable skill in like business but of careless habits would observe in avoiding injury to his own person or life under circumstances of equal or similar danger. It is very great negligence; negligence materially greater than ordinary negligence, the difference being one of degree, although sometimes it is said to be a difference of kind; negligence of an aggravated character; and gross failure to exercise proper care. The term implies a thoughtless disregard of consequences without exerting any effort to avoid them; an indifference to the things or welfare of others. It refers to conduct which is positive or affirmative rather than merely passive or negative." 65 C.J.S., Negligence, § 8d, p. 370. Here, as stated in my third point, the evidence was not sufficient to establish any intentional misconduct nor gross negligence.

On count one the board found petitioner guilty of commingling funds where he placed the ward's money in a separate envelope in his safe. The majority opinion correctly holds that there was no commingling of funds. The money was produced by petitioner from the envelope where it had been all the time. It had remained there three years but there was no showing of any misappropriation of it or intent to do so, and the ward was not injured by its being so kept. Yet the majority arrives at a finding of gross negligence because petitioner's explanation does not set at rest "suspicions" and it "tests credulity," and that the evils inherent in commingling are present where petitioner keeps the money in his safe for three years and forgets its presence there. Disciplinary matters are not and should not be decided on "suspicions." The only evidence shows that the money was there at all times, was never misappropriated and was always a part of the ward's estate. If the money had been deposited in the bank in petitioner's name as guardian for three years but was forgotten, it would not be called gross negligence. At most it would be ordinary negligence.

The second count deals with a failure of petitioner to include some $1,800 in his accounting. That was the same money that was in the envelope, and the same comments are applicable to it as were made with respect to the first count. Naturally he could not list it in the account if he had forgotten about it. There is no proof of any intent to misappropriate it and it was not misappropriated. The inadvertent omission of one asset of a ward's estate from the guardian's account can hardly be said to constitute ordinary negligence, much less gross negligence.

The sixth count deals with the failure to file an account as guardian until ordered by the court, and that the account filed was inaccurate and necessitated an independent audit. Petitioner did file an account after his appointment. If it was inaccurate, that was nothing more than negligence, as conceded by petitioner. It was not gross negligence. The account was filed and the ward was not injured. Certainly it cannot be said that such conduct constituted a failure to exercise the care a person of careless habits would exercise or gross negligence.

In my opinion the record in this case does not disclose any conduct of petitioner which can be said to even remotely justify discipline, and I would therefore dismiss the proceeding against him.

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39 Cal.2d 198

AETNA BLDG. MAINTENANCE CO., Inc. v. WEST et al.

L. A. 21876.

Supreme Court of California, in Bank.
July 8, 1952.

Rehearing Denied July 31, 1952.

Action by the Aetna Building Maintenance Company against James West, a former employee, and others for damages resulting from named defendant's alleged acts of unfair competition and for an injunction prohibiting such defendant from wrongfully soliciting plaintiff's customers and for other relief. The Superior Court, Los Angeles County, Harold B. Jeffery, J., entered judgment for plaintiff, and defendants appealed. The Supreme Court, Edmonds, J., held, inter alia, that the trade conditions were not such as to entitle plaintiff to an injunction prohibiting solicitation.

Reversed.

Carter and Shenk, JJ., dissented.

Edmonds, J., dissented from denial of rehearing.

Prior opinion, 236 P.2d 390.

1. Injunction 🔑56

Equity will not enjoin a former employee from soliciting business from his former employer's customers, provided his competition is fairly and legally conducted, in absence of enforcible contract containing negative covenants to the contrary.

2. Master and Servant 🔑60

Employee of building maintenance company had right to advise company's customers that he was severing his business relations with it and engaging in business for himself.

3. Master and Servant 🔑60

Merely informing customers of one's former employer of change of employment, without more, or willingness to discuss business upon invitation of such a customer is not "solicitation".

See publication Words and Phrases, for other judicial constructions and definitions of "Solicitation".

4. Injunction 🔑56

Equity will not enjoin a former employee from receiving business from customers of his former employer, even though circumstances be such that he should be prohibited from soliciting such business.

5. Master and Servant 🔑60

Former employee of building maintenance company was entitled to accept business from company's former customers, and such acceptance, by itself, did not constitute "solicitation".

6. Master and Servant 🔑60

Building maintenance company would be entitled to protection against former employee's use or disclosure in competition with company of trade secrets given to former employee only for purpose of carrying on company's business, even in absence of solicitation by former employee of business from customers of the company. Labor Code, § 2860.

7. Injunction 🔑56

In order for former employer to enjoin solicitation of its customers by former employee, it must be shown that information former employee acquired during employment was confidential and not readily assessible to competitors, that former employee solicited customers of former employer with intent to injure him, that former employee sought out certain preferred customers whose trade was particularly profitable and whose identities were not generally known to the trade, that the business is such that a customer will ordinarily partronize only one concern, and that the established business relationship between customer and former employer would normally continue unless interfered with. Labor Code, § 2860.

8. Trade-Marks and Trade-Names and Unfair Competition 🔑77

Where prospective customers were commonly known to building maintenance trade or were easily discoverable, and there was no evidence that former employee of building maintenance company sought out its preferred customers, and evidence indicated that there were no preferred customers in the trade, equity would not enjoin solicitation by former employee of company's customers. Labor Code, § 2860.

9. Injunction 🔑56

Equitable protection may be invoked against subsequent use by former employee of knowledge of peculiar likes and senses and other characteristics of former employer's customers where such knowledge will aid him in securing and retaining their business. Labor Code, § 2860.

10. Injunction 🔑56

Where superiority of product or service, rather than personal relationship or a secret specialty, is the basis for patronage, a knowledge of the customer's requirements is not sufficient reason for enjoining former employee from soliciting business from customers of former employer, and therefore building maintenance company was not entitled to such an injunction against its former employee. Labor Code, § 2860.

11. Injunction 🔑128

In action by building maintenance company against former employee for damages for alleged unfair use of trade secrets and for injunction prohibiting such activity, evidence was insufficient to show that insofar as methods of janitorial service and of estimating price of new contract were concerned there was a trade secret. Labor Code, § 2860.

12. Master and Servant 🔑60

Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Labor Code, § 2860.

13. Trade-Marks and Trade-Names and Unfair Competition 🔑93(3)

In action by building maintenance company against former employee for damages for soliciting and diverting away customers and for injunction prohibiting former employee from performing work for company's customers, and other relief, evidence was insufficient to support finding that former employee used and intended to use company's confidential cost data in unfair competition with it. Labor Code, § 2860.

Matot, Gabrielson & Manley, and A. V. Falcone and Arthur J. Manley, Los Angeles, for appellants.

Victor S. Cogen, Los Angeles, for respondent.

EDMONDS, Justice.

For about three years, James A. West was employed by Aetna Building Maintenance Company, Inc., as a salesman and supervisor. After he left that employment and engaged in the same business, Aetna sued him for damages assertedly resulting from unfair competition. A second cause of action was based upon a written contract which included an agreement by West to pay liquidated damages of $1,000 in the event that he failed to carry out its provisions. The appeal is from a judgment in favor of Aetna awarding it damages and permanently enjoining West from soliciting any of its customers.

The complaint alleges that, during his employment, West became familiar with the details of its business, including customer lists; the extent and type of service required by its customers; the use of certain procedures, material and equipment; the net costs of performing service for each customer and the charges made for it. Aetna claims that with this information, which, it asserts, constitutes trade secrets, West solicited some of its customers to transfer their patronage to him and obtained contracts to do work for them.

The record includes a contract executed by the parties during the time of West's employment by Aetna. One provision of it is that West would not, during his employment and for a period of two years thereafter, disclose any trade secrets or business information acquired as an employee. Upon termination of his employment, he promised to surrender all business records and other property belonging to Aetna. He also agreed not to "solicit, serve and/or cater to any of the customers of the Company served by him" as an employee for a period of two years after termination of his employment. In the event that he breached any of the terms of the agreement, he promised to pay $1,000 as liquidated damages, together with any exemplary damages which might be awarded in an action against him. Aetna retained the right to restrain the violation of the agreement.

There is evidence showing that West had told three out of about 50 to 75 establishments with which he had worked for Aetna that he had gone into business for himself. He notified one of them of his intentions before leaving Aetna. The other two were informed of his plans after they learned that he had left Aetna. He visited one firm three times without invitation, but "he did not solicit business." Estimates for maintenance service were submitted to two firms upon their invitations. His estimates were similar to the contracts which these firms had entered into with Aetna. In one instance, Aetna's contract had been cancelled before any negotiations were begun with West.

Samuel S. Zagel, president of Aetna, testified that West, as Aetna's supervisor, had been advised of the price received for each job and understood the amount of time and material allotted to it. He taught West how to estimate and sell a job, and trained him in the technique of window cleaning. The information given West, he said, was vital to the successful estimation of a contract in such manner as to avoid loss.

West denied that he had received such information and training at Aetna. He testified that, for about 25 years prior to joining Aetna, he had worked as a janitor.

According to Joseph K. Zagel, secretary of Aetna, he told West, as supervisor, the amount received from each client, the costs of servicing the account, and the particular requirements of each customer. West was given official records and also kept personal memoranda concerning the business of the clients. When he left Aetna's employment, he returned the office records but not his personal memoranda.

West stated that he was not given the amount of the charges made to the customers of Aetna, nor the cost of doing the work. However, he was informed of their service requirements. At the time he left Aetna, he returned to it the list of customers which he had been using. While with Aetna, he kept a personal memorandum book containing notations of calls to be made in accordance with Joseph Zagel's instructions. He did not return this book to Aetna. He admitted that, as to two of the Aetna customers whom he contacted after he went into business for himself, he understood the type of service required because of his experience with them and his general background of knowledge regarding the work to be performed. In one instance, he remembered the amount paid by the client.

The evidence shows that approximately 250,000 business establishments in Los Angeles County use janitor service. Aetna has about 200 customers. Maintenance accounts are sold on the open market, being worth about three times the monthly billing. Usually the contracts may be cancelled upon giving a thirty to sixty day notice, and renewals depend upon the ability of the maintenance company. Generally, a cancellation results from a customer's displeasure with the services given. Ordinarily, when a customer cancels a contract, he engages another company or employs janitors. As a result, Aetna and other companies spend much time and money in efforts to maintain good will and eradicate any ill feeling, even after a contract has been cancelled. Frequently, a customer who has cancelled his contract renews it.

Upon this evidence, the trial court found that West commenced a competing business and solicited and secured the maintenance business of three Aetna customers, whose names, addresses and requirements he learned while employed by Aetna. These acts were intended to, and did, damage Aetna's business. Unless restrained, West could continue to divert Aetna's customers, to its irreparable damage. Other findings are that, notwithstanding his claim of coercion, West voluntarily executed the employment agreement, and later violated its provisions, but the court determined that it was too ambiguous to be enforced.

In accordance with these findings, judgment was entered against West for $1,467. In addition, he was "permanently enjoined and restrained from soliciting, diverting, or taking away, directly or indirectly, any customers of the plaintiff * * * and * * * from performing janitorial or window cleaning service for any customer of the plaintiff whom defendant has persuaded to terminate his contract with plaintiff * * *." He also was restrained from divulging any confidential information pertaining to Aetna's customers.

West attacks the evidence as being insufficient to support the findings of solicitation and of damages. There are no trade secrets in the building maintenance business, he asserts and the record includes no evidence tending to prove that he used any trade secrets. In addition, he claims that the rights and duties of the parties have been determined differently than provided in the employment agreement.

Aetna analyzes the evidence as affording abundant support for the findings and judgment. In particular, it insists that the information which West secured from it constitutes trade secrets.

Neither party has challenged the determination that the employment agreement is too ambiguous to be enforced. Nor does either of them rely upon the contract as governing his rights. The basic question presented by West as ground for reversal of the judgment is whether the court properly granted equitable and monetary relief upon the cause of action for a tort. He argues that the existence of the contract, even though unenforceable, precluded the court from granting more than the stated amount of liquidated damages. However, if the trial court's construction of the contract is correct, as he concedes, the agreement is void. § 1598, Civ.Code. It can have no effect upon the rights of the parties.

[1] In the absence of an enforceable contract containing negative covenants to the contrary, equity will not enjoin a former employee from soliciting business from his former employer's customers, provided his competition is fairly and legally conducted. Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 110, 148 P.2d 9; Rest., Agency, Cal.Annot., § 396. The question, therefore, is whether West was guilty of unfair competition in soliciting Aetna's customers.

Considering the charge of solicitation, in the light most favorable to the findings the most shown by the evidence is that West informed Aetna's clients of the termination of his employment and his plans to go into business for himself. He also eagerly accepted business from Aetna's customers when it was offered to him. There is no evidence whatever of any suggestion to an Aetna customer that it cancel Aetna's contract and give him the business. In one instance he accepted an invitation to discuss business with a firm having a manufacturing plant and an office building upon the same premises. He submitted contracts to service both of them. Upon learning that Aetna still serviced the office building and the customer was satisfied with the work done there, although not in the plant, he made no further mention of the office building.

[2] West had the right to advise Aetna's customers that he was severing his business relations with it and engaging in business for himself. Continental Car-Na-Var Corp. v. Moseley, supra. In Theodore v. Williams, 44 Cal.App. 34, 37, 185 P. 1014, the former employee advertised his new

business association by driving a plainly labeled wagon along the laundry route which he had served for his former employer and by inserting announcements in newspapers. The court held that such activity did not violate an injunction against soliciting, either directly or indirectly, any business from customers of his former employer.

"Solicit" is defined as: "To ask for with earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite." Black's Law Dictionary, 3rd ed., p. 1639. "It implies *personal* petition and importunity addressed to a particualr individual to do some particular thing, * * *." Golden & Co. v. Justice's Court, 23 Cal.App. 778, 798, 140 P. 49, 58. It means: "'To appeal to (for something); to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain.'". People v. Phillips, 70 Cal.App.2d 449, 453, 160 P.2d 872, 874.

[3–5] Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business. Golden State Milk Products Co. v. Brown, 217 Cal. 570, 571, 20 P.2d 657; New Method Laundry Co. v. MacCann, 174 Cal. 26, 32, 161 P. 990; Foster v. Peters, 47 Cal.App.2d 204, 206, 117 P.2d 726. West was entitled to accept business from Aetna's former customers and such acceptance, by itself, did not constitute solicitation.

[6] However, even in the absence of solicitation, Aetna is entitled to protection against West's use, or disclosure in competition with it, of trade secrets given to him only for the purpose of carrying on his employer's business. Riess v. Sanford, 47 Cal.App.2d 244, 246–247, 117 P.2d 694; Germo Mfg. Co. v. McClellan, 107 Cal.App. 532, 541, 290 P. 534; § 2860, Labor Code; Rest., Agency, § 396(b); see cases collected in Junker v. Plummer, 320 Mass. 76, 67 N.E.2d 667, 165 A.L.R. 1453. West takes the position that there are no trade secrets in the building maintenance business and there is no evidence of his use of a trade secret. Aetna, on the other hand argues that its customer lists; knowledge of the requirements of various customers; the use of certain procedures, material and equipment; and its cost records are trade secrets. The evidence, it says, was sufficient to support the finding that West secured these secrets as its employee and wrongfully used them in competition with it.

[7] The facts of this case do not justify the application of principles governing the rights of the parties in connection with retail delivery routes. Under such circumstances, as stated in George v. Burdusis, 21 Cal.2d 153, 159, 130 P.2d 399, and other decisions, to obtain relief against a former employee it must be shown: (1) The information was confidential and not readily accessible to competitors; (2) The former employee solicited the customers of his former employer with intent to injure him; (3) The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; (4) The business is such that a customer will ordinarily patronize only one concern; (5) The established business relationship between the customer and the former employer would normally continue unless interfered with. California Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197, 202, 188 P.2d 303, and cases there cited.

[8] These factors are here absent. Prospective customers are commonly known to the trade or may easily be discovered through business directories or by observation. Avocado Sales Co. v. Wyse, 122 Cal.App. 627, 634, 10 P.2d 485. There is no evidence that West sought out preferred customers. In any event, the evidence produced by Aetna is to the effect that there are no preferred customers in

the trade. Accounts are sold upon the open market at flat rates without regard to either their duration or profitableness. The evidence shows that the business is highly competitive and patronage depends upon efficiency of service rather than personal relationship. Contracts are of brief duration and cancellations are frequent. Under such trade conditions, equity will not enjoin the solicitation of the former employer's customers. Continental Car-Na-Var Corp. v. Moseley, supra, 24 Cal.2d at page 111, 148 P.2d 9.

[9, 10] Equitable protection may be invoked against the subsequent use by a former employee of knowledge of the " 'peculiar likes and fancies and other characteristics' " of the former employer's customers where such knowledge will aid him in securing and retaining their business. George v. Burdusis, supra, 21 Cal.2d at page 160, 130 P.2d at page 403; Dairy Dale Co. v. Azevedo, 211 Cal. 344, 345, 295 P. 10; Pasadena Ice Co. v. Reeder, 206 Cal. 697, 704, 275 P. 944, 276 P. 995. This rule applies where friendly contact with customers is important to solicitors, a circumstance typical of the so-called "trade route" cases. It has also been applied to situations involving a knowledge of the customer's desire for specialized information, his preference for certain products, and his buying habits. California Intelligence Bureau v. Cunningham, supra, 83 Cal.App.2d at page 204, 188 P.2d 303; Wallich v. Koren, 80 Cal.App.2d 223, 227, 181 P.2d 682. However, where, as here, superiority of product or service, rather than personal relationships or a secret specialty, is the basis for patronage, a knowledge of the customer's requirements is not sufficient reason for an injunction. Continental Car-Na-Var Corp. v. Moseley, supra, 24 Cal.2d at page 111, 148 P.2d 9; DeLuxe Box Lunch & Catering Co. v. Black, 86 Cal.App.2d 434, 441, 194 P.2d 715. Under circumstances of open competition, such knowledge is readily available to all in the trade.

[11, 12] Insofar as methods of janitorial service are concerned, the evidence shows no trade secret. An instructor of building maintenance testified to the standard techniques and procedure which he taught both in the public schools and to Aetna employees. "Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret." Rest., Torts, § 757, com. b. No evidence was introduced which tended to prove that Aetna used any unusual or secret material or equipment. On the contrary, the evidence shows that it regularly tested products of general use in the trade to determine which best suited its purposes.

According to Aetna, its procedure for estimating the price of a new contract, was a trade secret. However, no evidence was introduced tending to prove that Aetna had developed a secret, or even improved, system of making estimates. The very most which is shown by the evidence is that Aetna utilized a highly efficient system designed to meet competition and avoid losses. Of necessity, any competitor in the business must consider all of the factors which entered into Aetna's computations. There is a total absence of any showing that the method of making estimates was secret, or that West was informed of any claim of secrecy. Under these conditions, West was privileged to use "methods of doing business and processes which are but skillful variations of general processes known to the particular trade." Rest., Agency, § 396, com. b.

[13] The evidence upon the question of whether West had access to Aetna's cost records is conflicting. The trier of fact could have believed that West, during his employment, acquired knowledge of costs of doing business and took it with him. However, assuming, without deciding, that this information was secret, there is no evidence tending to show that he made unfair use of it in competing with Aetna, or intends to do so.

The evidence clearly shows that the janitorial business does not depend upon patrons whose work can be done at an exceptionally low cost. Under these circumstances, the records in West's possession could have no value to him unless he desired to do janitorial work for less than Aetna's contract prices for the same service. But in the only two transactions shown in evidence where West submitted bids to Aetna's customers, his estimates were higher than the amounts which Aetna was receiving. He charged $5 more for identical service in one case. On the other bid, he offered janitorial service only for $13.50 less than Aetna charged for both janitor and window cleaning service. Such evidence is insufficient to support the finding that West used and intended to use Aetna's confidential cost data in unfair competition with it.

The judgment is reversed.

GIBSON, C. J., and SCHAUER, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

There is sufficient evidence to support the trial court's finding that defendant West obtained from plaintiff trade secrets which he used in soliciting its customers.

In regard to the solicitation, the evidence shows that defendant West advised three customers of plaintiff that he had severed his relation as an employee of plaintiff and had gone into business for himself. Obviously, that statement was made for the purpose of obtaining their patronage at plaintiff's expense. There is ample evidence to justify an inference which the trial court could draw to this effect. There is nothing in Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 148 P.2d 9, to the contrary. The court there merely said that an ex-employee may send out a form letter that he is engaging in business for himself. That does not mean, that under any circumstances, personally advising the former employer's customers of the severence of his relations and that he is engaging in the same business will not support an inference that he actually asked the customers for their patronage. Here defendant personally so advised the customers and gave them his business card. He made such a call on three occasions on one of the customers. He took proposed contracts to another which were practically identical with those used by plaintiff with which he was familiar. In addition, plaintiff's officers called him on the telephone after he had contacted the customers and charged him with having violated his contract by soliciting its customers. Defendant did not deny the solicitation. He merely replied that he had a right to and was going ahead to make a living. Such a failure to deny solicitation constituted an admission of it by an adoption of the accusatory statement. Code Civ. Proc. § 1870[3]; 10 Cal.Jur. 1070 et seq.

In regard to the nature of the information obtained by defendant in his employment as being a protectible interest, the evidence is adequate to support the finding on this issue. The parties entered into an employment agreement and it was signed by defendant. Although it was void for uncertainty, nevertheless, it contained statements that constituted admissions by defendant. It is recited therein that the parties acknowledged that the "good will, continued patronage and the list of names and addresses of its customers and their special requirements constitute the principal asset of the Company." Further that defendant in his employment "has become or will become acquainted with many of the said customers, their names, addresses, and special requirements, and will become acquainted with other and future customers and with the other confidential matters of the Company's business." In addition to that the evidence shows that plaintiff's contracts or accounts with its customers were not for merely one order or successive independent orders. They ran for a period of time. The character of the service was such that a customer would not be contracting with more than one supplier at the same time, as he might well do if only the purchase of supplies or products for resale were involved. The accounts had a definite marketable value which was in excess of the amount called for on the face of the contract, the increased value being predicated on the prospects of renewal contracts in the future. Defendant was a supervisor for plaintiff, and in that capacity, he obtained the lists of customers, made personal contact with them, considered their complaints concerning the service and endeavored to eliminate the cause for complaint. He learned from plaintiff the exact method of computing the cost of furnishing the service and the *actual cost* of jobs he later solicited, and the peculiarities and special requirements of the various customers. These factors bring the case squarely within the rule that customer lists are protected even though they may be obtainable where each customer may be differentiated from the other in the nature of his requirements and the value of his patronage to the former employer. The rule is thus stated: "There is no merit in this assertion (that the customer lists were not secret), since obviously it is not merely the knowledge of the identity of the customers, but the friendly contact with them, which is important to the solicitors: '* * * They became personally acquainted with the customers of the respondent, their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers.'" Dairy Dale Co. v. Azevedo, 211 Cal. 344, 345, 295 P. 10. In Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 218 Cal. 568, 24 P.2d 489, the issue was whether a former employee of a corporation engaged in the garbage collection business could be prevented from soliciting customers of his former employer. This court held that he could, stressing the fact that some of the customers were preferred because they discarded material that could be salvaged and sold as junk. This is similar to the nature of the conditions, the premises of the persons desiring janitorial service, varying with each customer. As in that case, the case at bar involves customers who could be found from directories, as nearly everyone had garbage disposal service, but each customer had his peculiarities.

The trial court had adequate justification for concluding that defendant employee had acquired the names of his employer's customers, the particular needs of each, what each complained of in respect to the service supplied by plaintiff, the idiosyncrasies of each, the particular needs for each job and the itemized cost thereof from actual experience while in the employ of plaintiff. Clearly the trier of fact could infer that pleasing a person with cleaning service depends largely upon the person's personal opinion and taste of what constitutes a satisfactory job. By his contacts, and as the recipient of complaints, defendant was in a position peculiarly adapted to gaining such information. Assuming, as does the majority, that the quality of the service was a major factor in obtaining and keeping accounts, yet the holder of the yardstick is the person to whom the service is furnished and whose opinion may vary from other persons and each of the latter may vary as to each other. Defendant acquired that knowledge in the course of his employment and information which was more than a part of his learning of the work generally. Having acquired that knowledge and information while in the employ of plaintiff, he sought to apply it to plaintiff's detriment by inducing plaintiff's customers to forsake plaintiff and employ him to do that which plaintiff had apparently been doing to the mutual benefit and satisfaction of plaintiff and its customers before defendant interfered.

I am in full accord with the views expressed in the opinion prepared by Mr. Presiding Justice Moore and concurred in by Mr. Justice McComb when this case was before the District Court of Appeal, Second Appellate District, Division Two, 236 P.2d 390.

I would, therefore, affirm the judgment.

SHENK, J., concurs.

Rehearing denied; EDMONDS, J., dissenting.

39 Cal.2d 305

WATSON v. WATSON.

L. A. 22328.

Supreme Court of California, in Bank.
July 14, 1952.

Suit for malicious prosecution by husband against wife. The Superior Court, Los Angeles County, Philbrick, McCoy, J., entered judgment dismissing the action, and plaintiff appealed. The Supreme Court, Shenk, J., held that plaintiff, who had obtained invalid decree of divorce from former marriage, and in marrying wife, represented to her that divorce was legitimate, was estopped from denying existence of marriage to defendant in order to sue her for tort, even though it was ultimately declared in proceeding pending at time of alleged malicious prosecution that the marriage was bigamous and would be annulled.

Judgment affirmed.

Prior opinion, 240 P.2d 1005.

1. Divorce ⚷315

Where parties are lawful spouses, one may not sue the other for damages in tort, even after entry of an interlocutory divorce decree but before entry of the final divorce decree.

2. Divorce ⚷313

A divorce decree is res judicata as between a party thereto and a stranger to the action to the extent that it establishes a future status of the parties to the divorce.

3. Marriage ⚷36

Husband, who had obtained invalid decree of divorce from former marriage, and in marrying wife, represented to her that divorce was legitimate, was estopped from denying existence of marriage to wife in order to sue her for tort of malicious prosecution, even though it was ultimately declared in proceeding pending at time of alleged malicious prosecution that marriage was bigamous and would be annulled.

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G. G. Baumen, Los Angeles, for appellant.

Meserve, Mumper & Hughes and Leo E. Anderson, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment of dismissal of an action for malicious prosecution on the ground that it was sham and frivolous and not filed in good faith. The real question is whether the complaint states a cause of action enforceable by the plaintiff.

The plaintiff, William Watson, and the defendant, Dorothy Watson, were married in Nevada in March, 1948. At that time an interlocutory decree of divorce had been entered as between the plaintiff and his first wife in a California court, but the final decree was not entered until 1950. Immediately prior to his marriage to the defendant and while the California interlocutory decree was still in effect, the plaintiff obtained a Nevada decree of divorce from his first wife and represented to the defendant that he had been legally and finally divorced by that decree and was free to marry her. In November, 1949, the defendant sued the plaintiff for a divorce in California. The trial court held that the Nevada divorce decree was invalid and ineffective in dissolving the plaintiff's prior marriage, and in December, 1950, entered a decree annuling the marriage between the plaintiff and the defendant on the ground that it was bigamous and void. In December, 1949, while the proceedings which resulted in annulment were pending, the defendant caused the plaintiff to be arrested on a charge of battery as defined by Section 242 of the Penal Code. Upon trial the plaintiff was acquitted of this charge. That arrest and acquittal form the basis for the present action.

The defendant seeks an affirmance of the judgment on the ground that her marriage to the plaintiff was valid to the extent that it prevented the plaintiff from maintaining a tort action against her for a wrong committed during the purported coverture and that in any event the plaintiff is estopped from contending otherwise.

[1] It is the established rule generally and is the law in California that where the parties are lawful spouses the one may not sue the other for damages in tort. Peters v.

Peters, 156 Cal. 32, 103 P. 219, 23 L.R.A., N.S., 699. The rule equally applies to prevent an action for a tort occurring after the entry of the interlocutory decree but before entry of the final decree. Paulus v. Bauder, 106 Cal.App.2d 589, 235 P.2d 422. However, the plaintiff contends that his marriage to the defendant was void from its inception, the alliance being a bigamous one. Under such circumstances, he asserts, there is no basis for the rule since there was in fact no marriage.

It is unnecessary to determine the legal status of the marital relation of the contending parties at the time this action was brought as bearing upon the plaintiff's right to sue for the reason that a consideration of the principles of estoppel meet him at the threshold of the litigation in support of the order of the trial court.

[2] To maintain his action it is necessary for the plaintiff to deny the validity of the Nevada divorce decree which he secured from his first wife. Decisions of this court have established that a divorce decree is res judicata as between a party thereto and a stranger to that action to the extent that it established the future status of the parties to the divorce. Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411; Blumenthal v. Blumenthal, 97 Cal. App. 558, 561, 275 P. 987. In Rediker v. Rediker, 35 Cal.2d 796, 805, 221 P.2d 1, 6, 20 A.L.R.2d 1152, the court stated that "the validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry." The decisions in this state and in other states are ample authority for the statement in the Rediker case.

The fact that in the present case it had been determined in a prior action that no marriage existed at the time of the alleged tort does not benefit the plaintiff's position. Such an eventuality was taken into consideration in Harlan v. Harlan, 70 Cal. App.2d 657, 161 P.2d 490. Before their marriage the plaintiff husband in that case had been instrumental in securing a Mexican divorce for the defendant from her first husband. Thereafter the plaintiff sought an annulment of their marriage as bigamous, asserting that the Mexican divorce was invalid for want of jurisdiction of the court. That situation is analogous to the present case in that in bringing his action it is necessary for the plaintiff to assert the invalidity of a previous divorce obtained by him. In the Harlan case the trial court found that the Mexican divorce decree was invalid, as was the Nevada divorce in the present case, and granted the annulment. In reversing the judgment the court held that notwithstanding the fact that the Mexican decree was invalid, the plaintiff was estopped from asserting its invalidity because he had aided and counseled the defendant in procuring it. In the present case the plaintiff is likewise estopped from asserting the invalidity of the Nevada divorce obtained through his own machination. The fact that he obtained that divorce as the party participant states a stronger case against him than operated as an estoppel in the Harlan case.

In a decision by the New York Court of Appeals, relied upon in the Rediker case, a defendant in a suit for separate maintenance asserted as a defense that the marriage was bigamous on the ground that a prior divorce he had obtained from a Nevada court was invalid for want of jurisdiction of that court. The New York court expressly assumed the invalidity of the divorce action but refused to let it be asserted, stating that "to refuse to permit this defendant to escape his obligation to support plaintiff does not mean that the courts of this State recognize as valid a judgment of divorce which necessarily is assumed to be invalid in the case at bar, but only that it is not open to defendant in these proceedings to avoid the responsibility which he voluntarily incurred." Krause v. Krause, 282 N.Y. 355, 359–360, 26 N.E. 2d 290, 292.

[3] By the same reasoning the plaintiff is estopped from asserting the invalidity of the Nevada divorce. Because of his representations to the Nevada court as an inducement to grant him a decree of divorce from his former wife, and his representations to the defendant that it placed him

in a position legally to marry, he will not now be heard to say that the Nevada divorce was invalid. Under such circumstances the defendant may rightfully assert the plaintiff's inability to prosecute this tort action against her.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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39 Cal.2d 355

MOUNTAIN STATES CREAMERY CO. v. TAGERMAN et al.

L. A. 22231.

Supreme Court of California, in Bank.

July 25, 1952.

Action by Mountain States Creamery Co., against George Tagerman and another, for balance due on goods sold and delivered, or on an open book account, or on an account stated. The Superior Court, Los Angeles County, William R. McKay, J., allowed plaintiff to amend complaint to conform with proof, and entered judgment on a verdict for plaintiff, and Tagerman appealed. The Supreme Court, Gibson, C. J., held that in view of facts that Tagerman was given notice at outset of trial of intented amendment, and that he was allowed to present all desired defenses at trial, and was allowed to reopen case to present further defenses, and did not show that he was in any way prejudiced, court did not abuse discretion in allowing amendment.

Judgment affirmed.

Prior opinion, 237 P.2d 532.

1. Pleadings 🔑236(2), 238(2)

The trial court, in its discretion, after notice to adverse party, may allow an amendment to any pleading upon such terms as may be just, and when such action is challenged, the question to be decided is whether, under the circumstances, reversible error was committed. Code Civ.Proc. § 473.

2. Limitation of Actions 🔑127(1)

Even where a statute of limitations is involved, an amendment of any pleading is permissible, and it will be held to relate back to date of filing of original complaint unless it sets forth an entirely different cause of action. Code Civ.Proc. § 473.

3. Pleading 🔑237(1)

Where defendant was given notice at outset of trial that plaintiff intended to amend pleadings, and was allowed to present all desired defenses at trial, and to reopen case after submission to jury to present further defenses, and did not show that he had in any way suffered prejudice, granting of plaintiff's motion to amend pleadings to conform to proof was not error. Code Civ.Proc. § 473.

4. Partnership 🔑217(3)

In action for balance alleged to be due on goods delivered, or on an open book account, or on an account stated, from defendant who allegedly agreed to assume debt when he became partner of individual who purchased the goods, evidence was sufficient to support judgment for plaintiff.

5. Appeal and Error 🔑931(1)

On appeal on ground of insufficiency of evidence, conflicts in evidence must be resolved in favor of findings of trial court.

David C. Marcus, Los Angeles, for appellant.

George Penney and Jean Wunderlich, Los Angeles, for respondent.

GIBSON, Chief Justice.

Defendant Tagerman has appealed from a judgment against him, and his principal contention is that the trial court erred in permitting plaintiff to file an amended complaint to conform to the proof.

The original complaint alleged that defendants Tagerman and Garrett were partners, doing business under the name of the Garrett Distributing Co., that between February 6 and March 5, 1948 plaintiff sold and delivered to defendants certain goods in the total amount of $8,716.50, and that no part thereof was paid except the sum of

$2,076.50, leaving a balance due and owing plaintiff of $6,640. It was also alleged in separate counts that defendants were indebted to plaintiff for the balance due upon an open book account and an account stated.

When the case was called for trial, plaintiff was given permission, over Tagerman's objection, to file an amended complaint alleging that the goods were sold to Garrett while he was doing business as an individual, that thereafter, on March 17, 1948, Garrett formed a partnership with Tagerman, and that as part of the consideration for the transaction Tagerman promised to pay the debt due plaintiff. Tagerman at first acquiesced in the filing of the amendment and then sought a continuance in order to file a demurrer, whereupon plaintiff's counsel withdrew the amended complaint but announced that he would later ask leave to amend to conform to proof. The trial proceeded on the original pleading, and over Tagerman's objection the court admitted evidence that he entered into a partnership or joint venture with Garrett and promised to pay Garrett's debt to plaintiff. At the close of its case, to conform to the proof, plaintiff was permitted to file an amendment setting forth substantially the same allegations as the amended complaint which was withdrawn at the beginning of the trial.

Tagerman then presented his defense and denied that he had agreed to assume the debts of Garrett as alleged in the amended complaint but testified that the agreement was that the debts should be paid out of the profits of the venture, if any. More than a month after the case was submitted, and before any findings were made, Tagerman made a motion to vacate submission and for permission to introduce additional evidence. He stated that the purpose of the motion was to permit him to meet and properly defend as to matters alleged in the amended complaint, and that the additional evidence was necessary in order that his rights might be fully preserved and protected. The motion was granted, the case was reopened, and Tagerman introduced his evidence. After resubmission of the case the court found and concluded that Tagerman had agreed to pay the balance of $6,640 due plaintiff. Judgment was entered accordingly.

[1-3] The trial court, in its discretion, after notice to the adverse party, may allow an amendment to any pleading upon such terms as may be just (Code Civ.Proc. § 473), and the question to be decided is whether reversible error was committed under the circumstances shown here. It appears that Tagerman was given notice of the intended amendment at the outset of the trial, and it is clear that he was afforded ample opportunity, both before and after the case was reopened, to present all desired defenses and that he took advantage of that opportunity. Defendant did not plead or otherwise raise the statute of limitations, and we are not presented with a case where it is claimed that there is an attempt to set up a new cause of action that is barred by the statute.[1] Tagerman has not shown that he was in any way prejudiced by the court's ruling.

[4, 5] The evidence is sufficient to support the judgment. The existence of the debt is not disputed, and there was testimony that Tagerman promised to pay the outstanding obligations of the Garrett Distributing Co. All conflicts must, of course, be resolved in favor of the findings of the trial court.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

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[1] Even where the statute of limitations is involved, an amendment is permissible, and it will be held to relate back to the date of filing the original complaint unless it sets forth an entirely different cause of action. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 717–718, 128 P.2d 522, 141 A.L.R. 1358; Frost v. Witter, 132 Cal. 421, 424–427, 64 P. 705; see Clark on Code Pleading [2d ed. 1947], p. 731.

39 Cal.2d 179

KELLEY v. UPSHAW et al.

L. A. 22187.

Supreme Court of California, in Bank.

July 7, 1952.

Action on note and extension agreement by Alexander R. Kelley against William A. Upshaw, Othelia A. Upshaw, and Cody W. Howarth. The Superior Court, Los Angeles County, Leo Freund, Judge pro tem., rendered judgment for plaintiff and defendant Howarth appealed. The Supreme Court, Edmonds, J., held that defendant Howarth had waived defense that action was premature as to installment not yet accrued and that evidence sustained judgment for plaintiff.

Affirmed.

Prior opinion 235 P.2d 861.

1. Bills and Notes 🔑140

Where agreement between lender, borrowers and new promisor extending time for payment of defaulted promissory note recited that $17,600 was due on note, which was to be paid in weekly installments of $50, but provided that if $8,000 plus interest was paid on or before June 1, 1948, that sum would be accepted in full payment of principal, and that in event of nonpayment of $8,800 by designated date the balance of note plus interest "shall be due" and payable at the weekly rate, agreement did not provide for acceleration of weekly payments.

2. Abatement and Revival 🔑81

Even if action by lender on note was premature as to installments not yet accrued, new promisor's failure to object until his objections to findings of fact and conclusions of law were filed, constituted waiver of defense by new promisor for failure to urge timely plea.

3. Action 🔑62

Appeal and Error 🔑173(10)

Defense that action is premature is in nature of a dilatory plea not favored in law and such defense must be seasonably urged in trial court or is waived.

4. Judgment 🔑205

When a defense in abatement has been waived the court may, following trial upon the merits, enter judgment for entire amount in controversy even though portion of cause of action had not accrued at time suit was commenced.

5. Abatement and Revival 🔑40

Plea that action has been prematurely brought is in nature of a dilatory plea which must be specially pleaded to be available as defense.

6. Abatement and Revival 🔑40

Even if trial court had had discretion to permit defense to lender's action on note to be raised by new promisor in objections to trial court's findings of fact and conclusions of law that action had been prematurely brought as to installments not yet due, no showing was made of abuse of discretion.

7. Execution 🔑75

Where judgment provided that principal and interest on note were due lender as to future installments, provision that execution should issue against promisor "only in accordance herewith" might be read as permitting issuance of execution only after date when installments should become severally due.

8. Bills and Notes 🔑518(1)

Usury 🔑117

In action on note, evidence was sufficient to show that there was good consideration and that the rate of interest was not usurious.

9. Appeal and Error 🔑996

Where different conclusions may reasonably be drawn from evidence by different minds, trial court's findings are not to be disturbed on appeal.

10. Bills and Notes 🔑527(1)

In lender's action on note, evidence sustained trial court's findings regarding total sum paid on note by borrowers and new promisor.

11. Bills and Notes 🔑523

In action on note by lender against borrowers and new promisor, evidence sustained finding that lender did not grant third party a thirty day option to purchase note but offered him option to purchase the right, title and interest, if any, of lender in those certain fixtures and assets of "borrowers'" business and that no tender was made of option price.

12. Chattel Mortgages 🔑215½

In action on note by lender against borrowers and new promisor, evidence sustained finding that thirty day option offered by lender to third party to purchase chattel mortgage was not given for consideration and was withdrawn by lender before acceptance.

13. Bills and Notes 🔑516

In action on note by lender against borrowers and new promisor, evidence sustained finding that assignment of chattel mortgage, which was security for note, to new promisor was part of consideration for agreement between lender and borrowers and new promisor to extend time for payment of note.

14. Chattel Mortgages 🔑255

Even if lender had not assigned chattel mortgage to new promisor as consideration for agreement extending borrowers' time for payment, new promisor could not complain that lender should have foreclosed chattel mortgage before suing on note since new promisor was not party to note secured by chattel mortgage.

15. Chattel Mortgages 🔑205

Where lender attempted to assign chattel mortgage to new promisor as part of consideration for new agreement extending borrowers' time for payment without assignment of debt which mortgage secured, attempted assignment was void.

16. Chattel Mortgages 🔑205

Even if option offered by lender to third party to buy chattel mortgage which was security for borrowers' note had been accepted, purchase of mortgage would have been invalid without purchase of note which mortgage secured.

17. Bills and Notes 🔑527(1)

In action on note by lender against borrowers and new promisor, evidence sustained finding of total amount paid on indebtedness by borrower and new promisor.

John M. Davenport, Los Angeles, for appellant.

Sampson & Dryden and Jacob Swartz, Los Angeles, for respondent.

EDMONDS, Justice.

Alexander R. Kelley loaned William A. and Othelia A. Upshaw $17,900. Thereafter, he entered into an agreement executed by the Upshaws and Cody W. Howarth which conditionally reduced the amount of the indebtedness and extended the time of payment. The appeal of Howarth presents for consideration questions concerning the rights of the respective parties under the extension agreement.

The complaint charged that in 1947, the Upshaws and Howarth jointly and severally became indebted to Kelley for $17,600 which they promised in writing to pay. They paid $4,402.74 upon their obligation, but refused upon demand to pay the balance due.

As a second cause of action, Kelley alleged that in 1947 he loaned the Upshaws $17,900. They executed and delivered to him a promissory note payable in installments of $200 per week, with interest at the rate of six per cent. The note provided that, in the event of default in any payment, the entire amount of principal and interest should become due.

Later, Kelley pleaded, after the note was in default, he agreed in writing to extend the time for payment and to forbear to sue. In consideration of the extension the defendants executed a contract promising to pay Kelley $8,800 by June 1, 1948. If the payment was not made, then they agreed to pay $17,600, the full amount unpaid upon the note, with interest. Kelley alleged his compliance with the agreement and the failure of the defendants to make the required payment. He acknowledged having received $4,402.74 in reduction of the principal of the extension agreement and claimed that $13,197.26, plus interest, is due and owing to him from the Upshaws and Howarth.

In a third count of the complaint against the Upshaws only, Kelley re-alleged the terms of the promissory note and their failure to pay any part of it except $4,702.74.

By their joint answer, the Upshaws and Howarth denied the allegations of the first cause of action except as to the payment of $4,402.74. As to the second cause of action, they admitted having paid that amount and pleaded the execution by the parties of the extension agreement. They alleged that in October, 1948, the parties terminated and rescinded this agreement and entered into a new contract. Later, they said, Kelley, for consideration, gave John T. Goodwin a 30-day option in writing to purchase the promissory note for $2,500. Thereafter, within the option period, Kelley refused to accept payment of that sum. Except as to the payment of $4,402.74, the answer denied the allegations of the second and third causes of action.

For a separate defense, it was alleged that, in February, 1949, Kelley agreed in writing with Goodwin to cancel the amount due from the defendants upon payment within 30 days of $2,500. Before the expiration of the option period, according to the answer, Kelley told Goodwin, Howarth and the Upshaws he would not accept that amount as full payment of the debt. A further allegation was that Goodwin, the Upshaws and Howarth were then, and are now, ready and able to pay Kelley $2,500, which he refuses to accept.

The answer also asserted, as a third defense, that the promissory note sued upon is secured by a chattel mortgage which Kelley has not foreclosed. By another defense the Upshaws and Howarth charged that the promissory note was given pursuant to an agreement by which Kelley loaned William Upshaw money at a rate in excess of 12 per cent per annum interest. According to the pleading, William Upshaw received only $15,000 as consideration for the note, Kelley retaining $2,900 as interest on the loan. The final separate defense was that the complaint does not state facts sufficient to constitute a cause of action.

By the extension agreement, William Upshaw and Howarth agreed to pay $1,200 forthwith and $50 per week, with interest, until the note was paid. The agreement stated the amount of $17,600 as being due upon the note, but provided that if $8,800, plus interest, was paid on or before June 1, 1948, that sum would be accepted in full payment of the principal. In the event of default, the contract reads, the entire balance of the note, plus interest, "shall be due and shall be paid on the weekly basis of Fifty ($50.00) Dollars per week, plus interest."

Howarth appeared as his own counsel at the trial. Undisputed evidence shows the execution of the promissory note and of the first extension agreement. There is testimony tending to prove that Kelley offered in writing to assign the chattel mortgage for $2,500. J. Clifford Argue, Goodwin's attorney, testified that he drafted the instrument, which was signed by Kelley alone. A copy of the instrument, "to the best of his knowledge", was admitted into evidence.

Argue described the document as being "in the nature of an option executed by Mr. Kelley wherein he granted to John Goodwin an option to purchase the chattel mortgage then existing against the equipment at Coast Enameling for $2500 cash. He gave him thirty-days' time in which to raise the $2500, and that was the option; that was the agreement."

The record also includes an assignment of the chattel mortgage by Kelley to Howarth in September, 1947. It recites receipt of a consideration of $8,800.

Kelley testified that, at the time he signed the alleged option, "there was no money given to me." He further said that, on a visit to Argue's law office a few hours later, his wife took the instrument away from Argue and destroyed it. The same day, Kelley told Goodwin that he had destroyed the document and did not intend to abide by its terms.

The testimony as to whether $2,500 ever was tendered to Kelley under his agreement with Goodwin is in direct conflict. Howarth said that five days after the instrument was executed, he offered to pay Kelley the money. He further stated that Goodwin acted as his agent in the transaction. Kelley denied that Howarth or any one else had tendered payment to him.

Following trial, and after entry of a minute order in which judgment was ordered against the defendants and Kelley's counsel directed to prepare findings, Howarth retained an attorney. Thereafter, his attorney filed objections to Kelley's proposed findings of fact and conclusions of law. In them, for the first time, Howarth took the position that he can be liable for no more than accrued installments of principal and interest under the extension agreement as of the date of judgment. There was, he claimed, no provision for acceleration of installment payments and no basis for a finding that the balance of the amount of the note, with interest, was due.

The findings of fact signed by the trial judge stated: The promissory note was in default at the time the parties signed the extension agreement providing for the payment of $8,800 by June 1, 1948. This agreement was in default. Four thousand, four hundred and two dollars and seventy-four cents had been paid on the note subsequent to the execution of the extension agreement, therefore, Howarth owed Kelley $13,197.20, plus interest, payable at the rate of $50 principal per week commencing December 1, 1947. As of June 30, 1950, there was $6,700 due from Howarth to Kelley, less $4,402.74 paid subsequent to December 1, or a total of $2,297.26, plus interest.

Other findings were: Kelley offered to give Goodwin a 30-day option "to purchase the right, title and interest, if any, of plaintiff, in those certain fixtures and assets of a business being conducted by defendants Howarth and Upshaw" for $2,500. Goodwin neither accepted the offer nor obligated himself to make any payment. Kelley rescinded the offer by taking possession of the memorandum and advising Goodwin that it was revoked. At no time did anyone on Goodwin's behalf tender Kelley $2,500. Although the note was secured by a chattel mortgage, Kelley "released and assigned" it to Howarth. The assignment and release was part of the consideration for the extension agreement and thereafter the obligation of the defendants was unsecured. The promissory note was not executed pursuant to an agreement for a loan at a rate of interest in excess of 12 per cent per annum.

As conclusions of law, the court held that Kelley was entitled to judgment against Howarth for $13,197.20 principal and $2,694.16 interest, payable as follows: $2,297.26 principal and $2,694.16 interest payable forthwith, the balance of $10,899.94 to be paid at the rate of $50 per week, plus interest, commencing July 1, 1950. The judgment provided "that execution shall issue as against said defendant Cody W. Howarth only in accordance herewith."

Howarth contends that the trial court erred in awarding judgment against him for the full amount of principal and interest provided in the extension agreement. He further argues that certain findings of fact are inconsistent and not supported by evidence.

If it be assumed that Kelley was entitled to judgment against him, Howarth says, the judgment should have been limited to the principal amount of the contract installments due at the time the action was filed, with interest only on that amount. The extension agreement, he argues, contains no provision for acceleration in the event of default in payment of weekly installments. Therefore, he states, Kelley may not recover for future installments which had not become an indebtedness at the time of suit.

Kelley, on the other hand, contends that, by the express terms of the contract, the entire amount of unpaid principal and interest was due and owing on June 1, 1948. He relies upon the provision of the agreement that, if $8,800 plus interest was not paid by June 1, the entire balance of the note, with interest, *"shall be due* and shall be paid on the weekly basis of Fifty ($50.00) Dollars per week, plus interest." (Emphasis added.)

[1] From the findings of fact, conclusions of law, and judgment, it is apparent that the trial court did not so construe the contract. It distinguished between accrued installments and the total amount provided in the agreement. That the interpretation which the trial court placed upon the contract is correct is clear from a reading of

the agreement as a whole. The contract provided for payment of $17,600 in weekly installments of $50. Kelley agreed to accept $8,800 in full satisfaction of the indebtedness if, but only if, that amount were paid by a date certain. Otherwise, the full $17,600 "shall be due" and payable at the weekly rate. The word "due" was used in the contract in the sense of "owed", not "payable". If the lesser amount was not paid on the date set, $17,600 would be owing, but payable only in accordance with the contract. There was no provision for acceleration of the weekly payments.

"The word 'due' upon which a claim is founded as applied to a debt or obligation to pay money does not always mean that the money is then immediately payable. It may be so used, but it often merely denotes the idea of a complete debt, an existing obligation, or money fully earned, but not payable until a future time or until the happening of another event." Philbrook v. Mercantile Trust Co., 84 Cal.App. 187, 196, 257 P. 882, 886; Black's Law Dictionary, 3rd ed., p. 625, "due".

[2] Even if there is merit to Howarth's contention that the action was premature in part, Kelley argues, he has waived this defense by failure to urge it seasonably in the trial court by special plea. Howarth, on the other hand, contends that his defense is not dilatory. The issue raised by the pleadings, he states, was the amount of money, if any, owed by him to Kelley; determination of the issue rested in part upon the number of matured installments of the contract. In addition, he argues that he seasonably presented his contention to the trial court in the form of objections to Kelley's proposed findings of fact and conclusions of law.

Neither the pleadings nor the evidence raised the issue of the prematurity of the action as to installments not yet accrued. The amount of money due, if any, was placed in issue by general denials of the allegations of the complaint and by special defenses which did not go to the question of premature commencement of the action. Howarth tried the case upon the theory that the rights of the parties were to be determined by the option contract. Not until his objections to the proposed findings of fact and conclusions of law were filed did he raise the question of prematurity of the action.

[3] "The rule has long been settled that the defense that an action is premature is in the nature of a dilatory plea not favored in the law, and that such defense must be seasonably urged in the trial court or it is waived." Seches v. Bard, 215 Cal. 79, 81, 8 P.2d 835, 836. "A plea in abatement, without disputing the justness of plaintiff's claim, objects to the place, mode, or time of asserting it, and requires *pro hac vice* that the judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time. It must not only point out the plaintiff's error, but must show him how it may be corrected, or in technical language it *must give the plaintiff a better writ*." Nevills v. Shortridge, 146 Cal. 277, 278, 79 P. 972. Thus, although a timely plea in abatement, properly proved, requires judgment for the defendant, it is an objection which may be waived if not seasonably urged.

[4] When a defense in abatement has been waived, the court may, following trial upon the merits, enter judgment for the entire amount in controversy, even though a portion of the cause of action had not accrued at the time suit was commenced. In Seches v. Bard, supra, the dispute concerned the rights of the parties to a total fund of $78,000, of which $48,000 was represented by a series of $4,000 notes payable progressively each month. At the time the action was commenced, five of the notes, totaling $20,000, had not matured and were unpaid. No plea in abatement was entered and the action was tried on its merits without reference to any possible prematurity. A judgment disposing of the entire sum in controversy was affirmed upon appeal.

Another case involving installment payments not matured at the commencement of the action is Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 128 Cal.App. 265, 16 P.2d 1040. The Association brought an action against the Exchange to recover almost $100,000 payable in installments. Three installments, aggregating some $30,000, had not matured at the date suit was brought. No plea in abatement was entered and the case was not tried upon the theory that only a portion of the debt was then due. Trial was had upon the issue of breach of contract. Judgment was entered in favor of the Association for the total amount, specifying that the sum of $30,000 would become payable in installments upon designated future dates. The judgment provided: "That defendant shall pay said sums to plaintiff as they become due, as aforesaid; that execution shall issue for each amount as each amount shall become due".

Upon appeal, the judgment was modified to read: " 'That execution shall not issue for such future instalments until after the date when such instalments shall become severally due.' " Relying upon Seches v. Bard, supra, the court said: "So far as the record speaks, the conclusion is inescapable that the case was tried upon the theory that, if the association was entitled to any of the refunds, it was entitled to all. It is too late now to take a different position." 128 Cal.App. at page 283, 16 P.2d at page 1047. The modification of the judgment was required for the protection of the right of the judgment debtor to be saved from execution until the amounts payable became overdue. It in no way challenged the validity of the judgment for amounts not then matured and, in fact, emphasized the power of the trial court to grant such judgment, subject to proper safeguards upon the issuance of execution.

Howarth claims, however, that his objections to the proposed findings of fact and conclusions of law constituted seasonable presentation of the defense of prematurity. He apparently bases his argument upon a quotation in the Seches case from Hentsch v. Porter, 10 Cal. 555, 561, that: " 'Where the objection, if true, would only defeat the present right to recover, the defendant, though not compelled to demur or answer, should be obliged to make the objection, by motion or otherwise, before the Court of original jurisdiction, during the term at which the judgment was obtained.' "

Similarly broad language appears in Williams v. Schalk Chemical Co., 11 Cal.App.2d 396, 399, 53 P.2d 1015, 1017. There the appellant was held to be precluded from raising the question of prematurity of the action "for the reason that there was no demurrer, no special defense, no motion to vacate any part of the judgment, nor any motion for a new trial specifically on that ground. In short, the question was not presented to the trial court in any manner, and it cannot be raised, in the absence of some such presentation as suggested, for the first time on appeal." In Loomis Fruit Growers' Ass'n v. California Fruit Exchange, supra, 128 Cal.App. at page 283, 16 P.2d 1040, the court also implied that the defense might be raised in some manner other than by plea.

[5] However, a more accurate statement of the rule appears to be "that the plea that an action has been prematurely brought is in the nature of a dilatory plea which must be specially pleaded in order to be available as a defense." Verbeck v. Clymer, 202 Cal. 557, 562, 261 P. 1017, 1018; Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 573, 194 P. 1024; Mears v. Jeffry, 80 Cal.App.2d 610, 615, 182 P.2d 294. In Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561, the opinion assumes that an objection based upon prematurity of the action was made in the statement on motion for a new trial. At that time, the bringing of a new suit would have been barred by a statute of limitations. No cause of action existed at the time the suit was commenced. The court held that the defense had not been seasonably urged and was waived. It said that "this is a mere matter of abatement, which is waived unless pleaded. Formerly, such pleas could only be interposed before a plea to the merit. Under our Code all defenses may be included in one answer, but, if a defense which is mere matter of abatement is not made by that time, it should be deemed waived. * * * It is simply matter of abatement,—a defense which is not favored, and must be made by plea, and in proper

time, or it is waived. If so waived, the court will be rarely justified in permitting the defense to be made later." 124 Cal. at pages 574—575, 57 P. at page 563.

[6] Likewise, in Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 405–406, 154 P.2d 399, the court held that the defense of prematurity was not asserted promptly when raised for the first time by a motion for nonsuit. Howarth attempts to distinguish the Bollinger case upon the ground that the statute of limitations had barred a new suit in that action, whereas the statute has not run against any installment here involved. The facts in the Bollinger and Bemmerly cases merely emphasize the reason for the rule, but do not alter the requirement that the defense be asserted promptly and plainly by plea. Assuming that the trial court, under the facts of this case, could have permitted the defense to be raised after waiver, it did not do so. If it is a matter of judicial discretion, as the Bemmerly case indicates, here there is no showing of an abuse of such discretion.

[7] For these reasons, it is now too late for Howarth to complain either of the award of installments and interest accrued at the date of judgment or of the determination of Kelley's right to unmatured installments. The provision of the judgment "that execution shall issue as against said defendant Cody W. Howarth only in accordance herewith" is adequate to protect Howarth's rights insofar as execution upon future installments is concerned. Unlike the judgment which was modified in the Loomis case, supra, 128 Cal.App. at page 283, 16 P.2d 1040, the provision for execution here may be read as permitting issuance of execution only after the date when the installments shall become severally due.

[8, 9] Howarth further contends that the evidence is insufficient to sustain the findings that the promissory note was executed and delivered for good and sufficient consideration and that it was not executed pursuant to an agreement to lend money at a rate of interest in excess of 12 per cent per annum. Even if we assume that Howarth may complain of these findings, though not a party to the note, his contention is without merit. The evidence is susceptible of the construction that William Upshaw, or his company, received adequate consideration for the note, either upon its execution or prior thereto. William Upshaw testified that Kelley loaned money to the business. He said that "the money that went into the Coast Enameling was around $15,000. The other was prior to the $15,000 loan." According to the witness, Kelley had invested in excess of $15,000. " 'Where different conclusions may reasonably be drawn from the evidence by different minds the trial court's findings are not to be disturbed on appeal.' " Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395, 399; Connor v. Owen, 28 Cal.App.2d 591, 592–593, 82 P.2d 1114.

[10] The findings in regard to the total sum paid on the note, Howarth claims, are not supported by the evidence. For this argument, he relies upon testimony by Kelley that the total payments from the inception of the note, both before and after the extension agreement, were $4,700, including $1,200 paid at the time the agreement was executed. Because of this testimony, Howarth says, he must be credited with the total payment of $4,700 in computing the amount which he owes. However, the amount and time of the payments were not in issue. By his answer, Howarth admitted the payment of $4,402.74 upon the extension agreement. Incorporated in his answer and admitted into evidence, was a copy of the agreement, which showed upon its face that the original debt had been reduced by $300 by the date of the agreement. The findings, therefore, are based upon the pleadings and the evidence.

Howarth's contention that the finding concerning the amount of his indebtedness is not supported by the evidence is based upon his claim that the action was premature in part. For the reasons which have been stated, he cannot now assert this defense.

[11, 12] Howarth further objects to the finding that Kelley did not grant Goodwin a thirty-day option to purchase the promissory note, but offered to give him such an option "to purchase the right, title and in-

terest, if any, of plaintiff, in those certain fixtures and assets of" Coast Enameling, and that no tender was made of the option price. Although the finding is inartificially drawn, it is not prejudicially erroneous. Kelley's testimony that there was no consideration for the offer, and that he withdrew it before acceptance, was undisputed. The trial court's finding says no more than that Kelley's "offer" was revoked prior to acceptance. The evidence is clearly sufficient to sustain the finding.

"'An agreement for an option not based upon consideration is simply a continuing offer which may be revoked at any time.'" Thomas v. Birch, 178 Cal. 483, 489, 173 P. 1102, 1104. Although the evidence is conflicting upon the question of whether tender of the $2,500 was ever made, Howarth's own testimony was to the effect that he did not make tender until after revocation of the offer. In any event, the evidence is sufficient to sustain the finding that no tender was ever made.

Howarth contends that the finding that Kelley offered Goodwin an option to purchase the chattel mortgage is inconsistent with the finding that the mortgage had been previously assigned and released. He further argues that the evidence does not support the finding that Kelley offered Goodwin an option to purchase his "right, title and interest, * * * in those certain fixtures and assets of a business." Nor does the evidence support the finding that the assignment and release of the mortgage was part of the consideration for the extension agreement, Howarth says. If Kelley did not assign the mortgage, Howarth argues, it remains as security for the indebtedness and should have been foreclosed. If he did assign it, the $8,800 consideration recited should be credited upon the entire indebtedness.

The finding that Kelley offered Goodwin an option to purchase his "right, title and interest" in the fixtures is supported by the evidence. Although the phraseology of the finding is inept, it is clear from the record that Kelley's only interest in the fixtures at any time was the chattel mortgage. Any error in the terminology is not prejudicial to Howarth. The finding properly may be interpreted as meaning that Kelley offered Goodwin an option to purchase the chattel mortgage.

[13] The evidence also is sufficient to support the finding that the assignment was part of the consideration for the extension agreement. Kelley testified that negotiations were conducted with Howarth prior to execution of the extension agreement. He then identified the assignment, which was admitted into evidence. From this evidence, the trier of fact could conclude that the assignment formed a part of the consideration for the agreement.

[14] Even if Kelley did not assign the mortgage, there is no merit to Howarth's argument that it should have been foreclosed. The mortgage was not security for Howarth's promise, but only for the promissory note, to which he was not a party. This Howarth admitted by his pleadings. "'The mortgage only affects the remedy against the mortgagor' or primary debtor * * * It never has been, nor has it ever been declared to be, the law in this state, that a mortgagee may not take security other and in addition to his mortgage security, and, if the contract with the giver of such security permits, may not enforce his debt from this third party, without reference to the mortgagor and his security." Martin v. Becker, 169 Cal. 301, 306–307, 146 P. 665, 667; cf. Loeb v. Christie, 6 Cal.2d 416, 418, 57 P.2d 1303; Security-First Nat. Bank v. Cooper, 62 Cal. App.2d 653, 666, 145 P.2d 722.

[15, 16] In any event, Kelley's purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity. Johnson v. Razy, 181 Cal. 342, 344, 184 P. 657; Adler v. Sargent, 109 Cal. 42, 48–49, 41 P. 799; Hyde v. Mangan, 88 Cal. 319, 327, 26 P. 180. In like manner, the option to purchase the mortgage, if it had been accepted, would have been of no legal effect. The rights of the parties, therefore, can be determined only upon the basis of the extension agreement.

[17] Insofar as the consideration recited in the assignment is concerned, the uncontradicted testimony is to the effect that the total amount paid upon the indebt-

edness was $4,702.74. From this, the trier of fact was entitled to believe that the recited consideration of $8,800 was not paid, or was merely a reference to the identical settlement figure in the extension agreement. Therefore, there is no merit to Howarth's contention that an additional $8,800 should be credited upon the indebtedness.

Howarth's last contention, that the judgment is not supported by the evidence, is a reiteration of his preceding arguments and does not require discussion.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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39 Cal.2d 235

PEOPLE v. GILLIAM.

Cr. 5300.

Supreme Court of California, in Bank.
July 9, 1952.

Defendant was convicted in the Superior Court, Fresno County, Philip Conley, J., of murder in the first degree, and he appealed from the judgment and from an order denying motion for new trial. The Supreme Court, Shank, J., held that evidence supported implied finding that defendant had requisite malice and intent in perpetrating mayhem which would justify first degree murder verdict.

Judgment and order affirmed.

Carter, J., dissented.

1. Homicide 🔑237

In homicide prosecution, evidence was sufficient to support implied finding that defendant was capable of deliberation, intent and malice in perpetrating mayhem, which would justify verdict of first-degree murder. Pen.Code, § 189.

2. Homicide 🔑235

In homicide prosecution, evidence supported conclusion that mayhem was perpetrated while victim was still alive. Pen. Code, § 189.

3. Criminal Law 🔑1172(1)

Instruction that person is guilty of mayhem though he had no intention of doing particular physical injury constituting mayhem which resulted from attack was not prejudicial, if erroneous, where record clearly supported implied finding that defendant intended assault which resulted in death. Pen.Code, § 189.

4. Criminal Law 🔑1166(3)

Where defendant was granted two postponements for arraignment to obtain material for trial, and third postponement was refused but reservation granted to make request for continuance of trial if deemed advisable, defendant had reasonable time to determine nature of plea and refusal to grant postponement was not prejudicial in view of preservation of right for further continuances.

5. Criminal Law 🔑938(1)

In prosecution for murder caused by mayhem, there was no basis for new trial or for reduction of first-degree murder verdict in absence of showing that material obtained from government agencies after trial was other than accumulative evidence or that it would have had material effect on verdict or outcome of motion for new trial. Pen.Code, § 189.

6. Criminal Law 🔑245

In murder prosecution, failure to move to set aside information was waiver of alleged denial of due process because defendant was not informed of rights nor represented by counsel at preliminary hearing. Pen.Code, §§ 995, 996.

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Floyd H. Hyde and Alfred Thomas, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Wallace G. Colthurst, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal from a judgment imposing the death penalty and from the order denying a motion for a new trial.

On August 30, 1951, the defendant, known as "Red", was in the county jail in Firebaugh because of intoxication. On September 1st he was released to work as a flagman at road construction. He worked during the morning. At noon and during the afternoon he drank some wine and beer. Later he consumed a small amount of food at a cafe and drank more beer. He testified that a Mexican in the cafe beckoned him to the rest room where he gave the defendant a Marijuana cigarette. After taking one or two puffs he claimed to have "blacked out" and did not remember anything of the events that followed.

Some time between 8:00 and 8:30 that night the Chief of Police saw the defendant and said he should be taken into custody. The defendant, 35 years of age and weighing about 212 pounds, was known to cause trouble after consuming intoxicating liquor. He was placed in a jail cell with three men, Leyva, Saccum, and Paul Self, the decedent. When the officers locked the door the defendant went to the aperture and cursed them. He then turned his attention to the men in the cell. He took Leyva's hand saying "You are my friend, huh?" Levya complained that the defendant was too stout and that his handshake hurt. Defendant shook hands with Saccum who objected for the same reason. He "messed" with Leyva and again with Saccum who remarked that he was ruptured. He pushed them around for a while, twisting one's head, the other's arm, throwing one into a bunk and out again, until Saccum said that he was sick and asked to be let alone. The defendant then noticed Self, who was lying in the lowest bunk, and ordered him to get out. There was no response and the defendant pulled him out with the blankets. Self offered no physical resistance, but calling him "Red" said he had done nothing and not to hit him. The defendant struck him several times so that his head fell against the wall about eighteen inches above the floor. The defendant invited him to get up, calling him a name. Saccum told him the man was unconscious and couldn't get up. The defendant suggested that Saccum shut his mouth or he'd get some of it. He again bothered Saccum and Leyva alternately until asked to desist. The defendant then returned to Self and continued kicking him, Saccum repeatedly asking him to stop but being told to "shut up." At some point the defendant picked up Self and dropped him on the floor, the head striking first. At another he kicked Self in the face with his heel, tore the flesh, and displaced an eye. He picked him up, held his feet apart and kicked him in the groin. Finally when gurgling sounds indicated the last of Self, the defendant sat down and ordered Saccum to pull off his shoes which were wet with blood. Saccum complied. These activities occupied considerably more than an hour. At about 10:15 p. m. they heard a car and Saccum stated that he thought the "cops" were coming. The defendant rolled into a bunk telling them to say nothing or they'd get the same treatment. The officers came in and remarked "it looks like we have a dead man here." They handcuffed "Red" who exclaimed that if the man wasn't dead he would finish him off. He was then taken to Fresno county jail where he refused to make a statement, saying that he supposed they would "fry" him but corrected himself to indicate that in California it would be "gas." An autopsy on the decedent revealed that death ensued from shock and hemorrhage caused by multiple fractures to the skull and torso.

On his arraignment the defendant was informed as to his legal rights and requested counsel. Attorneys Floyd H. Hyde and Alfred Thomas were appointed The defendant pleaded not guilty and not guilty by reason of insanity. Trial was had on each issue and consumed eight trial days. On the issue of not guilty the jury found the defendant guilty of murder in the first degree without recommendation; and on the issue of not guilty by reason of insanity he was found to have been sane at the time the offense was committed.

The defendant moved for a new trial on the statutory grounds or for reduction of the degree of the crime on the ground that the evidence was insufficient to indicate that he had the requisite intent to justify a verdict of first degree murder. The motion was denied.

No contention is made that the verdict of sanity is unsupported by the evidence.

On the issue of guilt the record does not support the contention that the defendant suffered a blackout in the nature of a psychomotor or psychic seizure. Facts concerning his background and the results of laboratory tests were put in evidence. The defendant was born in Arkansas. His mother died when he was two years of age and he was raised by grandparents on a farm. He attended school to the sixth grade at age 13, having repeated some grades. His father remarried several times. Accidents indicate two head injuries, one of which occurred while he was in the army. He claims to have suffered a four-day blackout in 1946. He married. He has a history of addiction to alcohol which increased after marital difficulties developed. He joined the army to get away from them, was sent overseas but was discharged for habitual drunkenness. An electroencephalograph examination and reading, a laboratory test used in the practice of neurology, indicates at most a borderline abnormal, but does not show a major disorder.

The defendant contends that there is no evidence of premeditation or of facts sufficient to show a purpose to torture or to perpetrate mayhem (§ 189, Penal Code), which would justify the verdict of first-degree murder. He relies on People v. Tubby, 34 Cal.2d 72, 207 P.2d 51, to indicate that the elements of torture were not present. He contends that the evidence shows that he was in a psychic seizure or in a fighting mood brought on by an intoxicated condition; that his primary purpose was not to cause suffering, to put out an eye, or to kill, but only to play or fight with the other men in the cell. He also contends that death did not occur in the perpetration of mayhem because there is no evidence that the victim was alive when he kicked him in the face.

There is sufficient evidence to support the jury's implied finding that the defendant was not suffering from a temporary amnesia or from any condition or disorder which prevented him from having the requisite malice and intent. There was no provocation for his conduct and the circumstances attending the killing showed an abandoned and malignant heart together with a consciousness of guilt which supports the verdict. People v. Isby, 30 Cal.2d 879, 890, 186 P.2d 405. This is further emphasized by testimony that only when the victim stopped breathing did the defendant desist in his efforts and that on his arrest he offered no resistance but admitted his guilt freely. The record supports the jury's implied finding that he was capable of deliberation, intent, and malice. An officer asked him if he realized what had happened. He replied, "What are you going to do, fry me * * * Well, you don't scare me in any way * * * that isn't the first time I've killed anybody * * * I am not afraid to die." The defendant made statements to several of the officers that if the decedent was not dead he would finish him off. Asked why, he replied that he couldn't stand him any longer, but on being pressed would give no reason, saying "never mind." After he corrected himself as to the method of execution in California, the defendant was asked whether there was any possibility of mistake as to who did the killing. Referring to the blood on his clothes, he asked them to figure it out for themselves.

[1, 2] On the record the jury could justifiably conclude that the defendant had the requisite intent which would support the verdict on any or all of the theories submitted to it. Considering the deliberateness of his acts and statements, the time intervening since his drinking, and the length of time consumed in committing the assault, the jury could infer that the defendant knew what he was doing and that he committed the acts with homicidal intent. The jury could also conclude that responding to an unprovoked sadistic tendency he had the purpose and intent to cause cruel suffering on the part of the decedent, and that among the torturous acts of brutality he maliciously gouged the victim's eye with his heel. The evidence that the defendant did not desist until his victim stopped breathing supports the con-

clusion that he was alive when that kick was administered. The justification for the implied findings of the jury, which support the verdict of first degree on any or all of these theories, differentiates the result from that in People v. Tubby, supra, 34 Cal.2d 72, 207 P.2d 51, and does not call for the application of that case nor of other cases on which the defendant relies.

[3] There is no merit in the contentions of misdirection in the instructions on torture and mayhem. Requested instructions given as modified embodied the elements of intent, purpose and malice. The court on its own motion gave an instruction including the definitions of mayhem and attempted mayhem. That instruction stated that a person was guilty of mayhem even though he had no intention of doing the particular physical injury constituting mayhem which resulted from the attack. The defendant contends that this lack of intent cannot apply to attempted mayhem. See People v. Nolan, 126 Cal.App. 623, 637–638, 14 P.2d 880. No contention is made that as to all other issues the jury was not fully and fairly instructed. Inasmuch as the record clearly supports the jury's implied finding that the defendant maliciously intended the prolonged assault, including the kick which gouged the eye, and that as a result Self is dead, there can be no question of prejudice if error in the respect claimed be assumed.

[4, 5] The defendant was granted two postponements for his arraignment. He contends that by the denial of a third request for a continuance he was refused a reasonable delay in order to obtain material from government agencies considered necessary in the preparation of a proper plea. At the time of the request (October 1st) the defendant was permitted to enter the plea of not guilty with a reservation of the right to change his plea to include that of not guilty by reason of insanity and make a request for continuance of the trial if deemed advisable. That course was followed and on October 31 the defendant changed his plea to not guilty and not guilty by reason of insanity. The trial on the plea of not guilty commenced on November 6th and consumed six trial days. The trial on the plea of not guilty by reason of insanity consumed two days. No further request for a continuance was made. There is no merit in the contention that the defendant was not afforded a reasonable time in which to determine the nature of his plea. In effect he was given the time requested for the investigation reasonably necessary for entry of the additional plea and preparation for trial thereon. His contention that the material sought arrived too late for use on the trial or on the motion for new trial, and that it was not merely cumulative, was argued on the hearing on the appeal. There is no showing that the additional evidentiary matter was other than cumulative or that it would have had a material effect on the verdict or on the outcome of the motion for a new trial. Since also the opportunity to ask for further continuances was preserved no prejudice appears from the refusal to grant the additional delay for arraignment. Nor can it be said that there is any basis for a new trial or for a reduction of the degree of the crime.

[6] The defendant contends that he was denied due process because he was not informed of his rights nor represented by counsel on his preliminary hearing. That contention is not a subject for consideration now. The defendant did not move to set aside the information pursuant to Section 995 of the Penal Code. The omissions of which he complains affect the legality of his commitment on the preliminary hearing. By failing to move to set aside the information he has waived the alleged invalidity. Section 996 Penal Code; In re Tedford, 31 Cal.2d 693, 192 P.2d 3. Unlike the case of In re James, 38 Cal.2d 302, 240 P.2d 596, on which reliance is placed, the defendant was ably represented by counsel and was cognizant of his rights on his trial in the superior court. Nothing appears to indicate that he did not have a full and fair trial.

The judgment and the order denying the motion for new trial are affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

On the authority of People v. Tubby, 34 Cal.2d 72, 207 P.2d 51, I would modify the judgment by reducing the degree of crime to murder of the second degree and as so modified affirm the judgment.

39 Cal.2d 193

PEOPLE v. BALLENTINE.

Cr. 5307.

Supreme Court of California, in Bank.

July 7, 1952.

Defendant pleaded guilty, to having committed the crimes of murder and of robbery, without representation by counsel, and, on the charge of murder, the death penalty was imposed by the Superior Court, Santa Clara County, William F. James, J., and defendant appealed. The Supreme Court, Edmonds, J., held that court was prohibited by statute from receiving a plea of guilty to a felony for which maximum punishment was death made by a defendant not represented by counsel.

Judgment reversed with directions.

1. Criminal Law 🔑264

Statute prohibiting receipt of plea of guilty of felony for which maximum punishment is death from defendant who does not appear with counsel does not prevent a defendant from waiving his right to counsel and defending himself but merely prohibits court from receiving a plea so made. Pen. Code, § 1018.

2. Criminal Law 🔑264, 300

When defendant, who is charged with crime the maximum punishment for which is death, waives right to counsel but refuses to answer charge by acceptable pleading, trial court must enter a plea of not guilty, and cause should proceed to trial, and defendant may represent himself, subject to requirement that waiver of right of counsel was made understandingly, competently, and voluntarily in the exercise of the free choice. Pen.Code, §§ 1018, 1024.

3. Criminal Law 🔑264

Although a defendant has a right to defend himself in person in a criminal prosecution, he is not guaranteed the right to plead guilty to a charge of a felony punishable with death except within statutory limitation that court may receive such a plea only when defendant is represented by counsel. Pen.Code, § 1018; Const. art. 1, §§ 8, 13.

4. Criminal Law 🔑264

A defendant, who is not constitutionally guaranteed right to plead guilty to a charge of a felony punishable with death, is not deprived of any right by being permitted to enter such plea only if he is represented by counsel, and validity of limitation upon entry of the plea is not affected by provision of statute permitting the plea when defendant has representation. Pen.Code, § 1018; Const. art. 1, § 8.

5. Criminal Law 🔑1186(1)

Where defendant waived counsel and entered pleas of guilty to charges of first degree robbery and murder in first degree committed upon the victim of robbery, but appealed only on ground that waiver of counsel as to murder charge had been improperly allowed, judgment of conviction of both crimes would be reversed so that state might not rely on conclusive conviction of robbery to prove murder in first degree by showing a killing in the perpetration of said robbery. Pen.Code, § 1018.

Callaghan, Giannini & Anello and Raymond G. Callaghan, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Wallace Colthurst, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Robert Thomas Ballentine, without representation by counsel, pleaded guilty to having committed the crimes of murder and robbery. After hearing evidence, the court determined that each crime was of the first degree. Upon the count charging robbery, Ballentine was sentenced to imprisonment for the period prescribed by law. On the charge of murder, the death penalty was imposed. The principal question presented upon the appeal, which is before this court pursuant to the provisions of section 1239(b) of the Penal Code, concerns the rights of Ballentine under section 1018 of that code relating to pleas of guilty.

When he appeared for arraignment, Ballentine was accompanied by an attorney. A continuance of one week was granted. At the next hearing, the attorney informed the court that he was "withdrawing from the case, Mr. Ballentine has no objection". To the court's question, "That is correct?" Ballentine replied, "Yes." The judge then said: "You are entitled to have an attorney. You ought to have one." Ballentine answered: "I don't wish to have an attorney, I waive it." He was then asked: "Do you object to the Court appointing one?" He replied: "I don't object to one, no. I am going to plead guilty. I can't see the sense of having one." Ballentine said that he realized the seriousness of the charge against him and knew he could be sentenced to death. He stated that, before the magistrate for preliminary examination, he was advised of all of his rights, including the right to representation by an attorney.

Commenting that, "I can't force anything on you, Ballentine", the judge then informed him in detail concerning all of his legal rights. After stating that he was entitled to be represented by an attorney at all stages in the proceedings, the judge told Ballentine that if he was unable to employ counsel the court would appoint one for him.

Following Ballentine's pleas of guilty to each count of the information and his admission of two prior convictions of felonies, the judge again inquired: "You still don't want an attorney?" Ballentine answered, "No." The judge asked: "Did you talk with Mr. Chargin, who was advising you in the meantime, have you?" Ballentine said: "Yes, I talked to him." To the question, "He has given you such advice—" Ballentine replied, "No, he hasn't given me any advice." Ballentine said that he understood that he could have an attorney. Thereupon the court ordered his guilty pleas and admissions entered by the clerk. At the commencement of the hearing to determine the degree of the crimes charged, the judge again inquired: "You still have no Counsel?" Ballentine answered: "No, I haven't." To the court's question, "You still don't want one?" he replied, "No."

Ballentine contends that the trial judge was without authority to receive and act upon his plea of guilty entered without representation by counsel. The position of the attorney general is that the acceptance of the plea did not constitute prejudicial error because Ballentine intelligently and voluntarily waived his right to counsel.

Section 1018 of the Penal Code reads in part: "No plea of guilty of a felony for which the maximum punishment is death * * * shall be received from a defendant who does not appear with counsel". The state relies upon Article I, section 13, of the Constitution which guarantees to one accused of crime the right to "appear and defend, in person and with counsel." The attorney general argues that the code provision should not be construed to abrogate Ballentine's right to represent himself.

[1, 2] The statute, however, does not prevent a defendant from waiving his right to the aid of counsel and defending himself. It merely prohibits the court from receiving a plea of guilty to a felony for which the maximum punishment is death made by a defendant not represented by counsel. Should a defendant waive his right to counsel and refuse to answer the charge against him by an acceptable pleading, the court must enter a plea of not guilty for him. Pen.Code, § 1024. The cause would then proceed to trial and the defendant might represent himself, subject to the requirement that his waiver of the right to counsel was made understandingly, competently, and voluntarily in the exercise

of a free choice. Cf. In re James, 38 Cal.2d 302, 313, 240 P.2d 596; People v. Chesser, 29 Cal.2d 815, 822, 178 P.2d 761.

[3] Although a defendant has the right to defend himself in person in a criminal prosecution, Const., Art. I, § 13, he is not guaranteed the right to plead guilty to a charge of a felony punishable with death. In that situation, "such proceedings shall be had as are * * * prescribed by law". Const., Art. I, § 8. The Legislature has deprived the court of the power to accept a guilty plea from a defendant charged with a felony punishable with death when he is not represented by counsel.

Our statute, enacted in 1949, is similar to those in other jurisdictions designed to protect adequately the rights of a defendant charged with a capital offense. New Jersey, since 1893, has provided that: "In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea should be offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case in manner aforesaid." N.J.S.A. 2:138–3. The constitutionality of this provision was upheld in State v. Genz, 57 N.J.L. 459, 31 A. 1037, against the contention that the statute deprived the defendant of the right to enter a plea of guilty.

Louisiana has a similar requirement which provides: "No court has authority to receive an unqualified plea of guilty in any capital case, and if any defendant so plead, the court shall refuse to receive the plea and shall order the plea of not guilty entered for him." LSA–R.S. 15:262. In New York it is provided that: "A conviction shall not be had upon a plea of guilty where the crime charged is or may be punishable by death." Code Cr.Proc. § 332.

[4] The principal difference between our statute and those of some other jurisdictions is that, in this state, a defendant appearing with counsel may enter a plea of guilty to a felony punishable by death, whereas elsewhere the plea is forbidden. Not having an absolute right to enter a plea of guilty, the defendant is not deprived of any right by being permitted to enter the plea only if he is represented by counsel. The validity of the limitation upon entry of the plea is not affected, therefore, by the provision of our statute permitting the plea when the defendant has representation.

[5] Ballentine has taken no appeal from that portion of the judgment determining that he is guilty of robbery in the first degree. However, the murder to which he pleaded guilty was committed in the course of the robbery of which he has been convicted. The same person was the victim of both crimes. The trial court found the killing to be murder in the first degree because it was committed in the perpetration of a robbery. Proof of the robbery, therefore, was essential to the conviction of murder in the first degree. If, on retrial, the conviction of robbery were to be deemed conclusive, the state would be required only to prove the killing in its perpetration to support a judgment of murder in the first degree. Under these circumstances, the entire judgment should be reversed.

The judgment is reversed with directions to the trial court to strike from its records Ballentine's plea of guilty to the charge of murder. The court is also directed to permit Ballentine to withdraw his plea of guilty to the charge of robbery if he be so advised. Further proceedings in the cause shall be had in accordance with the views expressed herein. The petition for leave to produce additional evidence is denied.

GIBSON, C. J., and SKENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

39 Cal.2d 230

GREEN v. GORDON et al.

S. F. 18523.

Supreme Court of California, in Bank.
July 9, 1952.

Mandamus action by person convicted of first degree murder, whose sentence of death was commuted to life imprisonment without parole, to compel Adult Authority to entertain his application for parole. The Superior Court, Marin County, Jordan L. Martinelli, J., entered an order to show cause, and, upon general demurrer to the petition, rendered judgment of dismissal, and petitioner appealed. The Supreme Court, Gibson, C. J., held that the governor had the power to condition the commutation so as to deny parole, though the statutory penalties for first degree murder were either death or life imprisonment with possibility of parole.

Affirmed.

Carter, J., dissented.

Prior opinion Cal.App., 236 P.2d 611.

1. Habeas Corpus ⚷23
Mandamus ⚷81

Habeas corpus may be used to test validity of terms of commutation, but mandamus may also be used to compel Adult Authority to entertain an application for parole if it has wrongfully refused to pass on such application. Pen.Code, § 3040 et seq.; Const. art. 7, § 1.

2. Motions ⚷24

An "order to show cause" is in the nature of a citation to a party to appear at a stated time and place to show why the requested relief should not be granted.

See publication Words and Phrases, for other judicial constructions and definitions of "Order to Show Cause".

3. Motions ⚷33

A showing on general demurrer that petition does not state sufficient facts to justify relief is a complete answer to an order to show cause, and the court is then warranted in discharging the order and dismissing the proceeding.

4. Motions ⚷33

Though court had issued order to show cause, it had power to dispose of matter on general demurrer to petition without making express findings on issues presented.

5. Pardon ⚷13

A commutation of sentence may not be imposed on a prisoner without his consent, but if he accepts the commutation, he must take it subject to the specified conditions thereof. Pen.Code, §§ 190, 3040 et seq.; Const. art. 7, § 1.

6. Pardon ⚷14.1

After acceptance by prisoner of commutation of sentence, validity of conditions of commutation depends on their reasonableness. Pen.Code, §§ 190, 3040 et seq.; Const. art. 7, § 1.

7. Pardon ⚷14.2

Condition that death sentence be commuted to life imprisonment without parole was reasonable. Pen.Code, §§ 190, 3040 et seq.; Const. art. 7, § 1.

8. Pardon ⚷14.2

The penalties prescribed by statute for first degree murder are ones to be imposed by trial court upon conviction, and the statutory provisions relating to such penalties and the right to parole do not purport to limit governor's power to impose conditions upon commutation of sentence, and therefore governor had power to commute death sentence to life imprisonment without parole, though statutory punishment for first degree murder provided only for death or life imprisonment with the possibility of parole. Pen.Code, §§ 190, 3040 et seq.; Const. art. 7, § 1.

◆

Elizabeth Cassidy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondents.

GIBSON, Chief Justice.

In 1932, petitioner was convicted of murder and sentenced to death. After affirmance of the conviction, People v. Green, 217 Cal. 176, 17 P.2d 730, Governor Rolph commuted the sentence to "life imprisonment without parole." Because of the terms of the commutation, the Adult Authority has refused to entertain petitioner's application for parole.

[1] The superior court issued an order to show cause why mandate should not be granted to compel the Adult Authority to consider petitioner's application.* The return consisted of a general demurrer to the petition, and at the hearing thereon the court rendered a judgment of dismissal, from which petitioner has appealed.

[2-4] He contends that by issuing the order to show cause the trial court passed upon the sufficiency of the petition and thereafter had no power to dispose of the matter without making express findings on the issues presented. An order to show cause is in the nature of a citation to a party to appear at a stated time and place to show why the requested relief should not be granted. See Difani v. Riverside Oil Co., 201 Cal. 210, 213-214, 256 P. 210. Obviously, a showing on general demurrer that the petition does not state sufficient facts to justify relief is a complete answer to an order to show cause, and the court is then warranted in discharging the order and dismissing the proceeding.

[5-7] We recently held that a commutation of sentence is in the nature of a favor which, under Article VII, section 1, of the Constitution, may be withheld entirely or granted upon such reasonable conditions, restrictions and limitations as the governor may think proper, that the general statutory regulations relating to parole, Pen. Code, § 3040 et seq., did not amount to an attempt to interfere with the governor's power, and that the withholding of parole upon the commutation of a death sentence to life imprisonment was not unreasonable. In re Collie, 38 Cal.2d 396, 240 P.2d 275. It is, of course, a possibility that in some types of cases the terms of a commutation may be more objectionable to the prisoner than the punishment fixed by his sentence, and a commutation may not be imposed on him without his consent. Cf. In re Peterson, 14 Cal.2d 82, 84-85, 92 P.2d 890. If he accepts the commutation, however, he must take it subject to the specified conditions. Thereafter the validity of the conditions depends on their reasonableness and, the condition imposed here must be held to be a reasonable one. See In re Collie, supra.

[8] Petitioner concedes that the Legislature cannot interfere with the governor's power to commute a sentence of death, but he claims that the Legislature has exclusive control over penalties for crimes, and that the punishment which has been provided for first degree murder is either death or life imprisonment with the possibility of parole. He argues that the governor cannot impose a different punishment, i. e., imprisonment for life without the possibility of parole. The penalties prescribed by statute, however, are the ones to be imposed by the trial court upon conviction of murder, and the statutory provisions relating to such penalties and the right to parole do not purport to limit the governor's power to impose conditions upon a commutation of sentence. See Pen.Code, §§ 190, 3040 et seq.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

While the holding of the majority of this court in this case is in accord with In re Collie, 38 Cal.2d 396, 240 P.2d 275, I have concluded that the last mentioned case was erroneously decided and should therefore be overruled. In my opinion the legal principle here involved is comparatively simple. Article VII, section 1 of the Constitution of California was adopted in 1879. At that time there was no parole law in this state, the first parole law having been enacted in 1893, Stats.1893, p. 183. It is therefore obvious that when Article VII, section 1 was adopted it was not contemplated that the Governor would have power to impose as a condition of commutation of sentence that the prisoner whose sentence was commuted should not be eligible to parole.

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* Although habeas corpus may be used to test the validity of the terms of a commutation, In re Collie, 38 Cal.2d 396, 240 P.2d 275, a petitioner may also use mandate to compel the Adult Authority to entertain an application for parole if it has wrongfully refused to pass on the application. Cf. Hollman v. Warren, 32 Cal.2d 351, 355, 196 P.2d 562; Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 315, 144 P.2d 4.

Section 7 of Article X of the Constitution was adopted in 1936, and in 1940 was amended to read as follows:

> "*Notwithstanding anything contained elsewhere in this Constitution,* the Legislature may provide for the establishment, government, charge and superintendence of all institutions for all persons convicted of felonies. * *
>
> "All existing statutes and constitutional provisions, purporting to create such institutions or such agencies or officers or boards, to so delegate such government, charge and superintendence, to so prescribe such powers, duties, or functions, or to so provide for such *punishment, treatment or supervision* are hereby ratified, validated and declared to be legally effective until the Legislature provides otherwise."

It is under the latter provision of the Constitution which was amended in 1940 that the Legislature has power to provide for the parole of prisoners. The Legislature has provided for a uniform system of parole (see Pen.Code, § 3040 et seq.) and a person sentenced to a life term in the penitentiary is eligible to parole after seven years confinement in prison (see Pen.Code. § 3046). The power of the Legislature to adopt such provision is conferred by section 7 of Article X of the Constitution "notwithstanding anything contained elsewhere in this Constitution" which would include anything contained in section 1 of Article VII of the Constitution, adopted long prior to section 7 of Article X of the Constitution and the parole law.

I think it is clear, therefore, that when section 7 of Article X was framed, it was contemplated that the Legislature should have power to provide for a parole system which would apply to all persons convicted of felonies, and that the Governor should not have power to nullify the parole law by imposing as a condition of commutation of sentence that a prisoner should not be eligible for parole. It seems clear to me that if the Governor has the power to impose such a condition when commuting a death sentence to life imprisonment, he may likewise impose such a condition when commuting a life or other lesser sentence to a lesser term of years. For instance, the Governor could commute a life sentence to 50 years without possibility of parole for 25 years or any other period and thus deprive a prisoner of his right to apply for parole until he had served such time instead of only seven years as provided by statute. Under such a rule a Governor could destroy the uniform operation of any system of parole, at least in its application to life termers.

While I think it is clear that it was not the intention of the framers of section 7 of Article X of the Constitution to interfere with the Governor's power under section 1 of Article VII of the Constitution "to grant reprieves, pardons, and commutations of sentence, after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper," I do not think that it was contemplated that the Governor could impose conditions, restrictions or limitations contrary to express statutory provisions which were enacted by the Legislature pursuant to a subsequent constitutional grant of power to the Legislature. Punishment for crime should be fixed by legislative act and not executive fiat.

It also appears to me that to so construe our constitutional and statutory provisions is to make it possible for the Governor to create a situation where a prisoner such as petitioner here is denied equal protection of the law in violation of the 14th Amendment to the Constitution of the United States.

I would, therefore, reverse the judgment.

39 Cal.2d 224

KUCHEL v. TOLHURST.

L. A. 22060.

Supreme Court of California, in Bank.
July 9, 1952.

Rehearing Denied Aug. 7, 1952.

Proceeding by Thomas H. Kuchel, as Controller of the State of California, against Shelley Rollins Tolhurst, to enforce a demand for additional tax due upon amount of deduction erroneously allowed in original computation of inheritance tax. The Superior Court, Los Angeles County, Frank G. Swain, J., rendered judgment for defendant, and petitioner appealed. The Supreme Court, Schauer, J., held that the final order of the probate court fixing the inheritance tax on the basis of the erroneous computation was conclusive.

Judgment affirmed.

Prior opinion, Cal.App., 239 P.2d 906.

1. Taxation 🔑900(2)

Where proceeding to correct mistake in appraisal, for inheritance tax purposes, of interest taken by will beneficiary, was begun more than six months after making of probate court order fixing tax on basis of the erroneous appraisal, relief could not be given on ground of mistake, inadvertence, surprise or excusable neglect. Code Civ.Proc. § 473; Revenue and Taxation Code, § 14671.

2. Judgment 🔑552

Revenue and Taxation Code provision, relating to the examination at a hearing of any person who appears to be liable for an inheritance tax, is intended to apply only to transfers as to which taxability, tax liability, and amount of tax have not been determined, and language used does not admit of a construction which would abolish or exclude application of principle of res judicata. Revenue and Taxation Code, § 14531.

3. Taxation 🔑900(2)

Revenue and Taxation Code provision relating to the examination at a hearing of person who appears to be liable for an inheritance tax provides State Controller with no authority for the correction of an erroneous estate appraisal on basis of which final order of probate court adjudicating inheritance tax had been entered. Revenue and Taxation Code, § 14531.

4. Taxation 🔑900(2)

Revenue and Taxation Code provisions relating to status of orders, decrees and judgments fixing inheritance taxes indicate legislative intent that no additional tax may be imposed after such an adjudication has been made. Revenue and Taxation Code, §§ 14601, 14672.

5. Judgment 🔑545

The doctrine of res judicata applies to the judgments and orders of the probate court, including an order fixing inheritance taxes, as well as to those of any other court.

6. Judgment 🔑576(1)

Taxation 🔑900(2)

Revenue and Taxation Code provision allowing Superior Court to enter order assessing inheritance tax upon the amount of an erroneously allowed deduction was not intended to apply where tax computed after allowance of erroneous deductions had been adjudicated to be correct by a Superior Court having jurisdiction, but was to apply to those instances in which tax has been assessed and paid without formality of court proceedings, and order entered pursuant to such provision is conclusive and final as to all property included therein. Revenue and Taxation Code, § 13984.

7. Taxation 🔑900(2)

Revenue and Taxation Code provided no authority by which State Controller could correct erroneous estate appraisal on basis of which inheritance tax had been adjudicated by final order of probate court, and, thus, general legal principle that a statute may not be construed as creating a right without a remedy was inapplicable. Revenue and Taxation Code, §§ 13984, 14501, 14515, 14531, 14651.

◆

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Morton L. Barker, Senior Inheritance Tax Atty. and Betty Jo Sheldon, Associate Inheritance Tax Atty., Los Angeles, for appellant.

R. Norman Wenzell, Hollywood, for respondent.

SCHAUER, Justice.

The state controller appeals from a judgment decreeing that no inheritance tax is due the State of California from respondent Shelley Rollins Tolhurst on certain property received by him under the last will and testament of his deceased mother, and that, in effect, all inheritance taxes due from him on such property have been paid and discharged in full. We have concluded that the judgment is correct and should be affirmed.

Respondent was the executor and sole beneficiary under his mother's will, which was probated in proceeding No. 286201 in Los Angeles County. In December, 1948, the inheritance tax appraiser made his written report (Rev. & Tax. Code, § 14506 [1]), which was filed with the superior court in the probate proceeding, that an inheritance tax of $76.59 was due. No objection was filed to the report and on February 14, 1949, an order was made in the probate proceeding fixing the tax at $76.59 (§ 14509). This amount was paid by the executor and reported to the court in his first and final account and report, and petition for distribution. The account was approved, distribution to the executor as sole beneficiary was ordered and made, and the executor was discharged on May 5, 1949.

Some twenty-one months later the controller instituted the proceeding now before us, by filing in the superior court in Los Angeles his "Petition for Determination of Inheritance Tax." From the uncontroverted allegations of the petition and from the record it appears that as to two parcels of real estate in which the decedent owned only undivided fractional interests, the inheritance tax appraiser in computing the value of the property "subject to inheritance tax in the estate of" the decedent erroneously allowed and reported as deductions the entire amount of certain encumbrances which existed against such real estate, "whereas the said encumbrances should have been listed to reflect only the decedent's proportionate share of said encumbrances"; that the difference between the amount which should have been allowed as a deduction and the amount which was allowed is $39,490.74; that the inheritance tax appraiser after preparing the erroneous report but before filing it with the court discovered the error and prepared a new and correct report, but through inadvertence the original (erroneous) report was filed with the court and the court's order fixing the tax was based thereon. In the present proceeding the controller sought an order of the court that an inheritance tax (amounting to some $1,023) is due from respondent upon the $39,490.74 erroneously allowed as a deduction.

Respondent contested the petition on the ground that the court's order fixing the tax had the effect of a judgment (§ 14672), which had long since become final and which was res judicata as to the inheritance tax owing from him. After a trial, the court made its findings of fact and conclusions of law in favor of respondent, judgment was entered accordingly, and the controller appeals.

[1] Inasmuch as this proceeding was commenced more than six months after entry of the order fixing tax, the controller may not, and does not, seek relief under the provisions of section 473 of the Code of Civil Procedure (see Rev. & Tax. Code, § 14671), on the ground of his "mistake, inadvertence, surprise or excusable neglect." Nor does he contend that a basis exists for equity to intervene to set aside the judgment on the ground of extrinsic fraud. (See Wattson v. Dillon (1936), 6 Cal.2d 33, 40, 56 P.2d 220; Neblett v. Pacific Mutual Life Ins. Co. (1943), 22 Cal.2d 393, 397–398, 139 P.2d 934; Gale v. Witt (1948), 31 Cal.2d 362, 365–367, 188 P.2d 755; Jorgensen v. Jorgensen (1948), 32 Cal.2d 13, 18–20, 193 P.2d 728.

[2, 3] The controller does, however, in reliance upon the provisions of section

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[1] Unless otherwise stated, all section citations in this opinion refer to the Revenue and Taxation Code.

13984,[2] contend that, regardless of the prior and final adjudication, he may institute proceedings at any time under the provisions of section 14531[3] to fix an additional tax upon the amount of an erroneously allowed deduction. It is clearly apparent, however, from a reading of section 14531 that that section is intended to apply only to transfers "as to which the taxability, tax liability, and amount of tax have not been determined," and no basis is shown upon which it may be invoked by the controller where, as here, the tax has already been adjudicated by appropriate proceedings in the probate court (§§ 14501, 14515, 14651). The language used does not admit of a construction which would abolish, or exclude application of, the principle of res judicata.

[4, 5] From further study it becomes likewise apparent that not only is no statutory procedure provided for the assessment and collection of an addition to the adjudicated tax under the circumstances here present, but that the provisions of the Revenue and Taxation Code affirmatively indicate a legislative intent that no such additional tax be imposed. In the first place, it is expressly stated in section 14672 that "Every order, decree, or judgment fixing tax or declaring that no tax is due and payable, made or rendered pursuant to this part [i. e., the Inheritance Tax Law], has the force and effect of a judgment in a civil action," and in section 14601 that "An order fixing tax or declaring that no tax is due and payable is conclusive only as to such property as may have been returned in the inventory or inventory and appraisement in the probate proceeding, or as may have been included in transfers disclosed to the inheritance tax appraiser before making his report or issuing his certificate." Inasmuch as the property here involved *was* included in the inventory and appraisement and an order fixing the tax thereon was made, such order is obviously conclusive as to the tax due as to such property. Moreover, it is the firmly established law of this state that the doctrine of res judicata applies to judgments and orders of the probate court, including an order fixing inheritance taxes, as well as to those of any other court. (15 Cal.Jur. 117–118, § 180, and cases there cited; 11a Cal.Jur. 101–102, sec. 46; In re Estate of Rath (1937), 10 Cal.2d 399, 408, 75 P.2d 509, 115 A.L.R. 836; see also In re Estate of Lloyd (1930), 106 Cal.App. 507, 511, 289 P. 892.)

[6] In the second place, it further appears that the provisions of section 13984 (quoted hereinabove in footnote 2), relied upon by the controller, were not intended to apply where the tax computed after allowance of an erroneous deduction has been adjudicated to be correct by the superior court having jurisdiction (§ 13313), but rather to apply to those instances in which the tax has been assessed and paid without the formality of court proceedings. On this point it may be noted that the next succeeding section of the Revenue and Taxation Code (§ 13985), which deals with the allowance as a deduction of a subsequently-established debt, expressly provides that "If a debt is established against an estate after the order

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[2] Section 13984: "Where it is proved to the satisfaction of the superior court having jurisdiction that any deduction was erroneously allowed, the court may enter an order assessing tax upon the amount of the deduction.

"For the purpose of this part, there is no limitation governing the time within which it may be proved that any deduction was erroneously allowed, nor the time within which an order assessing tax on the amount erroneously deducted may be made."

[3] Section 14531: "If, upon the petition of the Controller, it appears to the superior court having jurisdiction (a) that a transfer subject to this part has been made as to which the taxability, tax liability, and amount of tax have not been determined, and (b) that no proceedings are pending in any court in this State in which these matters may be determined, the court shall issue a citation ordering and directing any person who appears liable for the tax, or is known to own all or any part of the property transferred, to appear at a hearing * * * to be examined * * *."

fixing tax is made, the order may on petition after notice to the Controller be modified equitably.

> "For the purpose of this part, there is no limitation governing the time within which a debt may be established against an estate after the order fixing tax is made. However, any petition to have the order modified after the establishment of the debt shall be filed within one year after the debt is established."

The explicit provision that the order fixing tax may be modified equitably where a debt is later established, upon petition filed within one year, and the absence of provision for modification of the order after discovery of an erroneous deduction further indicates an intent by the Legislature that in the latter circumstance such order is conclusive and final as to all property included therein.

[7] Moreover, although no decision has been cited or discovered which interprets or applies the provisions of section 13984 (or the earlier statutes upon which it is based), the converse of the present controversy appears to have been before the court in Kelshaw v. Superior Court (1934), 137 Cal.App. 189, 191, 30 P.2d 432. In that case respondent administratrix had made payment of the exact amount of the tax determined by court order to be due from the estate, but after such order had become final without appeal she sought and obtained a further order that a portion of the tax be refunded by the county treasurer. On petition by the treasurer for prohibition to prevent contempt proceedings against him for failure to make the refund, the administratrix relied upon subd. (4) of section 11 of the Inheritance Tax Act (as then found in Stats. 1929, p. 1846; 1931 Deering's Gen.Laws, Act 8443),[4] which provided that "When any amount of said [inheritance] tax shall have been erroneously paid, the superior court having jurisdiction, on application after notice to the state controller, and on satisfactory proof to it, shall by order require the county treasurer to refund and pay to the * * administrator * * * the amount of such tax so erroneously paid * * *." Despite the seemingly broad language of the quoted portion of the statute, the court, in reliance upon In re Estate of Brown (1925), 196 Cal. 114, 122, 236 P. 144, held that it applied "only to some payment not made in conformity with the order fixing the amount of the tax," and after an original order determining the amount of the inheritance taxes due from an estate had become final without appeal, the court was without jurisdiction to order refund of any portion of the money paid in accordance therewith, "unless authority therefor can be found in the provisions of the inheritance tax law"; that no such authority existed; that the refund order was void as being without the jurisdiction of the court; and that prohibition should issue to halt the contempt proceeding based thereon. Likewise in the present case, we find in the provisions of the inheritance tax law no authority or right for the assessment of the further tax sought by the controller. There is, therefore, no occasion for the application here of the general legal principle, relied upon by the controller, that "a statute may not be construed as creating a right without a remedy." (See Bermite Powder Co. v. Franchise Tax Board (1952), 38 Cal.2d 700, 703, 242 P.2d 9.)

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

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[4] See present sections 14371–14373 of the Revenue and Taxation Code.

112 Cal.App.2d 46

TAYLOR v. LUXOR CAB CO. et al.

No. 15040.

District Court of Appeal, First District, Division 1, California.

June 27, 1952.

Action by Olivia Taylor against Luxor Cab Company and others for personal injuries allegedly sustained when plaintiff was a passenger in a taxicab and the cab was struck in the rear by another automobile. The Superior Court in and for the City & County of San Francisco, Frank T. Deasy, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence was sufficient to show that lack of care of both driver of cab and driver of automobile was contributing cause of accident.

Judgment affirmed.

1. Automobiles 🔑244(36)
Carriers 🔑318(7)

In taxicab passenger's action for personal injuries against owner and driver of taxicab and against motorist who crashed into rear of taxicab, evidence was sufficient to show that lack of care of both cabdriver and motorist was contributing cause of accident.

2. Trial 🔑296(3)

In personal injury action against several defendants, instruction authorizing recovery against that defendant whose negligence resulted in plaintiff's injury was not incomplete, inaccurate or misleading by reason of any omission of elements of proximate cause, in view of other instructions as to necessary elements of negligence and proximate cause.

3. Carriers 🔑316(4)

A passenger injured while riding in a carrier for hire is not deprived of the benefit of the doctrine of res ipsa loquitur merely because the accident involved another vehicle not under the control of the carrier.

4. Carriers 🔑321(21)

Where taxicab passenger who was injured when cab in which she was riding was struck by another automobile from rear, had no personal knowledge of how accident happened, and driver of other automobile testified that cab stopped suddenly without signalling, trial court did not err in instructing jury upon doctrine of res ipsa loquitur.

5. Trial 🔑296(3)

In taxicab passenger's action for personal injuries against driver and owner of taxicab and against driver of automobile which crashed into rear of taxicab, use of word "presumption", without definition, rather than "inference", in res ipsa loquitur instruction, was not misleading in view of other instructions given.

6. Trial 🔑296(3)

Use of words "res ipsa loquitur" in instruction without defining words was not erroneous, where such instruction was one of a series on subject of res ipsa loquitur, and the questioned instruction when read in its context would not mislead jury.

7. Appeal and Error 🔑1064(1)

A mere repetition of instructions, alone, is not reversible error.

8. Trial 🔑296(3)

In taxicab passenger's action for personal injuries against owner and driver of taxicab and against driver of automobile which crashed into rear of taxicab, court's refusal of defendants' requested instructions on unavoidable or inevitable accident was not reversible error where element of inevitability as to each defendant turned upon his lack of negligence or failure of his negligence, if any, to operate as effective cause of injury, and instructions given covered negligence and proximate cause.

◆

Worthington, Park & Worthington, Leonard A. Worthington, San Francisco, for appellants, Luxor and Schwartz.

Francis N. Foley, San Mateo, for appellant, Jack Newman Rabinowitz et al.

Rhein, Dienstag & Levin, Edward Levin, Paul A. Eisler, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff Olivia Taylor, a passenger in a taxicab owned by defendant Luxor Cab Company and driven by defendant Emanuel Schwartz, was injured when the cab was struck by a passenger car owned and driven by defendant Jack Newman Rabinowitz. The jury rendered its verdict in favor of plaintiff and against all three defendants. From the judgment entered thereon, the cab company and Schwartz (hereinafter called Luxor) appealed, as also did Rabinowitz, two separate appeals which have been consolidated.

No question has been raised concerning the extent of plaintiff's injuries or the amount of the damages awarded. The issues pertain to the sufficiency of the evidence to show liability of the part of Rabinowitz on the one hand and the cab company and Schwartz on the other, and the propriety of certain instructions given the jury.

We will consider first the sufficiency of the evidence. The cab was traveling northerly on Fourth Street, taking plaintiff to the Santa Fe bus station near Market Street, in San Francisco. Schwartz testified that he turned left on Fourth Street from Folsom and traveled up Fourth Street toward Market and the Santa Fe bus station. After crossing Mission there were two lanes of traffic on Fourth Street going toward Market. He was in the left lane, the lane nearest the center of the street, traveling at 12 or 14 miles per hour. When he approached Jessie Street, near the bus station, the traffic stopped and he stopped after signalling with his hand. He looked in his rear view mirror, saw this other car behind him coming up at a rate of speed which induced him to keep his brake a little firmer. The car behind swerved to the right and hit the right rear of the cab with the left front bumper driving the cab into the rear of the car ahead. The cab was stopped four to ten seconds before the collision. The cab driver had been maintaining about 10 or 15 feet between the cab and the car ahead.

Rabinowitz testified that he was driving on Fourth Street toward Market Street, between Mission and Market Streets, in the center lane. A car (not the cab here involved) was about 15 feet ahead of him in that lane. The cab was to his right and partly in front of him with its rear bumper about even with his front wheels. The cab started to cut in front of him, he took his foot off the throttle and let the cab cut in. The cab driver did not signal with his hand. The cab was about three or four feet in front of him and traveled about six or ten feet when it suddenly stopped without the driver signalling. He struck the rear of the cab. Neither car moved after the impact, it was a dead bump.

Robert Farmer, who was driving toward Market on Fourth Street, testified that he was intending to turn into the center lane of traffic and saw the cab stopped about 35 feet ahead of him. He was going to move into that space when he looked to the rear and saw Rabinowitz' car coming. Rabinowitz continued forward after the cab had stopped with the other traffic and struck the cab in the rear. The cab was stopped four, five or six seconds before the collision. The cab did not stop suddenly.

Marcus E. Gracia, who knew Rabinowitz, was traveling about two cars behind Rabinowitz. He testified that the cab was in front of Rabinowitz and in the center lane though not in direct line with the traffic in that lane. He did not observe the cab change lanes nor see the cab turn left. He only saw the position of the cab when it came to a stop, when he heard the impact. After the collision he saw that the cab was five to eight feet ahead of Rabinowitz' car and at a slight angle, i. e., it was not in a straight line with the street car tracks on the street.

Plaintiff testified that she was riding in the rear seat of the taxicab, having given directions to be taken to the Santa Fe bus station. She did not recall how heavy the traffic was on Fourth Street. She was not watching the traffic, was talking to a fellow passenger. She did not know whether the cab driver when making a left hand turn on to Fourth Street stayed in the lane nearest the center of the street; she was not watching him. She did not know whether he came over to the right or not. She thought he was traveling in the lane nearest the curb. She guessed he stopped; she did not know; she was busy talking; she did not know if he came to a full stop or was slowing down; the only thing she knew, she was hit; she could not say that the stopping of the cab occurred before the impact she felt. She did not know if he changed his course from the curb to the center of the street; she was not interested in how the cab was traveling. She thought it stopped immediately before the collision. The first thing she really knew, there was this crash, and that is when she first paid attention to where she was. She felt a crash in back of her. The next thing she knew she was across the front seat and back again and struck something in the back of the cab. She did not feel the impact from the front until she felt the one from the rear. She did not see the driver of the other automobile. After the impact it appeared that the cab struck another car in front; there was no lapse of time between the two impacts. There was nothing in the operation of the cab that she objected to; as far as she was concerned the cab driver drove satisfactorily.

[1] Each appellant claims this evidence was not sufficient to support a finding that he was negligent, or, if negligent, that his negligence was the proximate cause of the injury. Each points to the other as the sole causative factor disclosed by the evidence. Each overlooks or minimizes the significance of some of the evidence against him. The evidence that the cab driver stopped suddenly without signalling and that Rabinowitz, then some distance behind the cab, crashed into the cab, would support inferences that neither driver was exercising the degree of care which it was his duty to exercise and that such lack of care of each was a contributing cause. The evidence supports the verdict.

Rabinowitz assigns as prejudicial error the giving of the following instruction: "I direct you to find the Plaintiff's injuries were caused by the negligence of one or the other of the defendants, or by their joint negligence; you will therefore bring in a verdict for the Plaintiff against that defendant whose negligence resulted in the Plaintiff's injuries or, if you find that all of the defendants were negligent, regardless of the degree of the negligence of any of them, I instruct you to bring in a verdict against all of the defendants."

[2] Rabinowitz claims the omission of the element of proximate cause resulted in the court advising the jury they must find against the defendants, or either of them, if negligent, whether such negligence was or was not the proximate cause of plaintiff's injury. That is not literally true. The words "whose negligence *resulted*" include the element of causation, especially when we recall that the instruction quoted did not stand alone. It followed proper and adequate instructions on plaintiff's burden of proving her case by a preponderance of evidence, and the necessary elements of negligence and of proximate cause. Among the latter were these: "So in this case, before the plaintiff can recover here against both defendants or each one individually, as the case may be, it must first appear, and by a preponderance of the evidence, that the defendants were guilty, or each of them was guilty of some act of negligence which contributed proximately to the accident. If, under the instructions of the Court, you should find that the defendant was not guilty of negligence—and, of course, I am speaking now of either one or the other—which proximately contributed to the accident complained of, then of course you will have no occasion to consider the question of damages or the nature or the extent of the injuries. But it may be said now that there must be a verdict in favor of plaintiff against either one or both of the defendants," and "Now, the negligence must be the proximate cause of the injury or injuries, and what do we mean by proximate cause? Well, we say the proximate cause of an event must be understood to be that cause which, in the natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred. It is the efficient cause, the cause

without which the injury would not have occurred. We sometimes define it as the efficient cause of the injury," and "When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently, and as proximate causes, to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution." In the light of these instructions which should be read with it, the questioned instruction was neither incomplete, nor inaccurate, nor misleading. See Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 519–520, 203 P.2d 522; Amidon v. Hebert, 93 Cal.App.2d 225, 227–228, 208 P.2d 733; O'Connor v, City & County of S. F., 92 Cal.App.2d 626, 630–635, 207 P.2d 638; McChristian v. Popkin, 75 Cal.App.2d 249, 257–260, 171 P.2d 85. Rabinowitz has cited several decisions in support of his point but we do not find them applicable. In Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599, the questioned instruction, as to one of its elements, had no application to the facts of the case and, as to another, assumed an issuable fact to have been established as a matter of law. In Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066, the erroneous instruction was accompanied by instructions that incorrectly stated the law, was not aided by correct and adequate instructions. In Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169–170, 153 P.2d 338, there is a statement which, read out of its context, would seem to support Rabinowitz' position here. But that statement was made upon the affirmance of an order granting a new trial. It immediately followed statements to the effect that upon such an appeal all presumptions favor the order as against the verdict and that the order will be affirmed if sustainable upon any ground although the reviewing court might have ruled differently in the first instance. Those statements were accompanied by the observation that on the question of the possible prejudicial effect of a misdirection of the jury the trial judge "was in a position to determine far more accurately than an appellate court the effect of a particular instruction upon the jury and in view of the conflicting testimony concerning the happening of the accident, her conclusion that Finkelstein was prejudiced by the charge complained of rests upon sound grounds. Certainly there is no showing whatever of any abuse of discretion." 25 Cal.2d at page 171, 153 P.2d at page 341. Spear v. Leuenberger, 44 Cal.App.2d 236, 112 P.2d 43, was not a case of a single incomplete instruction which could be and was aided by other instructions. There were incomplete instructions and there were instructions which incorrectly stated the law. Their total effect was prejudicial error: "It appears to us that when all of the instructions herein are considered together, the jury were not clearly sufficiently, and correctly apprised of the law necessarily required to guide them in arriving at a proper verdict, when considered in the light of the sharply conflicting evidence in this case." 44 Cal.App.2d at page 252, 112 P.2d at page 52.

[3, 4] *Luxor claims it was prejudicial error to give these instructions,* which for convenience of reference we have numbered: (1) "* * * I should say that in this case plaintiff is entitled to a verdict and it is the question who are the parties defendant against whom such verdict should be." (2) "But it may be said now that there must be a verdict in favor of plaintiff against either one or both of the defendants." (3) "I direct you to find that the plaintiff's injuries were caused by the negligence of one or the other of the defendants, or by their joint negligence; you will therefore bring in a verdict for the plaintiff against that defendant whose negligence resulted in the Plaintiff's injuries or, if you find that all of the defendants were negligent, regardless of the degree of the negligence of any of them, I instruct you to bring in a verdict against all of the defendants." (4) "Where that which causes an injury is under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management and control use proper

care, it affords reasonable evidence, in the absence of explanation, that the accident is the result of the want of care." Luxor says that by the first three, the jury was given but two tasks (to determine the amount of the verdict and to decide against whom it should be entered) and that by the fourth of these instructions Luxor was put to the burden of showing it was not negligent. Luxor says it would have no quarrel with such an instruction if this were a case of a carrier in motion or which suddenly stopped. That it was not such a case, appellant says, appears from plaintiff's testimony and other witnesses. This argument leaves out the fact that plaintiff was quite uncertain as to what happened (she was talking with a fellow passenger, not paying any attention to traffic), ignores Rabinowitz' testimony that the cab suddenly stopped without signalling and overlooks the principle of law that a passenger injured while riding in a carrier for hire is not deprived of the benefit of the doctrine of *res ipsa loquitur* merely because the accident involved another vehicle not under the control of the carrier. See Stark v. Yellow Cab Co., 90 Cal.App.2d 217, 218–221, 202 P.2d 802, and authorities cited.

[5] *The use of the word "presumption" without defining it, in the following instructions, Luxor assigns as error:* (5) "You are instructed that when it is shown that injury to the passenger was caused by the act of the carrier, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on the carrier's part," and (6) "You are instructed that one of the cases where the mere fact of the accident raises a presumption that defendant was negligent is that of injuries to passengers on vehicles of common carriers, because of the special care that the common carrier owes to its passengers." A similar contention was made in Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533. In overruling that contention the court said: "While it appears to be well settled that under the rule of *res ipsa loquitur* an inference and not a presumption arises on proof by plaintiff of the necessary facts [citations], these terms are often erroneously used interchangeably, and as conveying the same meaning. We find that many lawyers and courts as well make this same mistake. We question whether the ordinary layman, to say nothing of many members of our profession, clearly comprehends the difference in the meaning of these two expressions. While courts have frequently called attention to the erroneous use of the terms, 'presume' and 'presumption' in stating the rule of *res ipsa loquitur,* no decision has been called to our attention in which a judgment has been reversed by reason of the erroneous use of these words. While it may be error, the error, in our opinion, has not prejudiced the defendants in any of their rights." 11 Cal.2d at page 734, 81 P.2d at page 955, 118 A.L.R. 533. In our case, although "inference" instead of "presumption" should have been used, and, "presumption" having been used the court should have defined it, we do not believe the jury was mislead, in view of other instructions given. For example, instructions (5) and (6) were preceded by instructions that the duty of the cab driver toward plaintiff did not make him responsible for the negligence, if any, of the driver of some other vehicle and that the duty to use the utmost care and diligence for the safe carriage of plaintiff as a passenger did not make Luxor an insurer or guarantor of such safety nor did it require the most effective methods of safety the human mind could imagine nor the best that scientific skill might suggest; it called for the exercise of a reasonable degree of skill, the highest care that reasonably could have been exercised consistently with the mode of transportation of its business as a carrier, measured in the light of the best precautions that were in common practical use in the same business and proved to be efficacious at the time of this accident. By other instructions the court advised the jury that plaintiff had the burden of proving the affirmative allegations of the complainant and that the negligence, if any, of either defendant could only be deter-

mined by consideration of all the facts and evidence in the case. In this connection, see Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 564–565, 90 P.2d 371. We conclude that instructions (5) and (6), viewed in their context, a portion of which we have indicated, did not mislead the jury.

[6] *The use of the words "res ipsa loquitur" without defining them, Luxor assigns as error in an instruction* that "The fact that a passenger was injured while riding in the vehicle of the carrier for hire does not deprive her of the benefit of the doctrine *res ipsa loquitur* merely because the accident involved another vehicle not under the control of the carrier." While it is true the court did not in so many words define the expression "res ipsa loquitur," it is also true that this instruction was one of a series on that subject. It immediately followed instructions (5) and (6) and was immediately followed by this explanatory statement: "Where that which causes an injury is under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management and control use proper care, it affords reasonable evidence, in the absence of explanation, that the accident is the result of the want of care." Here, again, the questioned instruction when read in its context convinces us the jury was not misled, the rights of the defendants were not prejudiced. In addition, we note that Luxor has not directed our attention to any instruction offered by it, on the subject of any of the questioned instructions, which might have obviated any of the asserted errors.

[7] *Luxor complains of instructions given concerning its duty as a common carrier "to use the utmost care and diligence for the safe carriage of the Plaintiff as a passenger,"* not because they were improper, merely *because they were repetitious and thus overly emphatic.* We do not so read them. The first time the court used the quoted expression was in defining the degrees of care respectfully owed plaintiff by Luxor and by Rabinowitz. The next time it was for the purpose of defining the meaning of this expression and delimiting its scope,—explaining that Luxor was not an insurer or guarantor of plaintiff's safety, that it need not use the most effective methods of safety imaginable, that it was required to use a reasonable degree of skill, the highest care that reasonably could have been exercised consistently with the mode of transportation used and the practical operation of its business as a carrier. The third time, the court was telling the jury it was the duty of the cab driver to use "the utmost care" to avoid colliding with another car. The fourth time, the court was advising the jury that if they believed from the evidence that the taxicab driver failed to exercise this degree of care "as * * * defined elsewhere in these instructions" and that such failure contributed to proximately cause injury to the plaintiff, then even if they found the driver of the other car negligent, the taxicab company and its employees would also be liable. This was not mere repetition, nor emphasis by way of repetition; no more so than is the use of the term "ordinary care" several times in a set of instructions when that is the applicable standard of care. Such repetition as occurred here was reasonably necessary to a clear and understandable exposition of an applicable principle of law. Moreover, "Mere repetition of instructions, alone, is not reversible error." Rose v. Tandowsky, 80 Cal.App.2d 927, 932, 183 P.2d 347, 351.

[8] *Finally, Luxor predicates reversible error upon the refusal of instructions it requested on unavoidable or inevitable accident.* Luxor says that "Under the factual evidence presented in this case * * * defendants were entitled to the benefit of these instructions," but does not direct our attention to any particular facts in evidence which might require the giving of such an instruction, and cites no authorities. The recent decision of the Supreme Court in Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823, indicates that the giving of such an instruction might not have been improper. That decision has been interpreted as

meaning that "the giving of an instruction on unavoidable accident is proper unless the defendant is negligent as a matter of law." Driver v. Norman, 106 Cal.App.2d 725, 727, 236 P.2d 6, 8. However, it does not follow that the failure to give such an instruction in our case was reversible error. The court in one of its instructions (No. (3), above) directed the jury "to find that the plaintiff's injuries were caused by the negligence of one or the other of the defendants, or by their joint negligence; you will therefore bring in a verdict for the plaintiff against that defendant whose negligence resulted in the Plaintiff's injuries or, if you find that all of the defendants were negligent, regardless of the degree of the negligence of any of them, I instruct you to bring in a verdict against all of the defendants." None of the appellants has taken exception to that instruction, save as to the asserted omission therefrom of certain of the elements of liability, features we have discussed and found not wanting. This indicates that the element of inevitability, as to each defendant respectively, turns upon lack of negligence upon his part or the failure of his negligence, if any, to operate as an effective cause of the injury. The trial court fully advised the jury concerning negligence, proximate cause, plaintiff's burden of proof, and other pertinent factors, and gave two instructions to find in favor of Luxor Cab Company and Schwartz if the jury found that the accident in question was caused solely and entirely by the negligence of the driver of the other car. Inasmuch as "the terms inevitable or unavoidable accident signify an injury which is caused by something other than the actionable negligence of the parties involved," and the "'* * * defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence if any, was not the proximate cause of the injury'". Parker v. Womack, supra, 37 Cal.2d 116, 120 and 120–121, 230 P.2d 823, 826, and the jury was fully advised on those subjects, we find no reversible error in the trial court's failure to give the proffered instructions on inevitable or unavoidable accident. Indeed, the requested instructions might well have confused the jury unless modified to fit in clearly with the instructions given.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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112 Cal.App.2d 251

DE MIRJIAN et al. v. IDEAL HEATING CORP.

Civ. 18827.

District Court of Appeal, Second District, Division 2, California.

July 17, 1952.

Rehearing Denied Aug. 1, 1952.

Hearing Denied Sept. 11, 1952.

Action by Albert DeMirjian, and others, individually, and as copartners doing business under the fictitious name and style of California Art Company, against Ideal Heating Corporation, for damages resulting from fire allegedly caused by defendant corporation acting through its agent. The Superior Court of Los Angeles County, Paul Nourse, J., entered judgment for plaintiffs, and defendant appealed. The plaintiffs cross-appealed on issue of damages. The District Court of Appeal, McComb, J., held that in absence of finding that defendant's agent was performing acts having connection with duties of his employment or which were authorized or ratified by defendant, such acts could not be basis of imposition of liability on defendant.

Judgment reversed.

1. Appeal and Error 🔑989

Appellate court, when reviewing findings of trial court, must read them together, and, if possible, reconcile findings to prevent a conflict upon material points.

2. Principal and Agent 🔑159(1)

Unless required by law to employ a particular agent, a principal is responsible to third persons for negligence of his agent in transaction of business of agency, including wrongful acts committed by such agent as part of transaction of such business, and for his willful omission to fulfill the obligations of the principal, but a principal is responsible for no other wrongs committed by agent, in absence of authorization or ratification by principal of such wrong, even though they may have been committed while agent was engaged in principal's service. Civ.Code, §§ 2338, 2339.

3. Principal and Agent ⚷195

Where trial court, in action for damages for causing fire, had found that defendant's agent had not been required in the performance of his duties to perform act complained of, but that such act had been without knowledge or consent of defendant and unconnected with duties which agent was delegated to perform, further finding that such act was done in course of agent's employment would be construed to mean that act was done during time of employment, in order to make latter finding consistent with other specific findings. Civ. Code, §§ 2338, 2339.

4. Principal and Agent ⚷159(1)

Where fire which damaged plaintiffs' property was caused by defendant's agent's negligent acts which had no connection with agent's duties of employment and which were not directly or indirectly authorized or ratified, no liability for damages from fire existed on part of defendant.

◆

John W. Preston, John W. Preston, Jr., Bordon & Bordon and Parker, Stanbury & Reese, by John W. Preston, Los Angeles, for appellant Ideal Heating Corp.

Lane & McGinnis, Irving E. Tarson, McBain & Morgan, by Angus C. McBain, Los Angeles, for respondents DeMirjian and others.

McCOMB, Justice.

Plaintiffs instituted an action to recover damages resulting from a fire alleged to have been caused by the defendant corporation, acting through its agent, defendant Lupella in negligently causing a fire which damaged property of plaintiffs. A cross-complaint was filed and after trial before the court without a jury, the trial court found:

(a) "That it is true that on the 12th day of April, 1946, defendant Lupella was employed by defendant Ideal, and that while on the premises of said defendant Ideal at 807 E. Gage Avenue *in the course of his employment,* said Lupella negligently and carelessly caused certain spatter thinner, then being used by him for his own purposes and not for any purpose of defendant Ideal, to ignite and to set fire to said premises; that said Lupella was at said time using said spatter thinner to fill his cigarette lighter and was using it in a portion of the plant of Ideal in which smoking was prohibited by defendant, and that said Lupella while in said plant *in the course of his employment* was not required in the performance of his duties to enter into said portion of said plant, but was not forbidden to enter said portion of said plant, but was forbidden to smoke therein; that the acts of said Lupella in using said spatter thinner for his own purposes was without the knowledge or consent, express or implied of defendant Ideal, and that said act of Lupella was not connected with the duties which said Lupella was then delegated to perform for defendant Ideal."

(b) "That defendant Ideal did not itself, or through any person acting pursuant to its orders or directions, carelessly or negligently, or at all, cause the fire which resulted in plaintiffs' loss, and was not itself a wrongdoer, * * *."

(c) "* * * that it is true that defendant Anthony V. Lupella was on the 12th day of April, 1946, and at the time of the fire described in said second amended complaint an employee of defendant Ideal Heating Corporation, hereinafter called Ideal, and was acting *within the course of his employment.*" (Italics added.)

From a judgment in favor of plaintiffs there is (1) an appeal by defendant Ideal Heating Company, and (2) a cross appeal by plaintiffs.

(1) Defendant's Appeal

Defendant contends that the findings of the trial court set forth above do not support a judgment against it. This proposition is sound and must be sustained. The following rules are here applicable:

[1] 1. It is the duty of an appellate court in reviewing findings of the trial court to read them together and if possible to reconcile the findings to prevent a conflict upon material points. (Hotaling v. Hotaling, 193 Cal. 368, 385 [14], 224 P. 455, 56 A.L.R. 734; Johndrow v. Thomas, 31 Cal.2d 202, 208 [7], 187 P.2d 681.)

[2] 2. Unless required by or under the authority of law to employ a particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of business of the agency including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal. A principal is responsible for no other wrongs committed by his agent than those mentioned above, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service. (Civil Code, sections 2338, 2339.)

[3] Applying the foregoing rules to the findings in the instant case it is to be noted that there is a total absence of any finding that defendant Lupella was acting within the scope of his employment or authority at the time he committed the negligent act which was the proximate cause of the damage suffered by plaintiffs.

The only findings upon this subject are the court's findings that the act which defendant Lupella negligently performed was done "in the course of his employment." In view of other specific findings of fact to the effect that defendant Lupella in filling his cigarette lighter with fluid was not required to do so in the performance of his duty, but did so for his own purposes and without the knowledge or consent, express or implied, of defendant Ideal, and such act of defendant Lupella was not connected with the duties which he was delegated to perform, the finding that it was within the "course of his employment" (which we assume only for the purpose of this appeal to be a finding of fact and not a conclusion of law)*, must under rule 1 in order to make the findings consistent, be construed to mean that the negligent act performed by defendant Lupella was done during the time of his employment, thus making it consistent with the other specific findings of the trial court.

Should the phrase be construed to be synonymous with the finding that defendant Lupella committed the act "within the scope of his employment" there would arise an irreconcilable conflict in the findings of fact.

[4] Since an employer is not liable for damages resulting from a fire started by an employee while serving his own pleasure or purpose, which acts have no connection with the duties of his employment and which are not directly or indirectly authorized or ratified (see rule 2, supra; Yore v. Pacific Gas & Electric Co., 99 Cal.App. 81, 85[3], 277 P. 878; cf. Feeney v. Standard Oil Co., 58 Cal.App. 587, 589 [1], 209 P. 85), under the findings of fact of the court in the instant case defendant corporation was not liable for the negligent act of its co-defendant and the trial court erred in entering judgment in favor of plaintiff.

(2) Plaintiffs' Cross Appeal

Because the judgment in favor of plaintiffs is reversed it is unnecessary to consider the questions raised on plaintiffs' appeal relative to rulings of the trial court pertaining to the amount of damages. The judgment in favor of plaintiffs being reversed for the reason that the findings of the trial court do not support any judgment in their favor, it is obvious that it is immaterial as to whether the trial court applied the correct rule of damages in reaching the amount of the erroneous judgment.

Judgment reversed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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* See National Park Bank v. Louisville & N. R. Co., 199 Ala. 192, 74 So. 69, 75 [9]; Christian Benevolent Burial Ass'n v. Thornton, 241 Ala. 13, 1 So.2d 8, 10[5], for cases holding that similar allegations are not one of fact but are mere conclusions.

112 Cal.App.2d 345

MAZIROW et al. v. RITNER.

Civ. 19027.

District Court of Appeal, Second District,
Division 2, California.
July 21, 1952.

Action by Joseph Mazirow and others against Miriam Ritner to recover damages for breach of contract to sell a food market. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to support the judgment of the trial court, and that defendant's appeal was frivolous.

Affirmed with instructions.

1. Appeal and Error ⚿1010(1)

Findings and judgment of trial court must be affirmed on appeal, if there is any substantial evidence in support thereof.

2. Appeal and Error ⚿989

When judgment is attacked as being unsupported by evidence, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or otherwise, which will support findings of trial court.

3. Vendor and Purchaser ⚿350

In buyers' action to recover damages for seller's breach of contract to sell food market, evidence supported findings that contract was made and that seller thereafter repudiated contract, to buyers' damage in the amount of $2,500.

4. Costs ⚿260(4)

Where findings of trial court were amply supported by evidence, defendant's appeal on sole ground that findings were not supported by evidence was frivolous and taken solely to harass plaintiffs, warranting imposition of penalty.

◆

Grudd & Grossman, North Hollywood, for appellant.

Walley & Davis and Milton Davis, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court in an action to recover damages for breach of a contract to sell a food market, defendant appeals.

Defendant's sole contention is that the findings are not supported by the evidence.

[1] This proposition is devoid of merit. The findings and judgment based thereon must be affirmed if there is any substantial evidence in support thereof. (Graves v. Smolicz, 110 Cal.App.2d 221, 242 P.2d 371.)

[2] The power of the appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or otherwise, which will support the findings of the trial court. (McKee v. Mires, 110 Cal.App.2d 517, 242 P.2d 954.)

[3] Applying the foregoing rules to the findings in the instant case a review of the record discloses the following:

Findings

I

"That the plaintiffs and the defendant, Miriam Ritner, were, at all times mentioned in the pleadings filed in this action, residents of the County of Los Angeles, State of California."

This finding is admitted by defendant's failure to deny it in her answer.

II

"That by an instrument in writing, which instrument was received in evidence in this action as plaintiffs' Exhibit 4, plaintiffs did on October 2, 1948, make an offer to the defendant, Miriam Ritner, to purchase the Century Market, located at 6001 South Broadway, Los Angeles, California, for the sum of $5,000.00, plus stock at current wholesale prices, and that said offer was communicated by plaintiffs' representative, Charlotte Haagen, to the defendant, Miriam Ritner, on October 2, 1948."

This finding is supported by plaintiffs' Exhibit 4, which contains the terms of the offer made by plaintiffs, together with the alterations which were initialed by all parties plus the testimony of Charlotte Haagen, hereinafter referred to as the broker, that she saw defendant who made the offer to her, let her read it and discussed the proposition with her. She told defendant she held plaintiffs' check in the sum of $500.00 as a deposit.

III

"That the defendant, Miriam Ritner, rejected plaintiffs' said offer and did on the same day, to-wit: October 2, 1948, make a counter-offer in writing, set forth in and upon the said Exhibit 4, to sell said Century Market to the plaintiffs for the sum of $7,500.00, plus stock at current wholesale prices, by striking from said Exhibit 4 the purchase price of $5,000.00 set out therein by plaintiffs, and inserting in place and stead thereof, the selling price of $7,500.00, and by thereafter affixing her signature to said writing and initialing said changes therein, and by then delivering said writing to plaintiffs' said representative, Charlotte Haagen, with the intention and purpose that said Charlotte Haagen communicate defendant's said counter-offer to the plaintiffs."

This finding is amply supported by plaintiffs' Exhibit 4, plus the broker's testimony that on October 2, 1948, she discussed the offer and counter-offer with the defendant and at such time the changes in price were made in Exhibit 4 and were initialed. In addition, the broker testified that defendant at such time said if the counter-offer was accepted she was ready to go into escrow. Also, defendant admitted having initialed the changes on Exhibit 4 and having affixed her name at the bottom of the instrument.

IV

"That all writing appearing on plaintiffs' said Exhibit 4, at the time it was received in evidence in this action, with the exception of the initials of one of the plaintiffs, Barnet Mazirow, was contained on and appeared in said Exhibit 4 when it was returned and delivered to the said Charlotte Haagen by the defendant, Miriam Ritner, on October 2, 1948, as aforesaid."

The broker gave direct testimony in support of each fact in the foregoing finding, which sustains it.

V

"That said counter-offer of the defendant, Miriam Ritner, was communicated by said Charlotte Haagen to plaintiffs on the same day, to-wit: October 2, 1948, and plaintiffs then and there on said 2nd day of October, 1948, accepted the counter-offer of the defendant, Miriam Ritner, to sell the said Century Market to the plaintiffs for the said sum of $7,500.00, plus stock at current wholesale prices, and that said acceptance by plaintiffs was within a reasonable time thereafter, to-wit: four days, communicated to the defendant, Miriam Ritner."

The broker testified that after leaving defendant's place of business she contacted plaintiffs and showed them the counter-offer of defendant; that plaintiffs initialed the changes on Exhibit 4 and accepted the counter-offer, permitting the broker to retain the deposit check previously given her as a deposit on the counter-offer. She further testified that as soon as she was able to contact defendant she communicated to her the fact that plaintiffs had accepted her counter-offer. This testimony supports the finding.

VI

"That it is true that plaintiffs and the defendant, Miriam Ritner, made and entered into a written agreement as aforesaid, wherein and whereby said defendant agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase from said defendant, said Century Market at and for the sum of $7,500.00, plus stock at current wholesale prices, and that notwithstanding said defendant having made and entered into said agreement as aforesaid, said defendant thereafter failed and refused to consummate said sale and repudiated said agreement and thereafter agreed to sell and did sell said Century Market to her husband, Louis Ritner, instead, from which husband she was then separated."

The foregoing finding with the exception of the statement that defendant after repudiating her agreement to sell to plaintiffs sold the market to her husband, is fully supported by the testimony herein set forth.

The portion of the finding relative to the sale of the market to defendant's husband is supported by a stipulation entered into by the parties in the trial court that such was the fact.

VII

"That on the 2nd day of October, 1948, said Century Market was of the reasonable market value of $10,000.00, exclusive of stock."

The broker testified that on October 2, 1948, the market was worth a minimum of $10,000.00 and a maximum of $13,000.00 and the finding is thus supported by the evidence.

VIII

"That plaintiffs purchased said Century Market from the aforementioned Louis Ritner on November 19, 1948, and obtained possession thereof on November 29, 1948."

The parties stipulated in open court that plaintiffs purchased the market from Louis Ritner, husband of defendant, on November 19, 1948.

One of the plaintiffs testified that plaintiffs obtained possession of the market on November 29, 1948, which supports the finding.

IX

"That plaintiffs were prevented by said actions of the defendant, Miriam Ritner, from obtaining possession of the Century Market at all times until the plaintiffs purchased said Century Market from said Louis Ritner and received possession thereof from him as aforestated, but plaintiffs suffered no damages by way of loss of profits as a result of having been so prevented from obtaining possession of the Century Market, in that said business earned no profit during the period from October 2, 1948, to November 29, 1948."

The foregoing finding is immaterial since it is in favor of defendant.

X

"That plaintiffs suffered damages in the amount of $2,500.00, representing the difference between the aforesaid reasonable market value of said Century Market of $10,000.00, and the said price of $7,500.00 for which the defendant, Miriam Ritner, agreed to sell said Century Market to the plaintiffs."

The finding supra is amply supported by the evidence set forth above. There is left a mere mathematical calculation to ascertain the amount of damage sustained by plaintiffs as a result of defendant's breach of her contract.

The record in the instant case is exceptionally free from error of any kind.

[4] From the foregoing findings and the evidence recited in support thereof it is obvious that the present appeal is unjustified, vexatious, frivolous and was taken solely for the purpose of delaying and harassing plaintiff. As said by this court in Sipe v. McKenna, 105 Cal.App.2d 373, at page 375, 233 P.2d 615, 616, speaking through the late Justice Wilson, "This appeal has not only caused plaintiff an unnecessary expense but has consumed the time of this court which might have been spent in determining meritorious cases. Such appeals apparently can be discouraged only by the imposition of a penalty on the offender as authorized by section 957 of the Code of Civil Procedure. (Citing cases.)"

The judgment is affirmed and damages are imposed upon defendant-appellant in the sum of $150.00 for having taken and prosecuted a frivolous appeal and the trial court is instructed to enter judgment in favor of plaintiff and against defendant for said sum in addition to the costs of appeal.

MOORE, P. J., and FOX, J., concur.

FLINT et al. v. RUTHERFORD et al. *

Civ. 8021.

District Court of Appeal, Third District, California.

July 2, 1952.

Rehearing Denied Aug. 1, 1952.

Hearing Granted Aug. 28, 1952.

Leda Mary Flint and Earl N. Flint, Jr., brought suit against Bertel H. Rutherford and others to enjoin foreclosure and sale under trust deed, for cancellation of note, and for conveyance of realty, or, in the alternative, for damages. The Superior Court, Stanislaus County, B. C. Hawkins, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that terms of a contract duly entered into cannot be changed except with concurrence of all parties thereto.

Judgment reversed.

1. Contracts ⚷241

Terms of a contract duly entered into cannot be changed except with concurrence of all parties thereto.

2. Contracts ⚷241

Where A agreed to finance purchase of sawmill by B if B would give trust deed on lots in subdivision owned by B, and B, in order to raise money to pay off balance owing on subdivision, orally contracted with C that he would give C interest in sawmill if C's wife would consent to placing of trust deed against home of C's wife, and A, B and C and wives of B and C entered into written agreement whereby primary source of repayment of loan would be proceeds from sales of lots in subdivision, A, B, and A's assignee could not, without consent of C and his wife, abrogate provisions of original contract providing that payments on note should be first made out of proceeds of sales of lots in subdivision, since A could not release one joint debtor without extinguishing obligation of the other.

◆

Mazzera, Snyder & DeMartini, Stockton, Taylor & Taylor, Modesto, for appellant.

Vernon F. Gant, Frank B. Collier, Modesto, for respondent.

PEEK, Justice.

Plaintiffs sought to enjoin the foreclosure and sale under a deed of trust of certain real property owned by Mrs. Flint, as her separate property; to have cancelled a promissory note for which the deed of trust was given as security; to obtain a reconveyance of the real property or in the alternative damages in the sum of $10,500. Judgment was entered in favor of defendants and plaintiffs' appeal followed.

A summary of the evidence shows that defendant John L. Frazier, in addition to owning and operating a retail lumber business, was also engaged in the development and sale of two subdivisions—the Frazier Tract, on which he owed a balance of approximately $8,000, and the Rutherford Tract, on which he owed a larger sum, and which was then in default. Plaintiff Earl N. Flint, Jr. was employed by said defendants as a subdivision salesman. Frazier desired to purchase a sawmill but did not have the necessary finances. Flint introduced him to the defendant Iris S. Kewin, who agreed to provide the financing for the purchase of the mill but only if she could obtain a first deed of trust upon the Frazier Tract. In order to raise the sum necessary to pay off the balance then owing on the Frazier Tract and to secure an additional $32,000 for the purchase of the mill Frazier entered into an oral contract with Flint whereby if Mrs. Flint would consent to the placing of a trust deed against the Flint home he (Frazier) would give Flint an interest in the sawmill. It appears that in pursuance of this plan two contracts were entered into. The first was a "Memorandum of Agreement between the parties hereto outside of Escrow". The second contract, which is the only one here in issue and which we will refer to as the supplemental agreement, as did the trial court, was entered into between Kewin as the party of the first part and Frazier and Flint and their respective wives as parties of the second part. It provides in part as follows:

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* Subsequent opinion 252 P.2d 945.

> "Whereas, the parties hereto desire to make provision for the application of all moneys received on account of said agreements of sale whether heretofore or hereafter entered into in payment and reduction of said note above mentioned;
>
> "Now, therefore, it is hereby mutually understood and agreed as follows:
>
> "1. That the parties of the second part shall deposit with * * * (the) Escrow Company * * * all agreements for the sale of any real property described in said deed of trust, and particularly all agreements with respect to the sale of any part or portion of the Frazier Home Tract. * *
>
> "2. That all payments thereafter made on account of said agreements or the purchase price of any property therein described shall be paid to said * * * Escrow Company, and shall be by said company credited upon said note and deed of trust above mentioned, and shall be paid to the said Iris S. Kewin. That the foregoing provision shall apply to all agreements for the sale of any of said property whether now made or hereafter made, it being understood and agreed that with respect to future sales, all agreements immediately upon execution shall be delivered for collection to said * * * Escrow Company.
>
> "3. * * * the failure of the parties of the second part to deposit any and all agreements of sale with said * * * Escrow Company as hereinabove provided and/or to faithfully keep and perform all the other terms, covenants and conditions herein contained by them to be kept and performed, shall constitute a breach of the obligation or obligations for which said deed of trust and chattel mortgage are security, and in the event of such breach, first party shall have the immediate right to proceed with the sale of the property described in said deed of trust in accordance with the provisions thereof and/or to proceed with the foreclosure of said chattel mortgage in the manner provided by law or by the provisions of said mortgage."

From the date of the execution of the agreement on November 24, 1947 until the first part of March 1949 all of the contracts of sale in said Frazier Tract and all of the purchase money payments made thereon were deposited with the Escrow Company and by it credited to Mrs. Kewin in accordance with the terms of the agreement. During all of this time there was on deposit with said Escrow Company sufficient funds to make the necessary monthly payments to the defendant Kewin. According to the president of the Escrow Company some time during the early part of March, 1949, defendants Frazier and Kewin instructed the Escrow Company not to credit the payments to the defendant Kewin in accordance with the original agreement but to accumulate the funds in the escrow. The evidence is uncontradicted that said instructions were without the knowledge or consent of the Flints.

Between March 1, 1949 and June 23, 1949, the moneys paid into the Escrow Company under said agreement were accumulated in accordance with said instructions and nothing was paid to Kewin. On the latter date there was approximately $5,085.99 on hand. At that time there was due to Mrs. Kewin the sum of $3,750, representing three monthly payments on the principal of the note together with interest.

At or about the date last mentioned defendants Frazier, Kewin and Rutherford executed certain agreements between themselves and opened another escrow with the Escrow Company. As a part of this transaction Kewin assigned her note for $40,000, together with its security, to Rutherford. Rutherford credited Frazier with the sum of $8,474.75, being the balance due on the note to Kewin as a credit to Frazier on the debt owed by him on the Rutherford Tract. The original deed of trust on the Frazier Tract and the chattel mortgage were released. A new note was executed by Frazier to Mrs. Kewin in the sum of the balance then owing on the original note and he also gave her a new trust deed on the Frazier Tract. The accumulated fund in the original escrow was transferred to the new escrow, $3,000 thereof being paid direct to Kewin on the new note and the balance to Frazier on his account. In other words, these subsequent transactions resulted in Kewin holding the Frazier note for the amount of the balance on the original note secured by a deed of trust on the Frazier Tract and the sum of $3,000 cash. Rutherford held the original $40,000 note which, as stated, had a balance due thereon of $8,474.75, which was secured by plaintiffs' home. On June 24, 1950 Rutherford filed notice of default under said original note and trust deed and instituted an action to foreclose the same against the Flint property.

At the conclusion of the hearing the trial court found generally in favor of the defendants. The portions of the particular findings pertinent to the contentions made by appellants are: That on March 17, 1949, defendants Fraziers and Kewin agreed that since plaintiffs had paid nothing the balance should be paid by the plaintiffs; that the November 26, 1947 agreement does not make the proceeds of the sale of the subdivision lots the primary security, with the real property of the plaintiffs only secondarily liable; that the November 26, 1947 agreement was made for the benefit of Kewin and does not prohibit her from waiving any of the provisions thereof; that she could release one or more of the joint debtors or any of the security; and that default occurred because plaintiffs have refused to pay their proportional part of the indebtedness.

Appellants' principal contention is that the so-called supplemental contract is plain and unambiguous and simply requires that all payments on the note come first from the sales of lots located in the Frazier Tract before any of the security be resorted to. That he cannot lose this right without his consent, which it is uncontradicted, he had not given.

The respondents' position is that the November 26, 1947 agreement was collateral security for Kewin, therefore she could release such part of it as she wished and she could release one joint debtor without extinguishing the obligation of the other.

While it is true that the Frazier subdivision, as well as the Flint home, were made subject to the terms of the note and trust deed, nevertheless it is also true that by the provisions of the supplemental agreement the subdivision sales contracts were made the primary source of repayment of the loan. Although the effect of such provisions were to insure that all sales contracts for lots would be deposited with, and the payments thereon paid through the escrow, thereby making Kewin's position as mortgagee more advantageous, that is not to say that the contract as a whole was for her sole benefit. The same provision likewise benefitted the Flints, since the note could not be in default as long as the moneys paid into the escrow by reason of the sales contracts were sufficient to cover the payments thereunder.

[1] It is basic contract law "that the terms of a contract duly entered into cannot be changed except with the concurrence of all the parties thereto." Newhall Co. v. Hogue-Kellogg Co., 56 Cal.App. 90, 97, 204 P. 562, 565; See also Ehrman v. Rosenthal, 117 Cal. 491, 49 P. 460.

[2] It necessarily follows that the subsequent agreement between the Fraziers, Kewin and Rutherford (which the uncontradicted evidence shows was without the knowledge or consent of the Flints) was an attempt to abrogate the provisions of the original contract providing that payments on the note should be made out of the proceeds of the sales of the property covered by the trust deed. Therefore under the rules above stated such change in the terms thereof was ineffectual in the absence of concurrence therewith by the Flints.

While the release of the mortgages and reconveyance of the property as contemplated by the last agreement were, of course, within the power of the mortgagees, they had neither the power nor the right to do so in derogation of the rights of appellant as set forth in the supplemental agreement without the consent of the Flints.

The judgment is reversed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

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112 Cal.App.2d 415

PEOPLE v. ELMER.

Cr. 4817.

District Court of Appeal, Second District,
Division 3, California.
July 24, 1952.

Petition for writ of error coram nobis. The Superior Court of Los Angeles County, Joseph M. Maltby, J., denied petition, and petitioner appealed. The District Court of Appeal, held that assertion that petitioner had been persuaded to enter plea of guilty because of representation of his counsel that he would receive a light sentence, when he in fact received a prison sentence, did not, in absence of assertion that some peace officer or officer of court had taken part in alleged representations, entitle petitioner to relief.

Order affirmed.

Criminal Law 🔑997

Allegations that petitioner was persuaded to enter plea of guilty to forgery with a prior conviction by representation of his counsel that he would receive a light sentence, when he in fact received a sentence to State Prison, without assertion that any peace officer or officer of court had any part in alleged representations or knowledge of them, were insufficient to warrant relief by writ of error coram nobis.

James E. Elmer, pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

PER CURIAM.

Appeal from an order denying a petition for a writ of error *coram nobis.* The sole ground of the petition was that petitioner was persuaded to enter a plea of guilty to forgery with a prior conviction, by the representation of his counsel that he would receive a light sentence, and that he received instead a sentence to State Prison. No claim was asserted that any peace officer, the district attorney or the court had any part in the alleged representations or any knowledge of them. Petitions for habeas corpus have been heretofore filed by petitioner with various courts and have been denied.

The present petition based solely upon alleged representations of petitioner's attorney presented no sufficient ground for granting the order sought. The appeal is without merit. People v. Aseltine, 139 Cal.App. 768, 34 P.2d 830; People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155.

The order is affirmed.

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112 Cal.App.2d 328

PEOPLE v. WHITTON.

Cr. 4753.

District Court of Appeal, Second District,
Division 1, California.
July 21, 1952.

Petition for writ of error coram nobis to annul, vacate and set aside judgment of conviction. The Superior Court, Los Angeles County, Clement D. Nye, J., entered an order denying the writ, and petitioner appealed. The District Court of Appeal, White, P. J., held that even if one of the prior three convictions relied upon in sentencing petitioner as a habitual criminal were not available, the legality of his confinement could not be tested on writ of error coram nobis.

Affirmed.

1. Criminal Law 🔑997

Even if one of prior convictions were not available to establish that accused was an habitual criminal, judgment of conviction entered on guilty plea to primary charge of robbery was valid in so far as other two unchallenged convictions were concerned, and legality of continued confinement after arrival of time when accused would be entitled to relief from imprisonment for primary offense, with two admitted prior felony convictions, could be tested on habeas corpus, but validity of confinement under such third prior conviction could not be determined on writ of error coram nobis prior to arrival of such time. Pen.Code, § 644; Code Civ. Proc. § 1918, subd. 7.

2. Criminal Law ⚷997

Whether prior convictions in other states were for acts or commissions of accused which, if committed or omitted to be done by accused in California, would have constituted offenses comprised within any of the crimes specified in the Penal Code relating to habitual criminals were questions of issuable fact and mixed law and fact which could have been raised on direct appeal from judgment of conviction, but which were not available on writ of error coram nobis. Pen.Code, § 644; Code Civ.Proc. § 1918, subd. 7.

3. Criminal Law ⚷1178

Where accused in his brief neither argued certain points nor called attention to any supporting authorities, such contentions would be deemed to have been abandoned.

4. Criminal Law ⚷273

Plea of guilty was a conclusive admission of guilt and of every element entering into the offense charged, and precluded a trial on the merits, and therefore lack of such trial was not ground for setting aside judgment.

5. Criminal Law ⚷1202(3)

The admission of an accused of his guilt as charged as well as the truth of all the allegations of prior convictions admitted is, in the absence of insane delusions, most satisfactory evidence upon which to base a conviction, and upon which to predicate a judgment that accused is a habitual criminal, and therefore where accused admitted certain alleged prior convictions, adjudication that he was an habitual criminal was not erroneous, though no evidence was introduced to prove the prior convictions by way of authenticated documents from proper authorities outside the State.

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James Edward Whitton, in pro per, William F. Peters, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

On July 11, 1946 the District Attorney of Los Angeles County filed an information wherein defendant was accused in two counts of the crime of robbery. It was further alleged that at the time of the commission of said offenses defendant was armed with a deadly weapon, to-wit, an automatic pistol.

The information further charged that prior to the commission of the aforesaid offenses defendant had been convicted of three felonies, viz., robbery (State of Ohio), assault to kill (State of Ohio), and aggravated robbery (State of Colorado), and that for each of said prior convictions defendant served a term of imprisonment in a state prison.

On July 15, 1946, defendant was duly arraigned upon the information now before us, waived reading thereof, and the Public Defender was appointed by the court as his counsel.

On July 18, 1946, defendant with his counsel regularly entered his plea of "not guilty as charged in each count of the information". He denied being armed and denied each of the alleged prior convictions. Trial of the action was thereupon set for September 12, 1946.

At the trial, defendant with his counsel present, by leave of court, withdrew his plea of not guilty, theretofore entered to Count 2, and regularly entered his plea of "guilty as charged in Count 2 of the information". He also admitted being armed at the time of the commission of the offense and at the time of his arrest.

Defendant also admitted each prior conviction as alleged in the information and that he had served a term of imprisonment in a state prison therefor.

Upon the entry of defendant's plea of guilty to the crime charged in Count 2 of the information the court found the offense to be robbery of the first degree. Defendant waived time for sentence and no legal cause appearing why judgment should not be pronounced, he was sentenced to the state prison for the term prescribed by law. He was declared to be a habitual criminal. Count 1 was dismissed in the interest of justice.

No motion for a new trial was made by defendant nor was any appeal taken by him.

On August 20, 1951, defendant filed a petition for a writ of error coram nobis in the Superior Court of Los Angeles County to annul, vacate and set aside the judgment on the grounds that the superior court was without jurisdiction in that it was neither alleged nor proved in said action that the crime of robbery had been committed by the petitioner; that the trial court had no jurisdiction to impose upon petitioner an aggravated penalty as a habitual criminal in that such judgment, findings and sentence were void for the reason that it was neither alleged nor proved in said action that said prior convictions as specified in the information were committed at the time, place and date therein mentioned, or whether said prior convictions as alleged were for acts or omissions of the petitioner, which, if committed by petitioner in the State of California, would have constituted offenses comprised within any of the crimes specified and set forth in section 644 of the Penal Code relating to habitual criminals.

To his aforesaid petition for a writ of error coram nobis defendant attached a "specification of errors", wherein he asserted (1) that he was denied counsel and was hastily brought to trial, (2) that he was denied a fair and impartial trial, (3) that the prior convictions were not authenticated in the manner provided in section 1918, subdivision 7 of the Code of Civil Procedure, (4) that the trial court was in error in failing to find that defendant had not served a term of imprisonment in the State of Ohio on the 1932 conviction, (5) that the trial court erred in failing to find that he had not served separate terms of imprisonment on said prior convictions, and (6) that the court was without jurisdiction to impose upon him an aggravated penalty as a recidivist.

The hearing on said petition was held on August 20, 1951, with the defendant's counsel, Deputy Public Defender R. W. Erskine, present. People's Exhibits Nos. 1 to 3 inclusive, (each a record) were admitted in evidence and filed. The petition for writ of error coram nobis was denied. From such order defendant prosecutes this appeal.

The record reveals that appellant is confined in the State Prison at Folsom, California, and by his petition for a writ of error coram nobis filed in the Superior Court of Los Angeles County, California, he challenged the validity of one of the prior convictions alleged in the information. The trial court denied the petition because of lack of jurisdiction, holding that the contentions raised by defendant could only be determined by a writ of habeas corpus and not by a writ of error coram nobis.

Upon this appeal appellant urges that the court below was not correct in its conclusion that the mistake of fact here sought to be corrected should have been raised by petition for a writ of habeas corpus in the Superior Court of Sacramento County where he is confined and not by way of petition for a writ of error coram nobis in the Superior Court of Los Angeles County.

In his petition aforesaid appellant contended that one of the prior convictions, to-wit, assault to kill, was erroneously pleaded in the information. That pleading alleged that the defendant was convicted in the court of common pleas in the State of Ohio of the crime of assault to kill, a felony, and the judgment of the said court against him was, on or about the 15th day of June, 1932, pronounced and rendered and said defendant served a term of imprisonment therefor in the state prison. Now, approximately five years after the rendition of such judgment of conviction and adjudication as a habitual criminal, appellant challenges such an adjudication as void in that he was never convicted, sentenced, or imprisoned at any time during the month of June, 1932, or at any other time in the year of 1932.

[1] Even though one of the prior convictions be not available to establish that the accused is a habitual criminal, the judgment is nevertheless valid insofar as the other two unchallenged convictions are concerned.

If, as contended by appellant, one of the convictions alleged to have occurred in the State of Ohio is not available to establish that he is a habitual criminal, the problem which arises is that of an excessive sentence, and for that appellant of course has a remedy. He admits he pleaded guilty to the primary charge of robbery as contained in Count 2 of the information and that he suffered two prior convictions. Manifestly, the judgment and sentence is, to that extent, valid. If a third prior conviction was improperly invoked, then upon arrival of the time when appellant would be entitled to release from imprisonment for the primary offense, with two admitted prior felony convictions, the legality of his continued confinement solely because of the prior conviction which he here challenges, can be tested on habeas corpus.

[2] Appellant further contends that it was not proven in the court below, "whether said prior convictions as alleged were for acts or commissions of petitioner which, if committed or omitted to be done by petitioner in the State of California, would have constituted offenses comprised within any of the crimes specified and set forth in section 644 of the Penal Code relating to habitual criminals". These are questions, the merits of which cannot be reviewed in the present proceeding. They were questions of issuable fact and mixed law and fact which were before the trial court when the judgment was pronounced. Upon a direct appeal from the judgment, had such an appeal been taken, they could have been raised therein People v. McVicker, 37 Cal.App.2d 470, 473, 99 P.2d 1110; People v. Harincar, 49 Cal.App.2d 594, 596, 121 P.2d 751.

[3] Finally, appellant contends that on the hearing of his petition the court should have considered all the other grounds contained therein, such as denial of counsel, and a fair and impartial trial "on the merits", and the failure of the court at the time appellant entered his plea of guilty to require proof and authentication of the prior convictions. In his brief appellant neither argues these points nor calls our attention to any supporting authorities. Under such circumstances the contentions will be deemed to have been abandoned, People v. Thompson, 69 Cal.App.2d 80, 85, 158 P.2d 213.

However, we are constrained to say that the record before us shows that appellant was represented by the Public Defender at all stages of the proceedings had in the superior court when he withdrew his plea of not guilty, pleaded guilty to Count 2 of the information, and admitted each alleged prior conviction.

[4] With reference to a "trial on the merits", suffice it to say that the plea of guilty precluded any such proceeding involving the taking of evidence because such plea was a conclusive admission of appellant's guilt and of every element entering into the offense charged, People v. Brown, 140 Cal.App. 616, 619, 36 P.2d 194; People v. Outcault, 90 Cal.App.2d 25, 29, 202 P.2d 602.

[5] Appellant's contention that the adjudication that he was a habitual criminal was erroneous because no evidence was introduced to prove the prior convictions by way of authenticated documents from the proper authorities outside the State of California is utterly without merit. The admission of an accused of his guilt as charged as well as the truth of all the allegations of prior convictions admitted is, in the absence of insane delusions, most satisfactory evidnece upon which to base a con-

viction and also, upon which to predicate a judgment that he is a habitual criminal, In re Gilliam, 26 Cal.2d 860, 866, 161 P.2d 793; People v. Stone, 69 Cal.App.2d 533, 536, 159 P.2d 701; In re Valenzuela, 71 Cal.App.2d 198, 200, 162 P.2d 301.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

112 Cal.App.2d 120

PEOPLE v. SPARKS.

Cr. 2813.

District Court of Appeal, First District,
Division 1, California.
June 30, 1952.

Hearing Denied July 24, 1952.

Defendant was convicted in 1948 of forgery. On October 5, 1951, defendant filed in Superior Court in original criminal proceeding a "motion for the records", to enable defendant to prosecute his cause in a writ of coram nobis. The Superior Court, County of Alameda, Charles Wade Snook, J., denied the motion and defendant appealed. The District Court of Appeal, Bray, J., held that where no proceeding was pending before the trial court at the time defendant filed his motion, the trial court was without jurisdiction.

Affirmed.

1. Criminal Law 🔑997

Matters reviewable on appeal cannot be made grounds for application for writ of coram nobis.

2. Criminal Law 🔑997

If no reason is shown why grounds contained in application for writ of coram nobis could not have been raised on appeal, the court in exercise of its discretion can refuse to order delivery of transcripts of criminal proceedings.

3. Criminal Law 🔑1077

On appeal in a criminal case, defendant is entitled to a reporter's transcript at state expense.

4. Criminal Law 🔑997

Where no proceeding was pending before trial court at time petitioner filed motion for the records of the criminal proceeding to enable petitioner to prosecute his cause in a writ of coram nobis, court was without jurisdiction to entertain the motion.

5. Criminal Law 🔑997

A proceeding in the nature of a writ of coram nobis is properly regarded as a part of the proceedings in the case to which it refers.

6. Criminal Law 🔑997

Fact that petitioner was moving in forma pauperis did not compel court to grant petitioner's motion for the records of criminal proceedings to enable petitioner to prosecute his cause in a writ of coram nobis, in view of fact that, in addition to lack of finances, it was incumbent upon petitioner to show that he had a substantial right to enforce or preserve.

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Lester Sparks, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Wallace G. Colthurst, Dep. Attys. Gen., for respondent.

BRAY, Justice.

Appellant, with two others, was convicted in 1948 of certain counts of forgery. Only one of the others appealed. See People v. Robinson, 102 Cal.App.2d 800, 228 P.2d 583. On October 5, 1951, appellant, in propria persona, filed in the superior court in the original criminal proceeding a "Motion for the Records." This requested the court to order the clerk to deliver to appellant the clerk's and reporter's transcripts of the proceedings at the trial, thereby "enabling petitioner to prosecute his cause in a writ of Error Coram Nobis." Accompanying this "motion" were a memorandum of points and authorities and the affidavit of appellant stating that he is confined in the California State Prison at Folsom, and has no funds with which to procure said transcripts. The court denied the motion. Appellant appeals.

[1, 2] No application for a writ of coram nobis was filed nor were any grounds

presented to the trial court upon which appellant intended to base his application for the writ. On appeal he has set forth in his brief these grounds. It might be pointed out that all of them are matters as to which no reason is shown why they could not have been raised on appeal and hence coram nobis would not lie. People v. Coyle, 88 Cal.App.2d 967, 200 P.2d 546. Therefore, if the court had before it an application for coram nobis and had such application contained these grounds only, the court, in the exercise of its discretion, could have refused to order the delivery of the transcripts. See People v. Coyle, supra, 88 Cal.App.2d at page 977, 200 P.2d 546.

[3–5] On appeal in a criminal case the defendant is entitled to a reporter's transcript at state expense. People v. Smith, 34 Cal.2d 449, 211 P.2d 561. However, in our case the time for appeal from the judgment had long since expired. Appellant is not pursuing such appeal. Moreover, the trial court had no jurisdiction to entertain the motion for the reason that there was no proceeding pending before the court at the time. "A motion is not an independent right or remedy * * * but implies the pendency of a suit between the parties and is confined to incidental matters in the progress of the cause. As the rule is sometimes expressed, a motion relates to some question collateral to the main object of the action and is connected with, and dependent on, the principal remedy." 60 C.J.S., Motions and Orders, § 3, p. 7. Here the action of People v. Sparks, in which appellant purported to bring his motion, had long since been terminated. It has been held that "a proceeding in the nature of a writ of coram nobis is properly regarded 'as a part of the proceedings in the case to which it refers,' * * *". In re Paiva, 31 Cal.2d 503, 509, 190 P.2d 604, 608. But this is not such a proceeding.

[6] Appellant's theory is that he is entitled to the transcript because he is moving in forma pauperis. In a proper proceeding the determination of such a motion is in the discretion of the court. In addition to the lack of finances, the moving party must show that he has "a substantial right to enforce or preserve * * *." Majors v. Superior Court, 181 Cal. 270, 280, 184 P. 18, 22, 6 A.L.R. 1274. Even had this motion been made in a coram nobis proceeding, appellant would have to show such right. People v. Coyle, supra, 88 Cal.App.2d 967, 200 P.2d 546. Appellant has shown no such right. The trial court properly denied the application.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

SILLS v. LOS ANGELES TRANSIT LINES et al. *

Civ. 18886.

District Court of Appeal, Second District,
Division 3, California
July 14, 1952.

Hearing Granted Sept. 11, 1952.

Action by Albert J. Sills against Los Angeles Transit Lines, and another for injuries sustained when defendant's streetcar collided with plaintiff's automobile. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence warranted giving of plaintiff's requested instruction on last clear chance doctrine.

Judgment reversed.

1. Appeal and Error 🔑928(1)

Appellate Court, in determining whether last clear chance instruction should have been given in behalf of plaintiff-appellant, would assume that jury might have believed evidence upon which cause of action of plaintiff was predicated, and that if correct instruction had been given upon subject, jury might have rendered verdict in his favor.

2. Trial 🔑203(1)

Each party in negligence action is entitled to have his theory of case go to jury, and requested instructions, proper in form and substance, should not be refused merely because trial court does not accept theory upon which a particular party relies.

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* Subsequent opinion 255 P.2d 795.

3. Street Railroads ⚷118(15)

In action for injuries sustained by plaintiff as result of collision between his automobile and streetcar of defendant, plaintiff's offered instruction on last clear chance doctrine was correct statement of law and should have been given under evidence adduced.

4. Negligence ⚷141(9)

Where facts in negligence action are such that doctrine of last clear chance may be applied, it is the duty of the trial judge to submit doctrine to the jury by proper instructions.

5. Street Railroads ⚷114(19)

In action for injuries to plaintiff as result of collision between his automobile and streetcar of defendant, evidence, when considered most favorable to plaintiff, would have warranted jury finding that after seeing automobile stopped on track, motorman had ample time, in exercise of ordinary care, to bring streetcar to stop, and that he had last clear chance to avoid collision.

6. Negligence ⚷141(9)

Last clear chance instruction is proper when evidence shows that negligence of plaintiff has placed him in a position of danger from which he cannot escape by the exercise of ordinary care, and that defendant has knowledge of plaintiff's situation and has last clear chance to avoid accident by exercising ordinary care, but fails to exercise same, with proximate result being accident and plaintiff's injuries.

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Francis J. Gabel and Henry F. Walker, Los Angeles, for appellant.

Melvin L. R. Harris and Trippet, Newcomer Yoakum & Thomas, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment entered on a verdict in an action for damages for personal injuries.

The principal assignment of error is that the court refused to give an instruction requested by plaintiff on the doctrine of the last clear chance.

[1, 2] In determining whether the instruction should have been given, we must assume that the jury might have believed the evidence upon which the cause of action of the plaintiff—the losing party—is predicated, and that if the correct instruction had been given upon the subject the jury might have rendered a verdict in his favor. Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645. Each party is entitled to have his theory of the case go to the jury; and requested instructions, which are proper in form and substance, should not be refused merely because the trial court does not accept the theory upon which a party relies. Cole v. Ridings, 95 Cal.App.2d 136, 144, 212 P.2d 597.

The accident occurred about 6:30 p.m. on October 17, 1949, at the intersection of 52nd Street and Pacific Boulevard, Huntington Park. Pacific Boulevard, running north-south, is intersected by 52nd Street, running east-west. Extending from the north curb line of 52nd Street, Pacific Boulevard is divided into three portions: an unpaved private right of way in the center for streetcars in which defendant's streetcar tracks are laid; pavement for vehicular traffic on each side of the private right of way, the east side for northbound traffic, the west side for southbound traffic. Beginning at the north curb line of 52nd Street and continuing south, the entire area of Pacific Boulevard from curb to curb, and including the portion in which defendant's streetcar tracks are laid, is paved, i.e., there is no private right of way south of the north curb line of 52nd Street.

Prior to the accident plaintiff had been driving his automobile southerly on Pacific Boulevard in the lane next to the west side of defendant's right of way. As he approached 52nd Street, he intended and started to make a left turn in the intersection. As he did so, there was a northbound streetcar approaching the intersection from the south on the east tracks, traveling about 30 miles an hour. Plaintiff stopped his automobile on the west southbound tracks and faced in a southeasterly direction, leaving the east northbound tracks open. As plaintiff's automobile was thus stopped awaiting the passage of the northbound streetcar, a southbound streetcar operated by defendant-motorman struck plaintiff's stopped automobile at the left front door. Plaintiff's automobile came to rest about 60 feet from the point of collision and faced in a southwesterly direction against the west curb of Pacific and south of 52nd Street.

Prior to the collision the motorman had been operating the streetcar southerly on the west track in the private right of way. His last stop had been about 1,500 feet north of 52nd Street. He did not expect to make a stop at 52nd Street. The lights of plaintiff's automobile and of the streetcar were on.

Defendant-motorman testified that when he saw plaintiff's automobile starting its turn at the intersection his streetcar was about 85 feet away traveling about 20 miles an hour, and that when plaintiff stopped his car on the tracks the streetcar was about 75 feet away. He testified that he put on the brakes and rang the bell upon seeing plaintiff's car turn.

A passenger on the streetcar testified she was seated on the righthand side about 3 or 4 seats from the middle door, heard the operator ring his bell "extensively," and when he applied his brakes she looked out to the front and saw the stopped automobile on the tracks. At that time the streetcar was 75 or 80 feet north of the north curb line of 52nd Street, with the stopped automobile about 10 feet farther to the south. She testified that the clanging of the bell was loud and long and, after hearing it, she had to lean left, shift her position to see over or past others, and that it was after this that she saw the stopped automobile.

Plaintiff testified that as he started to turn left he looked to the north and saw the southbound streetcar about 4 blocks away. He looked to his right and saw the northbound streetcar about a half block or a block and a half away. He stopped to allow the northbound streetcar to pass. He kept looking from left to right. As he looked left he saw the southbound streetcar about a block away—"It seemed to be going terribly fast." He thought of moving forward but could not because of the northbound car, or of backing and getting out, but by that time the southbound car was only about 6 or 7 feet away and then it struck him. He testified there was no change in the speed of the southbound streetcar from the time he saw it until it struck. He estimated that about 25 to 30 seconds elapsed between the time he brought his automobile to a stop on the tracks and the time he was struck. When he saw the southbound streetcar about a block away and coming toward him he looked toward the northbound car which was then approaching about 15 or 20 feet away. When he looked back again to his left all he could see was a big headlight and the big front of the southbound car.

[3, 4] The requested instruction on the doctrine of the last clear chance is set out in the margin.[1] No instruction was given on the doctrine. The instruction requested is a correct statement of the law and should have been given. Girdner v. Union Oil Co., 216 Cal. 197, 203, 13 P.2d 915. We have

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[1] "You are instructed that negligence on the part of a plaintiff does not necessarily preclude such plaintiff from recovering damages even though the accident would not have occurred but for such negligence. Thus, if you find from the evidence that plaintiff, whether negligently or otherwise, was in a position of danger and if you find either that it was physically impossible for him through the exercise of ordinary care to escape from said danger or that he was unaware of impending danger in his position, and if you find that defendant motorman had actual knowledge of plaintiff's dangerous position and that said defendant motorman knew or in the exercise of ordinary care should have known that plaintiff was either unaware of the danger impending in the situation or unable to escape therefrom in the exercise of ordinary care, and if you further find that thereafter said defendant motorman had a clear opportunity to avoid the accident and could have done so by exercising ordinary care but that he failed to avail himself of that

recently had occasion to discuss the facts upon which an instruction on the doctrine of the last clear chance should be given. Hopkins v. Carter, 109 Cal.App.2d 912, 241 P.2d 1063. It is not necessary to repeat it. If the facts be such that the doctrine may be applied it is the duty of the trial judge to submit it to the jury by proper instructions. Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 179, 93 P.2d 135.

[5] Plaintiff's automobile was stopped in the south half of the intersection. Defendant-motorman saw it in the intersection when he was at least 85 or 90 feet away. The streetcar was then traveling about 20 miles an hour. There was evidence that at 20 miles an hour the streetcar traveled 20.3 feet a second. The jury could have found that two or more seconds elapsed between the first clanging of the bell and the time the passenger got into position so as to see the stopped automobile on the track. The jury, therefore, could have found that the streetcar was 120 feet or more from the automobile when the motorman first saw it and began ringing his bell. About 30 seconds elapsed between the time plaintiff brought his automobile to a stop and the time it was struck. An expert testified that a streetcar, traveling at 20 miles an hour, could be stopped in 60.6 feet braking time. The motorman did not change the speed of the streetcar from the time he first saw plaintiff's automobile making a left turn until the collision. The speed of the streetcar at the instant of the collision was such as to knock the automobile about 60 feet. It thus appears, considering the evidence most favorable to plaintiff, that the jury could have found that after seeing the automobile stopped on the track the motorman had ample time, in the exercise of ordinary care, to bring the streetcar to a stop and that he had the last clear chance to avoid the collision.

[6] An instruction stating the doctrine of the last clear chance is proper when the evidence shows: "'[1] That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; [2] that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and [3] has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.' Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917." Selinsky v. Olson, 38 Cal.2d 102, 237 P.2d 645, 646, Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, 978. All of the elements of the doctrine find support in the evidence. It may be inferred that plaintiff was negligent and, as a result thereof, in a position of danger from which he could not escape by the exercise of ordinary care; the motorman had knowledge that the plaintiff was in such a situation and knew, or in the exercise of ordinary care should have known, that plaintiff could not escape from such situation; the motorman had the last clear chance to avoid the accident by exercising ordinary care, failed to do so, the accident resulted thereby, and plaintiff was injured as the proximate result of such failure.

The refusal of the court to give the instruction on the doctrine, in view of the state of the record, compels a reversal of the judgment. Bonebrake v. McCormick, 35 Cal.2d 16, 19, 215 P.2d 728.

Other points made by plaintiff are not likely to occur on a retrial and need not be discussed.

Judgment reversed.

SHINN, P. J., and PARKERWOOD, J., concur.

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opportunity and as a proximate result of such failure struck and injured plaintiff, then you are instructed that plaintiff is entitled to a verdict against the defendants for any injury suffered by plaintiff and proximately caused by the said accident."

112 Cal.App.2d 276

MARLO v. STATE BOARD OF MEDICAL EXAMINERS OF DEPARTMENT OF PROFESSIONAL STANDARDS et al.

Civ. 18776.

District Court of Appeal, Second District,
Division 2, California.

July 18, 1952.

Hearing Denied Sept. 11, 1952.

Mandamus against State Board of Medical Examiners and others for review of administrative proceedings culminating in suspension of petitioner's license to practice medicine. The Superior Court, Los Angeles County, William R. McKay, J., denied peremptory writ, and petitioner appealed. The District Court of Appeal, Moore, P. J., held that evidence supported Medical Board's determination that petitioner had performed the acts of abortion charged in the accusation.

Judgment affirmed.

1. Constitutional Law 🔑275(1)

Physicians and Surgeons 🔑11(3)

Complaint in proceeding for revocation of physician's license, which charged physician in ordinary and concise language with having performed an abortion on a specified date, and which designated general location, name of female victim, and contained declaration that abortion was not necessary to preserve life, was sufficient to apprise accused of charge lodged against him, and did not offend due process. Government Code, §§ 11503, 11505, 11506; U.S.C.A.Const. Amend. 14; Business and Professions Code, § 2377.

2. Appeal and Error 🔑193(1)

Objections to form of complaint will not be considered when raised for first time on appeal.

3. Administrative Law and Procedure 🔑454, 473

Constitutional Law 🔑275(1)

Physicians and Surgeons 🔑2

Provisions of Administrative Procedure Act relative to revocation of physician's license after hearing before Board of Medical Examiners, in view of requirement that verified accusation be served against person concerned, accompanied by notice that such person may request hearing by filing notice of defense, and that accused filed notice of defense, including request for hearing, objections to accusation and any new defensive matter, provide for proper notice and hearing and are in harmony with fundamental principles of due process and impervious to attack on constitutional grounds. Government Code, §§ 11503, 11505, 11506; U.S.C.A.Const. Amend. 14.

4. Physicians and Surgeons 🔑11(3)

In proceeding for revocation of physician's license because of alleged violation of statute prohibiting criminal abortions, evidence sustained finding of Board of Medical Examiners that physician involved had performed a criminal abortion.

5. Mandamus 🔑187(9)

Appellate court, when reviewing determination of trial court on petition for mandamus for review of administrative proceedings which had culminated in revocation of physician's license, has function of determining only whether there is substantial evidence to support trial court's findings.

6. Physicians and Surgeons 🔑11(3)

Under provision of Government Code relative to hearings before Board of Medical Examiners and providing that hearsay evidence may be used for purpose of supplementing or explaining any direct evidence, admission in proceeding before Board for revocation of physician's license for having procured a criminal abortion, of laboratory tests indicating pregnancy of victim, was not improper. Government Code, § 11513(c).

7. Physicians and Surgeons 🔑11(3)

A proceeding to revoke a license to practice medicine is not a criminal proceeding, and statutory rule that one may not be convicted upon the uncorroborated testimony of an accomplice has no application.

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Morris Lavine and Ralph N. Highsmith, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Bayard Rhone, Gilbert Harelson, Howard S. Goldin, Deputy Attys. Gen., for respondents.

MOORE, Presiding Justice.

Dr. Marlo was accused before respondent of having violated section 2377 of the Business and Professions Code. That statute declares procuring or aiding or attempting to procure a criminal abortion constitutes unprofessional conduct. The State Board of Medical Examiners tried the issues created by such accusation and appellant's "notice of defense," Gov't Code, sec. 11506, convicted him and made an order revoking his license to practice medicine. His petition for reconsideration having been granted and a further hearing had, and other evidence and argument heard, the Board rendered its decision and made the same order of conviction and of revocation of license. A third attempt to obtain a rehearing having failed, appellant instituted his action in mandamuns for a review of the administrative proceedings. Following a trial, the court made and filed its findings denying appellant relief. Upon Dr. Marlo's petition, the case was reopened and further proceedings were had. But in the end a peremptory writ was denied.

Appellant now demands a reversal on the grounds that (1) the complaint filed against him does not state a cause of action; (2) Government Code sections 11505 and 11506 are "inherently unconstitutional"; (3) the evidence is insufficient to support the findings; (4) the court erred in the admission and inclusion of evidence.

The contention that the accusation fails to state a cause of action is based upon the theory that the complaint is not in conformity with section 11503 of the Government Code. That section provides in part that the accusation "shall not consist merely of charges phrased in the language" of the statutes or rules which the defendant is alleged to have violated. It is argued that the accusation does not comply with that provision in that it does not apprise the accused physician of the charge intended to be lodged against him and hence offends the guaranty of due process of law.

[1, 2] Such contention flies in the face of the instrument itself. From its allegations he knew precisely the violation of which he was accused. In "ordinary and concise language" he is charged with having performed an abortion on a specified date. It informed the accused of the general location where the act was committed, the name of the female victim of the assault and a declaration that the abortion was not necessary to preserve the woman's life. But conceding, arguendo, the correctness of appellant's criticism of the complaint, he is now foreclosed from raising an objection to the form since he failed to assert this point in his "notice of defense" or in any other document prior to this appeal. Section 11506 of the Government Code provides that such a failure to object to the form of the accusation "on the ground that it is so indefinite or uncertain that he [the accused] cannot identify the transaction or prepare his defense" shall operate as a waiver of all objections to the form of the accusation.

[3] The next assignment of error is that sections 11503, 11505 and 11506 are "inherently unconstitutional" and in violation of the due process clause of the Fourteenth amendment to the Constitution of the United States "in that they fail to set out a procedure which enables the accused to come in and defend against it at the time of hearing." No sound argument, however, is advanced as to why these statutes contravene the judicial concept of due process of law. A persuasive argument cannot be made. The cited sections are a part of the Administrative Procedure Act. They first provide for initiation of proceedings to suspend or revoke a license by the filing and serving a verified accusation against the person concerned. With the complaint shall be included a notice that he may request a hearing by filing a notice of defense. Sec. 11505. Section 11506 requires the accused to file a notice of defense, including a request for a hearing, objections to the accusation and any new defensive matter. Such notice performs essentially the office of an answer and demurrer in the ordinary civil action. Accordingly, since such statutes provide for proper notice and hearing in connection with the revocation or suspension of a license they are in harmony with fundamental principles of due process and impervious to attack on

constitutional grounds. Brecheen v. Riley, 187 Cal. 121, 124–125, 200 P. 1024; Suckow v. Alderson, 182 Cal. 247, 250, 187 P. 965.

[4] The chief contention made is that the evidence is not sufficient to support the Board's determination that appellant performed the acts charged in the accusation. The record discloses no support for such assertion. There is ample evidence that on or about February 1, 1949, appellant performed a criminal abortion upon the person of a young lady whom we shall refer to as Barbara.

While it must be conceded that the denials of appellant, the testimony of his expert witness, and the proofs that Barbara and her escort were not in El Monte on the fifth day of February, 1949, were persuasive, yet the proof adduced by the State in substantiation of the complaint is ample, when adopted by the trial court, to justify a finding of appellant's guilt. Barbara was clear, emphatic and intelligent. She had consulted Dr. Harker, her own physician, in her home town of Oxnard, about January 15th with vague complaints as to her health. She told him she might be pregnant; her last preceding menstrual period was on December 5. A Friedman test for pregnancy was then performed at the laboratory of St. John's Hospital at Oxnard. Dr. Harker received the report of the test in a few days and informed his patient that it was strongly positive.

On February 4 Barbara left Oxnard by train for Santa Ana where she met Vic Williams, a serviceman with whom she had kept company and who was then stationed in that city. Williams drove her to El Monte where the couple engaged accommodations at a motel on the main street of the town, either the Rose Garden or the Rose Bowl motel. At about midafternoon she and Williams drove to the nearby El Monte Hospital. Barbara entered the building alone and asked to see the doctor. No questions were asked and she was told to be seated. At approximately 4:45 p. m. appellant came out and invited her to enter his office. She informed him that she was pregnant and desired an abortion. After inquiring as to the probable length of her pregnancy, appellant made an examination. In response to her inquiry as to whether anything could be done, he told her to return the next day at 9:00 a. m. when he would perform an operation, and to bring $250. When she said that she could raise only $200, the doctor agreed to this sum as his fee.

The following morning shortly before 9:00 o'clock Barbara returned to the El Monte Hospital with $200. Dr. Marlo met her in the reception room where he accepted his fee and placed it in his wallet. To Barbara's knowledge, no record of any kind was made either at that time or on the previous afternoon. Appellant directed her to the operating room where shortly thereafter a nurse appeared and told her to undress. Barbara did as directed and donned a short hospital gown. The nurse instructed her to lie on the operating table on her back with knees raised and her buttocks near the end of the table. In about 15 minutes Dr. Marlo entered and had her slide further down toward the end of the table. His instruments were located on a stand at her feet. Appellant then inserted instruments into her vagina whereupon she "felt a sharp sting." As he continued working she felt a "kind of prodding, a pushing" and then "like he was using cotton and wiping out." She was on the table for about an hour. Appellant left the room at least twice during this period. His only conversation with Barbara was to caution her to lie still; her continual wriggling evidently annoyed him as he worked. The operation completed, Barbara was directed to lie on an adjacent bed for a brief period. She complied but there suffered nausea. Thereafter she used a sanitary pad supplied by the nurse and departed at about 11:30 a. m. She joined Williams waiting in his car and they returned to the motel where she rested until the following day.

The unfortunate girl had not reached the end of her troubles. Two days later she again visited Dr. Harker, complaining of vaginal bleeding. He hospitalized and examined her. After treatment the bleeding subsided and she was discharged in two days. But the bleeding having recurred, she was again hospitalized on February 24th notwithstanding the failure of a Friedman test made on February 22 to reflect pregnancy. On the 25th surgery was performed and a small amount of chorionic tissue removed from the uterus.

Vic Williams also testified before the Board corroborating Barbara's testimony with respect to her visit to the El Monte Hospital and their sojourn at the motel together. Also, he testified to having given her $100 on the morning of February 5th.

No argument is necessary to convince any reasonable person that the evidence adduced by the State and adopted by the triers of fact as true is substantial and constitutes sufficient support for the finding that appellant performed the act of which he was accused. However, he does not agree to such conclusion and protests that there is no valid proof against him. He insists that expert medical testimony introduced in his behalf consisting of that of learned and skillful physicians in the field of gynecology and obstetrics proved that no abortion had been performed on Barbara on February 5. Such opinions were founded upon the findings of Dr. Harker on February 7 when he observed no marks of instrumentation on the uterus of Barbara. But respondents proved by other experts that such marks are often lacking and they were believed. For a portion of respondents' evidence to be contradicted is not a novelty and does not warrant interference with a judgment so long as there is substantial support therefor.

Reliance is also placed on the fact that appellant's witness proved that a check of the motel registrations in El Monte for the period around February 4 and 5, 1949, revealed no registration of a Barbara or Williams and no record of the automobile used by them on their visit to that city. However, other testimony established that the Rose Garden Motel in El Monte (apparently the hostelry visited by the pair) had lost or destroyed all records for the period prior to September 1, 1949.

[5] Bearing in mind the rules regarding the scope of review in a proceeding such as this that the trial court was authorized to exercise its independent judgment on the evidence presented, Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20 and the function of the appellate tribunal is to determine only whether there is substantial evidence to support the trial court's findings (ibid), it must follow from a recital of the above evidence that this court is now powerless to intefere with the judgment based on any theory of lack of evidentiary support.

[6] Appellant attacks the ruling of the court on the admission into evidence before the Board of the two hospital reports of the Friedman tests performed upon Barbara. It is urged that such reports are hearsay "of the rankest sort" and hence inadmissible. However, even conceding such reports to be ordinarily inadmissible, Government Code section 11513(c) specifically provides that in a hearing such as that held by the Board, hearsay evidence may be used "for the purpose of supplementing or explaining any direct evidence", and "any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." Apparently both Doctors Harker and Marlo saw fit to place reliance upon such laboratory reports. Accordingly, in view of such statutory provision, there was no error in their admission.

[7] Appellant's final contention that the testimony of Barbara, an accomplice, is insufficient to support the accusation against him is without support. That she was generously corroborated is readily to be observed by a perusal of the above recital of the evidence. In any event, such a contention has previously been met and determined adversely to appellant's view. A proceeding to revoke a license to practice medicine is not a criminal proceeding and hence the statutory rule that one may not be convicted upon the uncorroborated tes-

timony of an accomplice has no application. Murphy v. Board of Medical Examiners, 75 Cal.App.2d 161, 168, 170 P.2d 510; Lanterman v. Anderson, 36 Cal.App. 472, 477, 172 P. 625.

Judgment affirmed.

McCOMB, J., concurs.

Hearing denied; CARTER, J., dissenting.

* * *

112 Cal.App.2d 454

McMAHON v. MERRILL.

Civ. 18882.

District Court of Appeal, Second District,
Division 1, California.
July 29, 1952.

Hearing Denied Sept. 25, 1952.

Suit by attorney at law against client for fee for legal service. The Superior Court of Los Angeles County, Thomas P. O'Donnell and Arnold Praeger, JJ., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that in absence of transcript court must presume evidence supports findings and judgment.

Affirmed.

1. Appeal and Error 🔑907(2)

Where no transcript of testimony is filed on appeal, appellate court must presume that the evidence supported findings and judgment. Rules on Appeal, rule 52.

2. Judgment 🔑344

Refusal to vacate judgment was not an abuse of discretion. Code Civ.Proc. § 473.

John F. Poole, Los Angeles, for appellants.

Schifferman & Schifferman, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff is an attorney at law. He sued defendant for $2,046.75 for legal services. Defendant denied the claim and cross-complained for $9,665.80 for professional malpractice of plaintiff.

Much of the background of this case is to be found in the reported decisions in McMahon v. Superior Court, 29 Cal.2d 515, 175 P.2d 817; Estate of Merrill, 29 Cal.2d 520, 175 P.2d 819; Estate of Merrill, 81 Cal.App.2d 102, 183 P.2d 300; and Estate of Merrill, 89 Cal.App.2d 826, 202 P.2d 123.

In those cases plaintiff sought unsuccessfully to have adjudged as proper, fees which he claimed as attorney for the special administrator of the Estate of Rae S. Merrill, deceased. In this case plaintiff seeks to collect such fees personally from defendant Fred B. Merrill, who was the special administrator of the estate.

After a trial of nine days the trial judge found for defendant on all the issues.

Plaintiff appeals from the judgment against him which followed; from an order denying his motion for a new trial; and from an order denying him relief under section 473 of the Code of Civil Procedure.

[1] No reporter's transcript has been filed in this case. It is here on the judgment roll alone. So, under familiar, well-established principles, this court must presume that the evidence supports the findings and the judgment. E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417; Miller v. Lantz, 9 Cal.2d 544, 71 P.2d 585; Helvey v. Security-First National Bank, 99 Cal.App.2d 149, 221 P.2d 257; Rule 52, Rules on Appeal. See 21 So.Cal. Law Review 270; and also see cases digested in 6 West, Appeal & Error 🔑907.

[2] So far as the record permits, this court has examined each of plaintiff's contentions on appeal: that the trial judge was disqualified to hear a motion to reopen the case; that the causes of action in the cross-complaint were demurrable and barred by the statute of limitations; that a judgment against plaintiff in a former case, Estate of Merrill, 81 Cal.App.2d 102, 183 P.2d 300, was not *res judicata;* that interest should not have been allowed in the

judgment; that defendant was in any event personally liable; and that the findings are contradictory, irreconcilable, and mere surmise and conjecture.

None of these contentions is tenable. And there was no abuse of discretion in denying plaintiff's motion under section 473 of the Code of Civil Procedure.

The judgment and the order under section 473 of the Code of Civil Procedure are each affirmed; the appeal from the order denying plaintiff's motion for a new trial is dismissed. Reeves v. Reeves, 34 Cal.2d 355, 209 P.2d 937; Lee v. Dawson, 44 Cal. App.2d 362, 112 P.2d 683.

WHITE, P. J., and DORAN, J., concur.

112 Cal.App.2d 321

SOUTHALL v. SECURITY TITLE INS. & GUARANTEE CO.

Civ. 19015.

District Court of Appeal, Second District, Division 1, California.

July 21, 1952.

Hearing Denied Sept. 18, 1952.

Walter R. Southall brought an action against Security Title Insurance and Guarantee Company, a corporation, for breach of escrow agreement. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, White, P. J., held that the complaint did not state a cause of action.

Judgment affirmed.

1. Appeal and Error 🔑854(3)

Judgment entered for defendant after demurrer to amended complaint was sustained would not be reversed where demurrer should have been sustained on a ground other than ground assigned by trial judge for sustaining demurrer.

2. Escrows 🔑8(1)

Alleged fact that escrow agent breached escrow agreement by failure to inform plaintiff that deeds necessary to convey to plaintiff title to realty plaintiff had contracted to purchase from third person had not been deposited with escrow agent by such third person, which failure allegedly delayed plaintiff in bringing successful action against third person to require third person to deposit necessary deeds with escrow agent, had no causal connection with fact that plaintiff was obliged to bring such action against third person, and did not entitle plaintiff to recover from escrow agent costs and counsel fees incurred by plaintiff in bringing such action against third persons.

Ralph Bancroft, San Francisco, for appellant.

F. W. Audrian, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment entered after a demurrer was sustained to his amended complaint upon the stated ground that his cause of action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure.

Plaintiff alleged that on December 3, 1947, he entered into a contract for the purchase of certain real property from William and James P. Bianchini as heirs-at-law of one Eugenio Bianchini and also as co-trustees of a trust established by the will of Eugenio Bianchini, and secured approval of the purchase from all of the beneficiaries of the trust. Plaintiff and the Bianchinis thereupon executed and delivered escrow instructions to defendant title company, a copy of the instructions being annexed to the amended complaint, and it is alleged, "said defendant then and there covenanted and agreed to and with plaintiff for a valuable consideration that it, the said defendant, would carry out its obligations in accordance with the terms of said escrow agreement," and the Bianchinis as trustees agreed to deliver to defendant "papers required to vest title as designated in said escrow instructions". Plaintiff further alleged "That by the terms of said escrow defendant agreed that it would give plaintiff notice of facts within the knowledge of defendant which would prevent its compliance with said escrow instructions."

The asserted breach of contract or duty by the defendant, as set forth in the amended complaint, is that on February 18, 1948, and on June 3, 1948, "plaintiff wrote defendant asking for information as to the status of said escrow but received no reply thereto from said defendant. That on July 8th, 1948, defendant's title search was completed and the title to the property described in said escrow was found by defendant to be in order and that defendant was then in a position to transfer title to plaintiff; however, the said William Bianchini and James P. Bianchini, co-trustees, had not delivered to defendant the papers required to vest title in plaintiff as agreed by them in said escrow."

Further, it was alleged that "although repeatedly requested by plaintiff, both by letter and telephone, defendant at no time informed plaintiff that the papers required from the co-trustees to vest title in plaintiff had not been delivered to defendant and at no time did defendant inform plaintiff that the title search was completed and that defendant was able to procure a standard form Owners Policy of Title Insurance upon the delivery to it of the papers required from the co-trustees to vest title in plaintiff * * *".

The resulting damage to plaintiff from the asserted dereliction of defendant is pleaded in the following language of the amended complaint:

> "That by reason of the said breach of the contract by this defendant, as heretofore alleged, it became necessary for plaintiff to at once employ counsel to bring an action for specific performance against the said William Bianchini and James P. Bianchini, co-trustees, * * * that plaintiff * * * did obtain a decree (of specific performance) * * *; that plaintiff was compelled to pay $250.00 costs and $2,250.00 for reasonable counsel fees * * *. That by reason of the premises, plaintiff has been damaged in the sum of $2,500.00, * * *."

[1] We deem it unnecessary to determine the question of whether this is an action upon a contract, obligation or liability upon an instrument in writing, to which subdivision 1 of section 337 of the Code of Civil Procedure applies, or an action to recover damages for negligence of the escrow agent in discharging its obligations under a parol agreement to faithfully perform the duties of its agency. We have arrived at this conclusion because we are convinced that the demurrer must be sustained on the ground that, regardless of the character of the action, the complaint does not state facts sufficient to constitute a cause of action against defendant. This was one of the grounds urged upon demurrer, and while the court sustained the demurrer on the assigned ground "that the alleged cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure," no citation of authority is required for the statement that if the demurrer should have been sustained upon any of the grounds urged, the judgment will not be reversed. It is the validity of the court's action in sustaining the demurrer which is here reviewable, and not the court's opinion or statement of reasons for its action.

[2] The conclusion that plaintiff was injured by any omission of the defendant escrow agent does not follow from plaintiff's pleading. To the contrary it appears clearly from the allegations of his amended complaint that plaintiff's stated loss or damage, that is, the expense to which he was put for costs and attorney's fees, was caused solely and proximately by the failure of the sellers to perform their agreement, with the consequent necessity of a suit for specific performance. Assuming that defendant's failure to advise the plaintiff that the necessary deeds had not been deposited resulted in a delay in securing title to the property, it was not alleged that any damage (such as might result from a depreciation of the property) resulted from such delay. The escrow agent was under no duty to

secure the necessary documents, and its asserted breach of contract in the matter of advising the plaintiff that the deeds had not been deposited with it can by no stretch of the imagination be held to have any causal connection with the fact that plaintiff was "obliged" to bring a suit for specific performance against the sellers.

Plaintiff having failed to state a cause of action against defendant the demurrer was properly sustained.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

112 Cal.App.2d 245

McHENRY'S, Inc., v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

Civ. 18760.

District Court of Appeal, Second District, Division 2, California.

July 17, 1952.

Hearing Denied Sept. 11, 1952.

Action by McHenry's, Inc., doing business as McHenry's Tail o' The Cock, against California Employment Stabilization Commission and/or James G. Bryant, Director of Employment, State of California, to recover wage earner contributions paid by plaintiff under protest and interest on such payment and employer contributions. The Superior Court of Los Angeles County, Joseph W. Vickers, J., rendered judgment for recovery of wage earner contributions paid under protest but denying interest on such payment and denying recovery of employer contributions and plaintiff appealed. Defendant appealed from that portion of the judgment providing for recovery of wage earner contributions. The District Court of Appeal, McComb, J., held that the plaintiff was entitled to certain contributions erroneously collected and to interest thereon from date of payment.

Reversed and remanded with instructions.

1. Taxation ⇨347.1

A corporation which succeeded to business of individuals was not required to pay unemployment insurance contributions on the first $3,000 of wages paid by corporation when sole change in business was one of legal entity and when in the same calendar year the predecessor individuals had paid unemployment insurance contributions on the first $3,000 paid to any one worker. Gen.Laws, Act 8780d, §§ 1 et seq., 11, 37.

2. Taxation ⇨543(8)

A plaintiff from whom contributions under California Unemployment Insurance Act were erroneously collected was entitled to interest from date of payment of such contributions. Gen.Laws, Act 8780d, § 45.11(c, d).

Todd W. Johnson, Edward D. Robertson and Donald C. McGovern, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Deputy Atty. Gen., William L. Shaw, Deputy Atty. Gen., and Vincent P. Lafferty, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

The trial court gave judgment to plaintiff for the amount of wage earner contributions paid by it under protest, and for costs, but denied interest on such payment. To recover such interest as well as the employer contributions (for which judgment was denied plaintiff), plaintiff has appealed. Defendant has appealed from the portion of the judgment providing for the recovery of the wage earner contributions paid under protest.

Facts: Prior to July 1, 1946, Shelton A. McHenry and Bernice McHenry, husband and wife, wholly owned and operated a restaurant business under the name of McHenry's Tail o' the Cock. The capital of the business consisted of contributions of separate property by each spouse and of property acquired during their marriage through services of the respective parties.

On or about July 1, 1946, plaintiff acquired the entire business theretofore owned and operated by Shelton A. McHenry and Bernice McHenry as McHenry's

Tail o' the Cock. On or about July 5, 1946, plaintiff issued stock certificate No. 1 to Bernice McHenry for 4900 shares of its capital stock at a par value of $1.00 per share and on the same day issued stock certificate No. 2 to Shelton A. McHenry for 5100 shares, which two certificates represented all the corporation's outstanding shares and which issuance was in the same proportion as their ownership of the predecessor business.

There was no change in type or location of the business after transfer to plaintiff. The actual management of the business was conducted by plaintiff in the same manner as it had been conducted during the operation of its predecessor. The identity of the business carried on under the same name was not altered or otherwise affected by the transfer to plaintiff.

There was no relevant or pertinent change of employees resulting from the transfer of the business except that after the succession thereto by the corporation the status of both Shelton A. McHenry and Bernice McHenry changed to being that of employees of the business, whereas prior thereto they were the proprietors. The relationship of the employees upon whose wages the tax under the California Unemployment Insurance Act is based, to the business, after acquisition thereof by plaintiff, was the same as it was prior thereto. The predecessors of plaintiff corporation paid all taxes due under the California Unemployment Insurance Act for the first and second quarters of the year 1946. Plaintiff filed returns with defendant for the third and fourth quarters of the year 1946, and in such returns the employment of the persons who had worked for plaintiff's predecessors during the year 1946 prior to the transfer of the business to plaintiff, and who continued to work for plaintiff was considered as one employment by plaintiff. Wages in excess of $3,000 paid during the calendar year 1946 to any one employee by either plaintiff's predecessors or by plaintiff or both were by plaintiff considered exempt from tax under the California Unemployment Insurance Act.

On or about September 29, 1948, defendant made an assessment against plaintiff of additional taxes and interest totaling $511 with the explanation, "Wages paid by your predecessor were erroneously included in your computation of exempt wages in excess of $3,000." The sum of $513.31 was paid by plaintiff to defendant under protest on or about October 20, 1948; a claim for refund thereof was filed by plaintiff and denied by defendant; a petition for review of said claim and for refund was filed by plaintiff, and said review was granted and defendant issued its tax decision denying plaintiff's claim for refund.

All administrative remedies required by law were exhausted by plaintiff and the present action instituted. The trial court rendered judgment for plaintiff against defendant in the total sum of $205.34, and for costs in the sum of $16.50. The amount of $205.34 represents wage earner contributions in the amount of $184.95 plus interest applicable thereto which had been assessed against plaintiff and paid under protest.

The judgment did not include interest upon the amount of $205.34 from the time of payment on or about October 20, 1946. The trial court did not give plaintiff judgment for employer contributions in the amount of $277.43 plus interest thereon paid by plaintiff on or about October 20, 1946.

[1] *Questions*: First: *Is a corporation which succeeds to the business of an individual required to pay unemployment insurance contributions on the first $3,000 of wages paid by the corporation when the sole change in the business is one of legal entity and when in the same calendar year the predecessor individual has paid unemployment insurance contributions on the first $3,000 paid to any one worker?*

No. In the instant case the change on or about July 1, 1946, was one of form and not substance and was in effect the continuation of an employing unit. The California Unemployment Insurance Act, Deering's General Laws, Act 8780d, section 37, provides that "contributions" be made by employers to defendant. The section provides that contributions shall be based on "wages" paid by the employer.

The statute excludes from the definition of the term "wages" remuneration in excess of $3,000 paid to an individual by an employer in any calendar year. It reads in part:

> "Sec. 11(a) Except as hereinafter in the section provided the term 'wages' means:
>
> "(1) All remuneration payable for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the cash value of all remuneration payable in any medium other than cash. * * *
>
> "(c) If, when, and during such time as the definition of the term 'wages,' as contained in the Federal Unemployment Tax Act excludes from 'wages' any one or more of the following types of payments, then such type or types of payments as are so excluded shall likewise be excluded from the definition of wages as contained in subsection (a) of this section:
>
> "(1) That part of the remuneration which, after remuneration equal to three thousand dollars ($3,000) has been paid to an individual by an employer with respect to employment during any calendar year is paid after December 31, 1939, and prior to January 1, 1947, to such individual by such employer with respect to employment during such calendar year; or that part of the remuneration which, after remuneration equal to three thousand dollars ($3,000) with respect to employment after 1938, has been paid to an individual by an employer during any calendar year after 1946, is paid to such individual by such employer during such calendar year."

This construction has been sustained in well reasoned opinions by the appellate department of the superior court in and for the city and county of San Francisco in California Employment Commission v. Ransohoff, Inc., et al., C.C.H. Unemployment Insurance Reporter, California, par. 1205.115, and Barrett et al. v. California, Employment Commission, C.C.H. Unemployment Insurance Reporter, California, par. 1205.116. A like result has been reached by the Supreme Court of Illinois in Karlson v. Murphy, 387 Ill. 436, 56 N.E. 2d 839, and the Supreme Court of Michigan in Meyer v. Unemployment Compensation Commission, 311 Mich. 440, 18 N.W.2d 886.

These cases hold that an employer, not liable to an unemployment tax, on remuneration paid to an employee in excess of $3,000 within a calendar year, is entitled to have taken into account wages paid during the calendar year to an employee by his predecessor to whose business the employer has succeeded. The meaning of the term "employing unit or employer" as used in the statute is that these terms refer to the unity of enterprise and are not concerned with the shifting of management or the legal form of the same enterprise.

A case involving the identical principle though on different facts was decided in accordance with the foregoing views by the District Court of Appeal of this state in Crook v. Department of Employment, 78 Cal.App.2d 308, 177 P.2d 634. In this case the interest of the business which was owned by E. I. Crook prior to his death was, subsequent to his death, owned by Bertha D. Crook, but was operated by the executor of decedent's estate during the administration thereof. After the decree of distribution was entered, Bertha A. Crook operated her interest in the business as a partner with Wayne D. Crook. The ownership prior to and subsequent to the decree of distribution was in Wayne D. Crook and Bertha D. Crook. The court held that the assessment of a tax upon the theory that three separate entities were involved was illegal as applied to the partnership carried on after the death of one of the partners by the surviving partner and the decedent's widow, where no change in the operation of the business occurred after the decree of distribution of the deceased party's estate, and that there was no new entity as employer established.

The reasoning of the foregoing decision is sound, the result is equitable and it applies to the facts involved herein. The business acquired by plaintiff was wholly owned by Shelton A. McHenry and his wife. Also, they owned all the shares of its capital stock subsequent to plaintiff's acquiring the business in the same proportion as their ownership of the predecessor business.

There was likewise no change in the type or location of the business. Also the actual management was conducted by plaintiff in the same manner as it had been during the operation of plaintiff's predecessors. The identity of the business was carried on under the same name and was not altered or otherwise affected by the transfer. Therefore, there was no change in the employing unit.

In view of the foregoing the trial court erred in not awarding plaintiff judgment for the amount of the employer contribution which it had paid under protest, to wit, the sum of $277.43.

[2] Second: *Did the trial court err in not allowing plaintiff interest upon the contributions erroneously collected by defendant from the date of payment of such contributions?*

Yes. Section 45.11(c) of the Act, with respect to interest upon refund of overpayments, reads as follows:

> "(c) * * * Interest shall be allowed and paid only to the extent that interest and penalties collected under this act are available therefor upon any overpayment of contributions at the rate of six per cent (6%) per annum from the date of overpayment to the date of the allowance of the refund or credit, provided, however that no interest shall be allowed if the commission determines that any overpayment has been made intentionally or by reason of negligence on the part of the employing unit."

Section 45.11(d) reads in part as follows:

> "In any such judgment [for contributions, interest or penalties erroneously collected], interest shall be allowed and paid only to the extent that interest and penalties collected under this act are available therefor, at the rate of 6 per cent per annum upon the amount of contributions found to have been illegally collected from the date of payment thereof to the date of such judgment."

Clearly under the foregoing provisions of the Act plaintiff was entitled to recover interest at the rate of 6 per cent from October 20, 1948, the date it made payments under protest, to and including the date of the judgment.

The judgment is reversed and the cause remanded to the trial court with instructions to enter a judgment in favor of plaintiff in accordance with the views expressed in this opinion.

MOORE, P. J., and FOX, J., concur.

112 Cal.App.2d 189

In re HILDE'S ESTATE.

KELLY v. LOS ANGELES COUNTY.

Civ. 18823.

District Court of Appeal, Second District,
Division 1, California.
July 8, 1952.

Rehearing Denied July 30, 1952.
Hearing Denied Sept. 4, 1952.

Proceeding in the matter of the estate of Ray I. Hilde, deceased. The Superior Court, Los Angeles County, John Gee Clark, J., entered order surcharging Nina Kelly, as administratrix, in the amount of cash and personal property of the estate at the appraisal value thereof and directing that she pay a claim of the County of Los Angeles and pay other fees and expenses, and the administratrix appealed. The District Court of Appeal, Hanson, J. pro tem., held that administratrix, who had sold the estate's interest in a trust deed without a court order at price of $750, was properly charged the estate's appraised interest in the trust deed in sum of $833.33.

Judgment affirmed.

1. Executors and Administrators ⚷510(13)

Where matters involving an administratrix' final accounting had been appealed to District Court of Appeal and a remittitur from that court had been sent down, such matters were res judicata and administratrix could not relitigate them by filing a new current account and report which made substantially the same claims.

2. Executors and Administrators ⚷158

An administratrix who sold a trust deed from the estate at a price of $750 without a court order was properly charged with the estate's appraised interest in the trust deed in the sum of $833.33.

3. Executors and Administrators ⚷158

An administratrix is liable for the appraised value of personal property in the absence of a court order permitting a sale at a lesser price.

4. Executors and Administrators ⚷109(2)

Where no claim for funeral expenses was filed with administratrix, her payment of such expenses without a court order was at her peril as between herself and creditors, and fact that the expenses were paid with approval of the heirs was of no consequence.

5. Executors and Administrators ⚷109(2)

It is for the court in its sound discretion to determine to what extent an expenditure by an administratrix for funeral expenses is fair and reasonable.

6. Executors and Administrators ⚷507(1)

Trial court properly dismissed for want of jurisdiction an administratrix' motion for new trial on issues raised on settlement of account. Probate Code, § 1231.

7. Executors and Administrators ⚷504(7)

Attorney for administratrix was not properly a party to a settlement of her account.

◆

H. L. Sacks, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Robert C. Lynch, Deputy County Counsel, Los Angeles, for respondent.

HANSON, Justice pro tem.

This is the second appeal taken in this case. Upon the first appeal, 101 Cal.App.2d 41, 224 P.2d 765, the rulings of the trial court were affirmed. In short it was held (1) that the allowance of a claim filed by the County of Los Angeles for the sum of $554.89 was not subject to attack; (2) that the court properly disallowed appellant's claim for reimbursement for funeral expenses of decedent.

[1] After the remittitur went down appellant filed a new current account and report in which she sought to relitigate the claim of the county and the administratrix' right to reimbursement. This she was not entitled to do as the matter was res judicata. Upon a hearing at which evidence was taken the court rendered findings (1) surcharging the administratrix in the amount of $1,156.15, which she had received in cash and personal property at the appraisal value thereof; (2) directing her to pay the county's claim and out of the balance of the surcharge to reimburse herself (a) for attorney's and administratrix fees in the amount of $152.48 and (b) for funeral expenses up to $405.54.

[2, 3] Upon the appeal before us the administratrix contends that she should not be charged with the estate's appraised interest in the trust deed, i. e., the sum of $833.33 but at the price she sold the interest without a court order, i. e., $750. The short answer to this contention is that the administratrix is liable for the appraised value of personal property in the absence of a court order permitting a sale at a lesser price. The administratrix had the trust deed in her possession when she sold the estate's interest in it.

[4, 5] The fact that the administratrix paid the funeral expenses in the sum of $1,038.02 with approval of the heirs is of no moment in the absence of a court order approving the expenditure. No claim for funeral expenses was filed with the administratrix and hence she paid the bill at her peril as between herself and creditors. It was for the court in its sound discretion to determine to what extent the expendi-

ture was fair and reasonable. In re Estate of Malgor, 77 Cal.App.2d 535, 176 P.2d 66.

[6] The motion for a new trial was rightly dismissed by the trial court for want of jurisdiction to entertain it, Probate Code, sec. 1231, and accordingly the appeal therefrom is dismissed.

Other errors assigned by appellant are so flimsy and unmeritorious as not to warrant our detailing them.

[7] The attorney for appellant had no standing to make himself a party to the case and his appeal from the court's ruling to that effect is accordingly dismissed.

The judgment below should be and it is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

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112 Cal.App.2d 339

PEOPLE v. KNOX.

Cr. 4793.

District Court of Appeal, Second District, Division 1, California.

July 21, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Ellsworth Meyer, J., of felonious possession of a firearm, and he appealed. The District Court of Appeal, Drapeau, J., held that the evidence supported the conviction.

Affirmed.

1. Weapons 🔑17(4)

Evidence was sufficient to sustain conviction for felonious possession of firearm. Gen. Laws, Act 1970.

2. Criminal Law 🔑1202(3)

Testimony of finger print officer and records of defendant's conviction, in Louisiana, of the crime of shooting into a dwelling house, a felony in that state, were sufficient proof of defendant's prior felony conviction. Act La. No. 8 of 1870, Ex. Sess.

Gladys Towles Root and Herbert Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant, Dan Knox, and his lady friend registered at a rooming house in Watts. While there they were arrested for resorting and taken to jail.

Before the room was rented to defendant it had been cleaned and the linen changed. It was not rented again that night. The next morning the landlady again cleaned the room and changed the linen. When she shook out the pillow case a gun fell out—a little black Colt's automatic. She took the gun to the police, who then talked to defendant about it. He told them that it was his and that he had put it into the pillow case.

Defendant's finger prints revealed that in 1930 he had been convicted of a felony in the State of Louisiana and had served a term in the Louisiana state penitentiary.

The District Attorney charged defendant with felonious possession of a firearm. Dangerous Weapons Control Act, Gen. Laws, Act 1970. He was convicted after trial by the Court, and sentenced to state's prison. He appeals from the judgment and from an order denying his motion for a new trial.

Defendant argues that the evidence of his possession of the gun is insufficient to warrant his conviction; and that the proof of his prior felony conviction is likewise insufficient.

[1] The facts already stated, and the inferences drawn from them are sufficient to support the finding of defendant's possession of the dangerous weapon. On his motion for a new trial, he presented an affidavit of his lady friend, in which she averred that she was the owner of the gun at all times and that it was she who hid it in the pillow case. If she had so testified at

the trial, possibly the result might have been different, taking into consideration the long period of time from defendant's conviction in Louisiana to his arrest in California. This she did not do. In fact she told the officers that the "little black Colt" belonged to defendant.

[2] Proof of defendant's former conviction is also sufficient. A police officer of the City of Los Angeles, assigned to the Scientific Investigation Division, latent finger print section, testified that defendant's finger prints taken after his arrest in Los Angeles and his finger prints taken in Louisiana were made by one and the same person. Records from Louisiana established that defendant was convicted of shooting into a dwelling house, and sent to the Louisiana state prison for a term of one to three years, under Section 8, Act No. 8, 1870 Extra Session of the Louisiana Legislature. The courts of Louisiana have held that violation of this statute is a felony. State v. Bowden, 181 La. 442, 159 So. 710.

The order denying defendant's motion for a new trial, and the judgment of conviction are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

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112 Cal.App.2d 283

MARKS v. MARKS.

Civ. 19043.

District Court of Appeal, Second District, Division 2, California.

July 18, 1952.

Proceedings by wife for modification of divorce decree to require continuance of support payments beyond date for automatic termination. The Superior Court, Los Angeles County, Percy Hight, J., entered order adverse to wife, and she appealed. The District Court of Appeal, Moore, P. J., held that where interlocutory decree provided for support payments for period of one year, with modification for sufficient cause, and neither decree nor property settlement contract contained provision that husband would continue support payments until wife's arthritic condition improved, mere showing of continuance of arthritic condition did not require modification of decree as to support, when other evidence indicated that wife was substantially self-supporting.

Order affirmed.

1. Divorce 🔑245(3)

Where interlocutory decree of divorce ordered husband to pay support money to wife for period of one year only, except that wife might request court to continue support payments for longer period of time for sufficient cause, and neither decree nor property settlement contract upon which decree was based contained provision requiring husband to continue support payments until wife's arthritic condition improved, mere showing that wife was unable to work full time because continuance of arthritic condition did not require modification for continuance of support payments when other evidence indicated that wife was substantially self-supporting notwithstanding such condition.

2. Appeal and Error 🔑948

An abuse of discretion is never presumed, but must be clearly demonstrated by the party making such assertion.

H. W. Funke, Long Beach, for appellant.

Everett L. Miller, Long Beach, for respondent.

MOORE, Presiding Justice.

By an interlocutory decree of divorce entered in favor of plaintiff on December 1, 1950, it was ordered that defendant pay to plaintiff for her support $65 per month. It provided further that "commencing November 30, 1950, and continuing thereafter for the period of one year only, excepting that plaintiff may request the Court to continue support payments for a longer period of time for sufficient cause, and that the request for such extension must be made on or before October 30, 1951, and should plaintiff fail to make said request within said time that all support for plaintiff is automatically to cease and terminate." While the order was based upon a property settlement agreement executed by the parties such agreement was not incorporated in the decree by reference or otherwise. The only indication in the judgment of such contract is the statement: "a property settlement agreement was introduced in evidence and was approved."

On October 22, 1951, plaintiff instituted proceedings for the purpose of obtaining such a modification of the decree as would require respondent to continue the support payments beyond the termination date fixed in the decree. Such relief having been denied, the wife now appeals from the order of denial. The question for decision is whether the trial court abused its discretion by its denial of such relief. Appellant contends that she is physically unfit to support herself by reason of the chronic rheumatoid arthritis from which she suffers. It is argued that respondent consented to make support payments for his wife as provided in the property settlement agreement because of plaintiff's poor health and her resulting inability to work at full-time employment; that it was the intention of the parties for the alimony payments to continue until plaintiff's physical condition improved or until her remarriage; that since her condition has not improved there is necessarily "sufficient cause" for extending the payments.

Neither the decree nor the property settlement contract contains a provision that respondent will continue support payments until plaintiff's physical condition improved. On the contrary, the latter instrument provides only for the maintenance of appellant for one year. Then follows a possible limitation on the termination, provided appellant can sustain the burden of demonstrating that "sufficient cause" is present justifying such extension. If an improvement in appellant's health had been required as a basis for a termination of respondent's obligation, it would have been reasonably logical and certainly a simple task for the parties so to state in their agreement.

Appellant's testimony revealed that though she still suffers from her longstanding arthritic condition, she is nevertheless able to work half-days as a bookkeeper for which she is paid $95 per month. Also, she receives additional income from leasing two rooms in her home and a third roomer assisted with labors about the house in return for lodging. Appellant testified also that "a good bit of the time" she and her daughter take their meals at the home of appellant's mother which indirectly aided her financially. In addition to all the foregoing, appellant receives $50 per month from respondent for support of the couple's eleven-year-old daughter.

Appellant's personal physician testified that Mrs. Marks can "do light work all the time" and some type of work at home, though she was probably not able to handle regular employment on a full time basis. He testified also that she no longer was being treated with the drug cortisone since her "symptoms improved sufficiently * * * and probably for economic reasons * * *" and that with treatment there might be a possibility of Mrs. Marks' making a radical improvement.

[1, 2] Based on such evidence, it cannot be said that the trial court has abused its discretion in denying modification of the prior support order. Neither the proof presented nor the interlocutory judgment, viewed in the light of the property settlement agreement, necessarily required the court to grant the relief sought by appellant. An abuse of discretion is never presumed but must be clearly demonstrated by the party making such assertion. Pope v. Pope, 107 Cal.App.2d 537, 540, 237 P.2d 312.

Order affirmed.

McCOMB and FOX, JJ., concur.

112 Cal.App.2d 374

WOOD et al. v. GORDON et al.

Civ. 18584.

District Court of Appeal, Second District, Division 1, California.

July 23, 1952.

Rehearing Denied Aug. 19, 1952.

Hearing Denied Sept. 18, 1952.

Stockholders' derivative suit by Pauline V. Wood, and others, against Nathan M. Gordon, and others, for alleged conspiracy to defraud corporation by violating fiduciary duties to the corporation. The Superior Court of Los Angeles County, Samuel R. Blake, J., ordered security for litigation expenses for some of defendants, and plaintiffs appealed. The District Court of Appeal, Hanson, J., pro tem., held that director who had purchased one fourth of stock of second corporation, which was not competitor of first corporation until after director sold the stock at its original cost to him, was properly granted security.

Judgments affirmed.

1. Corporations 🔑320(12)

Under statute giving defendant in stockholder's derivative suit right to security for his reasonable litigation expenses, defendant had burden to show, by preponderance of evidence, either that there was no fair likelihood of benefit to corporation or its security holders or that he did not participate in transaction complained of. Corporations Code, § 834.

2. Appeal and Error 🔑1011(1)

Under statute providing that defendant in stockholder's derivative suit may be entitled to security for his reasonable litigation expenses, the trial court must weigh the evidence, and its finding, when based upon substantial conflicting evidence, is binding upon the appellate court. Corporations Code, § 834.

3. Corporations 🔑214

Statute providing that defendant in stockholder's derivative suit is entitled to security for reasonable litigation expenses where there is no reasonable probability that prosecution will benefit the corporation or its security holders or that defendant participated in transaction complained of applies to both strike and bona fide suits. Corporations Code, § 834.

4. Corporations 🔑214

Where statute pertaining to giving of security for reasonable litigation expenses to defendant in stockholder's derivative suit was clear cut, the District Court of Appeal was bound to give full effect to its language. Corporations Code, § 834.

5. Constitutional Law 🔑70(3)

If statute pertaining to giving to defendant in stockholder's derivative suit security for his reasonable litigation expenses is too stringent or unduly restricts shareholders in their endeavor to recover from alleged fraudulent directors, the remedy must be sought in legislative enactment and not by judicial pronouncements. Corporations Code, § 834.

6. Trusts 🔑102(1)

If corporate director and manager did not violate his fiduciary duty in purchasing stock in competing corporation, but was liable in damages for breach of other fiduciary duties, a constructive trust would not arise concerning the competing corporation's stock which was still in his own hands or in that of his transferees.

7. Corporations 🔑320(12)

In stockholder's derivative suit, where trial court found that there was reasonable probability of liability of father who had purchased stock in competing corporation and had given some of such stock to son, but did not determine whether such liability stemmed from purchase of the shares, son was entitled to security. Corporations Code, § 834.

8. Corporations 🔑320(12)

In stockholder's derivative suit for alleged conspiracy to defraud corporation by violation of fiduciary duties to corporation, director who purchased one fourth of stock of second corporation, which was not competitor of first corporation until after director sold the stock at cost, was entitled to security for his reasonable litigation expenses in view of fact that trial court could have found from evidence that director did not know of alleged wrongful acts of other directors and managers which allegedly damaged corporation. Corporations Code, § 834.

9. Corporations ⚿320(12)

In stockholders' derivative suit against corporate directors, officers, and managers for conspiracy to defraud corporation by allegedly purchasing stock in competing corporation and transferring customers, key personnel, and equipment to competing corporation, director who was not part of conspiracy was entitled to security for his reasonable litigation expenses. Corporations Code, § 834.

10. Corporations ⚿313, 315

A corporate director may not violate his fiduciary obligations, acquire property in which his corporation has an interest or tangible expectancy, or engage in a rival business to the detriment of his corporation.

◆

Vaughan, Brandlin & Wehrle, J. J. Brandlin and Pat B. Trapp, Los Angeles, for appellants.

Fleming, Robbins & Tinsman, Los Angeles, for respondents Weinstein and Larson.

Fred Horowitz, Alvin F. Howard, Los Angeles, for respondent Robert Gordon.

HANSON, Justice pro tem.

In this shareholders' derivative suit instituted by preferred shareholders the ultimate question presented is whether the trial court erred in holding, upon the facts adduced, that Section 834 of the Corporations Code was applicable and as a consequence that the plaintiffs were under a duty to deposit security for litigation expenses in favor of the defendants I. M. Weinstein, Harold Larson, and Robert Gordon.

The statute in question expressly provides that if a party upon a hearing pursuant to a proper motion establishes *either* (1) that there is no reasonable probability that the prosecution of the action against him will benefit the corporation or its security holders or (2) that he did not participate in the transaction complained of in any capacity, he shall be entitled to security for his reasonable litigation expenses of a character and in an amount to be fixed by the court upon the evidence adduced.

[1,2] Under the statute the burden of proof is upon the moving party. In short, the burden is upon him to show, by a preponderance of the evidence, *either* that there is no fair likelihood of benefit to the corporation or its security holders and not that there is no foreseeable possibility or chance of slight benefit, cf. Ballentine, Shareholders Derivative Suits, 37 Cal.L.R. 399, 404; *or,* that he did not participate in the transaction complained of. It is for the trial court to weigh the evidence and its finding, based upon substantial conflicting evidence, is in this as in every civil case binding upon the appellate court.

As the statute requires the moving party to file and serve his motion within thirty days of the service of summons upon him (unless it is extended by the court), it follows that an order granting or denying security is a "final disposition of a claimed [statutory] right which is not an ingredient of the cause of action and does not require consideration with it". Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546–547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528. The further statutory provision which vests the trial court with a discretionary power, upon a proper showing, to order an increase or decrease in the amount of the security, once security has been ordered, is in an entirely different category. Cohen v. Beneficial Industrial Loan Corp., supra.

The complaint avers that the defendant-respondents Weinstein, Larson and Gordon along with certain other defendant officers and directors, past and present, of the United Linen Supply Co., entered into a successful conspiracy to defraud the corporation by violating their fiduciary duties to the corporation. In brief compass, the complaint avers that the defendants Gordon, Weinstein, Larson and Zipperman while directors of United aided by defendant Weingart, who was no longer a director or stockholder, conspired to purchase all the outstanding capital stock of a laundry corporation, i. e., Craig Laundry, Inc., for the purpose of causing the latter to expand its business so as to engage in the linen supply business, and thereby come into direct and unfair competition with United. It was also averred that the parties mentioned solicited and took away customers and key personnel from United Linen, and additionally transferred trucks, equipment, and supplies from United Linen to Craig, whereby they realized profits in excess of $1,000,000, and greatly reduced the business of United Linen and impaired its organization.

There was no direct evidence of the alleged conspiracy and the trial court expressly found that none of the three parties here involved had entered into any conspiracy. From the evidence adduced it was for the trial court to draw all reasonable inferences therefrom and it is not for us to draw contrary inferences.

Upon the evidence submitted the trial court declined to order security for litigation expenses as requested by the defendants Craig Laundry, Inc., Nathan Gordon (the father of Robert Gordon), Louis Zipperman, Ben Weingart, Consolidated Hotels, and certain other defendants. Accordingly, it is plain that the trial court was of the view that the parties just named had not individually sustained the burden of proof that rested upon them.

In appealing to us for a reversal of the order requiring security in favor of the respondents, the appellants contend (1) that Section 834 of the Corporations Code was intended and should be interpreted to apply to "strike" suits and not to actions by bona fide shareholders holding a very substantial interest in the corporation; and (2) that the court made an erroneous conclusion of law when it adjudged there was a reasonable probability that no recovery could be had against the respondents.

[3–5] The argument that the statute was intended and should be limited to strike suits is unavailing in view of its language. The test laid down by the statute as to one who has participated in some act complained of does not turn on whether the suit is or is not a "strike" suit but whether there is a reasonable probability that its prosecution against the moving party will or will not prove of ultimate benefit to the corporation or its security holders. The statute does not distinguish between so-called strike suits and those that are generally classed as being bona fide. The distinction between such suits is however well known and, indeed, recognized by statutes of like tenor in other states. Accordingly, we must assume the legislature was fully cognizant of those statutes and intended by the statute it enacted not to differentiate between the two types of suits. As the statute is clearcut we are bound to give full effect to its language. If our statute, and those upon which it appears to be patterned in part, are too stringent or unduly restrict shareholders in their endeavor to recover from alleged fraudulent directors, as some writers contend, the remedy must be sought in legislative enactments and not by judicial pronouncements.

[6, 7] We come next to the question whether it may be said, as the trial court held, that the defendant Robert Gordon did not "participate" in any of the transactions complained of by plaintiffs and, accordingly, for that reason alone was entitled to security for his reasonable litigation expenses. In that aspect of the case we observe that appellants do not contend that Robert participated in any of the transactions of which they complain, but that they do contend that as he received all his shares in Craig as a gift from his father and not by purchase he stands in the shoes of his father and, hence, if his father Nathan is liable to United Linen he necessarily holds the shares in trust. The fallacy of the argument lies in the fact that while the trial court found, in effect, that there was a reasonable probability of liability on the part of the father it did not determine whether that liability stemmed from the purchase of shares of stock in Craig or because of the subsequent activities of that corporation acting through its directors and managers. If it should be found that Nathan Gordon did not violate his fiduciary duty in purchasing stock in Craig Laundry, Inc., but was liable in damages for breach of other fiduciary duties, a constructive trust would not arise with respect to the stock still in his own hands and *a fortiori* not in those transferred by him. Accordingly, it follows that if the court was of the view that the father was liable at most in damages, as we must assume, it did not err in requiring security in favor of Robert Gordon.

[8] We come next to a consideration of the question whether the prosecution of the action against Weinstein would benefit the corporation. Upon the evidence the court could have found that Weinstein did not know until July, 1943, that Nathan Gordon as manager and Zipperman as assistant manager prior to March 1, 1943, had not only refused to do the laundry work of Consolidated Hotels, Inc., at United's laundry plant in Hollywood but had closed that plant as well. Hence, we do not see any theory upon which there could be a recovery against Weinstein for loss of profits or damages for the activities indulged in by Gordon and Zipperman, such as loaning equipment and key men to others at the expense of United—of which facts Weinstein testified he was unaware.

When in July, 1943, Weingart of Consolidated Hotels, Inc., telephoned from Los Angeles to Weinstein in Atlanta, Georgia, and told him United had thrown out the Consolidated laundry account, and that he could purchase the common capital stock of Craig Laundry, Inc., and through it get the laundry service Consolidated needed, he did not ask or suggest that United should reopen its laundry plant in Hollywood. What he asked of Weinstein was financial assistance in the purchase of the capital stock of Craig. To that request Weinstein responded by stating that Weingart could draw upon him up to $15,000. Subsequently this was done and Weinstein accordingly became the owner of one fourth of the Craig common capital stock. At the moment, United was not a competitor of Craig even though it would have been had it been operating its own laundry. Whether the entire common stock of Craig Laundry, Inc., which had been offered to Weingart was priced above or below its real market value; whether Craig was operating profitably or at a loss was not shown. Accordingly, it was not shown that Weinstein possessed at any time a so-called "corporate opportunity" which he should have tendered to or purchased for United Linen. The undisputed testimony is that Weinstein held the stock for only a year and then in July, 1944, disposed of it to Weingart for the exact amount he had paid for it. It was not until a year later that Craig entered the linen supply business in direct competition with United Linen. Upon the facts recited we think it clear that the trial court did not err in finding that Weinstein was entitled to security.

[9] As the trial court found that Larson was not a party to any conspiracy the case against him necessarily must be based on his alleged negligent inattention to his duties as a director as he was not a shareholder in either United Linen or Craig Laundry, Inc. He had no hand in the operations of either corporation except as a director, and is not shown to have had knowledge of what was or was not done by the management. His position as attorney for both corporations and as attorney for both Weingart and Weinstein involved only advice and the drawing of legal papers. Upon what basis he could be held for not forestalling, if he could, the purchase of the common stock of Craig by Weingart, Weinstein, Gordon and Hyman or in what manner he could effectively have forestalled Craig from entering into competition in 1945 with United Linen is not shown. We fail to see—on the facts as they were found by the trial court—any reasonable probability of liability on his part.

[10] We agree with appellants that a director may not violate his fiduciary obligations, or acquire property in which his corporation has an interest or a tangible expectancy, or that he may not engage in a rival business to the detriment of his

corporation, but these principles, as we view the evidence, were not violated. At least the trial court so found on conflicting substantial evidence and hence we are bound to sustain it.

The judgments are affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.

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112 Cal.App.2d 255

RAVEL v. HUBBARD et al.

Civ. 18879.

District Court of Appeal, Second District,
Division 2, California.
July 17, 1952.

Action by Francis Ravel against Leo Hubbard and others for breach of exclusive contract for hauling of prefabricated houses. The Superior Court, Los Angeles County, R. R. Sischo, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, McComb, J., held, inter alia, that the contract was not void for lack of mutuality.

Affirmed.

1. Appeal and Error 🔑1039(1)

The manner of pleading becomes unimportant when a case is fairly tried on the merits under circumstances which indicate that nothing in the pleadings mislead the unsuccessful litigant to his prejudice.

2. Appeal and Error 🔑1040(10)

Where defendants who attacked complaint by demurrer failed to indicate wherein they were not fully informed of the issues which they were called upon to meet or wherein they were prejudiced by trial court's overruling of demurrer, such action by trial court would be affirmed.

3. Appeal and Error 🔑1031(1), 1032(1)

Prejudice is never presumed, it being incumbent upon complaining party to show affirmatively that they have been prejudiced by any alleged error.

4. Carriers 🔑62
Limitation of Actions 🔑24(2)

Where manufacturer of prefabricated houses wrote letter to trucker setting forth terms under which manufacturer would like to have trucker haul houses within exclusive territory, such letter constituted an offer which, when accepted, ripened into a contract, and therefore the four-year statute of limitations, rather than the two-year statute, was applicable to action by trucker against manufacturer for breach of contract. Code Civ.Proc. §§ 337, 339.

5. Contracts 🔑10(3)

Where contract required trucker to have equipment to move at least five houses per day and to put a swamper on each truck, and provided that in consideration of trucker's furnishing necessary equipment so that manufacturer of houses could be sure that houses would be taken out as fast as they were produced, manufacturer would give trucker exclusive hauling within certain territory, but that if trucker fell down and did not provide adequate equipment, manufacturer would be privileged to secure other trucking companies, contract was not void for lack of mutuality.

6. Contracts 🔑9(3)

Generally, a contract is not fatally defective merely because it does not specify a time presently definite for its termination, and where agreement provides that exclusive right is to endure so long as party shall perform terms of his agreement, the contract is valid and sufficiently certain.

7. Contracts 🔑321(1)

Where a contract is terminable at will, liability attaches for breaches occurring prior to termination of the contract.

8. Carriers 🔑63

Fact that manufacturer of prefabricated houses, prior to termination of trucking contract, gave portion of hauling to persons other than trucker, who, under contract, had exclusive right to such hauling, did not effect a termination of such contract, but indicated merely that trucker had waived some of his rights by not sooner insisting upon strict compliance with contract.

9. Automobiles 🔑**107(1)**

Trucker was not barred from recovering from manufacturer of prefabricated houses for breach of exclusive hauling contract, though trucker held radial highway common carrier permit, rather than a highway contract carrier permit. Civ.Code, §§ 2466–2469; Gen.Laws, Act 5129a.

10. Automobiles 🔑**107(1)**

In view of fact that it was unnecessary for validity of contract for hauling of prefabricated houses for trucker to have highway contract carrier's permit, failure to make finding in action by trucker for breach of such contract that trucker held such permit was not error. Civ.Code, §§ 2466–2469; Gen.Laws, Act 5129a.

11. Names 🔑**10**

In action by trucker against manufacturer of prefabricated houses for breach of exclusive hauling contract, evidence sustained trial court's finding that trucker was doing business under certain company name and was the sole owner of such company and had complied in all respects with pertinent sections of Civil Code. Civ.Code, §§ 2466–2469; Gen.Laws, Act 5129a.

12. Pleading 🔑**122**

Denial upon information and belief that trucker, under exclusive contract for hauling prefabricated houses, had complied with pertinent provisions of Civil Code constituted an admission of the truth of the allegation. Civ.Code, §§ 2466–2469; Gen. Laws, Act 5129a.

13. Assignments 🔑**137**

Evidence supported trial court's finding that trucker, who had exclusive contract for hauling of prefabricated houses, had assigned the contract, which was basis for breach of contract action against manufacturer, to trucking corporation.

Philip T. Lyons, Los Angeles, for appellants.

Wood, Crump, Rogers, Arndt & Evans, Dale J. Herian and M. W. Young, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court in an action to recover damages for breach of a contract to permit plaintiff to do all defendant's hauling of its prefabricated houses, defendants appeal.

Facts: On March 14, 1946, defendants wrote plaintiff as follows:

"Ravel Trux Co.
1528½ North Cordon Street
Hollywood, California

"Gentlemen:

"We are very anxious to have a mutual agreement in regards to the trucking of our prefabricated houses. It is my understanding that you have given our Mr. Galbraith the terms which have been accepted by him, and I understand that you will have adequate equipment to take care of at least five houses per day and that you will put a swamper on each truck so that the buildings can be unloaded properly.

"It is also our understanding that you have Cargo Insurance as well as Compensation Insurance. We would appreciate very much your giving us a certificate from your insurance carrier as to this. In consideration of your furnishing the necessary equipment so that we can be sure that these buildings can be taken out as fast as we produce same, we are willing to give you the exclusive hauling on same for California and Arizona. It is understood and agreed, however, that if at any time you fall down and do not provide the adequate equipment, that we are privileged to secure other trucking companies.

"We might call your attention to the fact that we are selling our houses f. o. b. our plant and the customer is paying the cartage, and it might be possible that some customers will insist on furnishing their own trucks, but we will not permit it without your approval, and we would prefer to have you do the hauling.

"Very truly yours,
Prefab Manufacturing Co.
(Signed) Leo E. Hubbard
Credit Department
(Signed) J. W. Galbraith"

The foregoing offer was accepted by plaintiff, who entered into the performance of the agreement. With the consent of defendants, this agreement was later assigned by plaintiff to Ravel Ffoulke Corporation.

Plaintiff and its assignee did all of defendants' hauling of prefabricated structures for about six months. Thereafter, defendants permitted other persons to do their hauling and on June 9, 1948, wrote plaintiff terminating their agreement with him.

Plaintiff instituted the present suit to recover for the loss of profits which he had suffered because defendants had breached their agreement with him. Defendants filed a demurrer to the complaint on the grounds that (1) several causes of action were alleged in the complaint and not separately stated; (2) the complaint was uncertain in that it failed to set forth with particularity the items of damage claimed by plaintiff; (3) the causes of action were barred by the statute of limitations as to all items accruing more than two years prior to February 1, 1950, and (4) a general demurrer. This demurrer was overruled and after trial judgment was entered in favor of plaintiff.

[1–3] *Questions:* First: *Did the court err in overruling defendants' demurrer?*

No. As to the first and second grounds of the demurrer the following rule is applicable: The manner of pleading becomes unimportant when a case is fairly tried on the merits under circumstances which indicate that nothing in the pleadings mislead the unsuccessful litigant to his prejudice. (Buxbom v. Smith, 23 Cal.2d 535, 543[6], 145 P.2d 305; Alonso v. Hills, 95 Cal.App.2d 778, 782[2], 214 P.2d 50.) In the instant case defendants have failed to indicate wherein they were not fully informed of the issues which they were called upon to meet or wherein they were prejudiced by the trial court's ruling. Prejudice is never presumed, it being incumbent upon defendants (appellants herein) to affirmatively show they have been prejudiced by any alleged error. (Vaughn v. Jonas, 31 Cal.2d 586, 601[8], 191 P.2d 432; Santina v. General Petroleum Corp., 41 Cal.App.2d 74, 76[1], 106 P.2d 60.) Therefore, pursuant to this rule we must disregard the first two grounds of the demurrer.

[4] Relative to the third ground of the demurrer, the trial court found "said agreement was evidenced on the part of defendants by a document in writing, a true copy of which is attached to the complaint and marked Exhibit 'A'. * * * Plaintiff then and there accepted the terms and conditions set forth in said agreement of March 14, 1946, and entered into performance thereof." This finding was supported by the letter of March 14, 1946, signed by defendants, set forth supra. This letter was an offer which the trial court found was accepted by the plaintiff at which time it became a contract evidenced by a writing signed by the party to be charged. (Ryer v. Stockwell, 14 Cal. 134, 136; cf. Tagus Ranch Co. v. Hughes, 64 Cal.App.2d 128, 130, 148 P.2d 79.) Therefore the four year statute of limitations and not the two year statute was applicable and the trial court properly overruled the demurrer on this ground.

[5, 6] There is no merit in defendants' contention the general demurrer should have been sustained because the contract lacked mutuality. The contract required plaintiff to have equipment to move at least five houses per day and to put a swamper on each truck. In addition it provided "In consideration of your furnishing the necessary equipment so that we can be sure that these buildings can be taken out as fast as we produce same, we are willing to give you the exclusive hauling on same for California and Arizona. It is understood and agreed, however, that if at any time you fall down and do not provide the adequate equipment, that we are privileged to secure other trucking companies." From the foregoing it is apparent plaintiff was

entitled to have the exclusive hauling of defendants' prefabricated houses for so long as plaintiff was able to perform his portion of the contract. It is the general rule that a contract is not fatally defective merely because it does not specify a time presently definite for its termination. Where the agreement provides that plaintiff's exclusive right is to endure so long as he "shall perform the terms of" his agreement, the contract is valid and sufficiently certain. (Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 165[4], 88 P.2d 698, 89 P.2d 386; Mile v. Cal. Growers Wineries, Inc., 45 Cal.App.2d 674, 679[4], 114 P.2d 651.) This rule is here applicable.

[7] Where a contract is terminable at will, liability attaches for breaches occurring prior to the termination of the contract. (See Mile v. Cal. Growers Wineries, Inc., supra.) Miami Coca Cola Bottling Co. v. Orange Crush Co., 5 Cir., 296 F. 693, Dupont de Nemours & Co. v. Claiborne-Reno Co., 8 Cir., 64 F.2d 224, 89 A.L.R. 238, and Thacker v. American Foundry, 78 Cal.App.2d 76, 177 P.2d 322, relied on by defendants, recognize the rule just stated. Ellis v. Dodge Bros., D.C., 237 F. 860, which holds to a contrary rule, is not the law in California and therefore is not here controlling. See Brawley v. Crosby etc. Foundation, Inc., 73 Cal.App.2d 103, 114, 166 P.2d 392.)

[8] There is likewise no merit in defendants' contention that there was a partial termination of the contract because defendants for a period prior to the termination of the contract gave a portion of their hauling to persons other than plaintiff. Plaintiff merely waived some of his rights by not sooner insisting upon defendants strictly complying with their contract.

[9] Second: *Was plaintiff barred from recovery because of the fact neither plaintiff nor his assignee was properly licensed?*

No. There is no merit in defendants' contention that the work done by plaintiff and his assignee was illegal because neither of them had a "contract carrier's permit." The trial court found, supported by substantial evidence, that "on March 14, 1946, plaintiff Francis Ravel was doing business under the name of Ravel Trux Co. and was the sole owner thereof. At no time did anyone other than plaintiff have any interest in Ravel Trux Co." It was further found he had complied with the provisions of Civil Code sections 2466 and 2469. The Highway Carriers' Act (Gen.Laws, Act 5129a) provides three classifications of carriers: Highway common carrier, radial highway common carrier and highway contract carrier. Plaintiff and the corporation which did a portion of the hauling held radial highway common carrier permits. That such a permit is sufficient to cover the character of operations engaged in by plaintiff here was settled in the case of Hill v. Progress Co., 79 Cal.App.2d 771, 777[3], 180 P.2d 956, the facts of which are somewhat similar to those herein involved, and the same contention having been made that plaintiff could recover when he held a radial highway common carrier permit even though he did not hold a highway contract carrier permit.

[10] Third: *Did the trial court err in failing to make a finding that plaintiff and the Ravel Ffoulke Corporation held a contract carrier's permit?*

No. In view of the fact that it was unnecessary for the validity of the contract for either to have a highway contract carrier's permit it is utterly immaterial whether the trial court made a finding on this issue or not.

[11, 12] Fourth: *Was the finding that plaintiff was doing business under the name of Ravel Trux Co., was the sole owner thereof, and had fully complied in all respects with sections 2466 to 2469 of the Civil Code supported by the evidence?*

Yes. In the complaint plaintiff alleged he was doing business under the name of Ravel Trux Co. and was the sole owner thereof and had complied with the code sections set forth above. Defendants denied upon information and belief the allegations that plaintiff had complied with the provisions of sections 2466 to 2469 of the Civil Code. Such an allegation when denied upon information and belief constitutes an admission of the truth of the allegation. (Goldwater v. Oltman, 210 Cal. 408, 425, 292 P. 624, 71 A.L.R. 871; Atwater v. Argonne Van & Storage Co., 74 Cal.App.2d 410, 412[4], 168 P.2d 776.) In addition, plaintiff testified he did not have a partner and that he was conducting the business himself. This sustains the trial court's findings.

[13] Fifth: *Did plaintiff assign the contract to the corporation?*

Yes. The trial court found that plaintiff had assigned the contract in question to the corporation. This finding is supported by plaintiff's testimony that everything had been merged into the corporation.

Affirmed.

MOORE, P. J., and FOX, J., concur.

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112 Cal.App.2d 388

KELLY v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 4367.

District Court of Appeal, Fourth District, California.

July 23, 1952.

Hearing Denied Sept. 18, 1952.

Action by Everett O. Kelly against Bank of America National Trust and Savings Association, as executor of the last will and testament of Arthur H. Kelly, deceased, to quiet title to realty. The Superior Court of Tulare County, Glenn L. Moran, J., entered judgment for defendant and an order denying a new trial, and plaintiff appealed. The judgment was affirmed by the District Court of Appeal, 242 P.2d 923. On rehearing, the District Court of Appeal, Mussell, J., held that whether there was a valid delivery and acceptance of gift deed by plaintiff's father, since deceased, and plaintiff as grantor and grantee respectively, were questions of fact for trial court under the evidence.

Appeal from order denying a new trial dismissed and judgment affirmed.

1. Appeal and Error 🔑110

An order denying a new trial is not appealable.

2. Evidence 🔑269(2)

Where the issue was whether grantor intended that gift deed should be presently operative when he manually handed it to grantee, evidence of acts and declarations of grantor, since deceased, and grantee subsequent to execution of deed was admissible.

3. Evidence 🔑271(6)

Where intent is a material element of disputed fact, declarations of decedent made after, as well as before, alleged act, which indicate intent with which decedent performed the act, are admissible in evidence as exception to hearsay rule, and it is immaterial that such declarations are self-serving.

4. Deeds 🔑66

Delivery or nondelivery of a deed is a question of fact to be determined from the surrounding circumstances of the transaction.

5. Deeds 🔑56(2)

The act of delivery of a deed must be accompanied by intent that it shall become presently operative as such and presently pass title, and to establish a valid effective delivery, it must be shown that grantor intended to divest himself of title.

6. Deeds 🔑66

Whether requisite intent of grantor to divest himself of title accompanied delivery of deed is question of fact for determination by trial court or jury.

7. Deeds 🔑208(1)

Request made by grantor at time he handed gift deed to grantee that it remain unrecorded until after grantor's death would not necessarily affect validity of deed, but it was a strong circumstance indicating intent of grantor when considered with grantor's later statement that he had made deed with understanding that it was to be used only if he did not survive anticipated operation, and such statements together with evidence that grantor was then in poor health and did have such an operation and evidence of his subsequent acts and declarations supported a reasonable inference that grantor did not intend to presently pass title to the property at time deed was handed to grantee.

8. Wills 🔑88(4)

A deed manually delivered to grantee with intention that title shall pass to grantee only in the event grantor does not survive anticipated operation is entirely inoperative as constituting an attempt to make a testamentary disposition of property without formalities required for execution of a will.

9. Wills 🔑108

A testamentary disposition of property can be made only by a will executed as required by law.

10. Wills 🔑88(1)

A deed, the purpose of which is intended to be testamentary, cannot be given effect.

11. Deeds 🔑208(1)
Evidence 🔑269(2)

Request made by grantor at time he manually delivered deed to grantee that it remain unrecorded until after grantor's death rendered evidence of subsequent acts and declarations of grantor and grantee admissible to show grantor's intention at time of delivery and such evidence was sufficient to support finding that deed was delivered without intent to presently pass title to the property.

12. Deeds 🔑56(1)

Whether deed was delivered to and accepted by grantee as an unequivocal transfer of title to him must be considered as well as intent of grantor in determining validity of deed.

13. Deeds 🔑64

Assent of grantee is necessary in order to make delivery of a deed to realty effective and the deed operative as such, since the law does not force a man to take title to realty against his will.

14. Deeds 🔑200

Evidence that while gift deed to realty was manually delivered to grantee by grantor, since deceased, grantee did not assume possession of the realty, pay taxes thereon, report the gift tax, or seek a return of deed after its delivery to grantor was admissible to show lack of delivery and acceptance by grantee.

15. Appeal and Error 🔑991

In action to quiet title to realty in grantee as against estate of deceased grantor, whether there was a valid delivery and acceptance of gift deed by father and son as grantor and grantee respectively were questions of fact for trial court under the evidence.

16. Appeal and Error 🔑1010(1)

Findings of trial court supported by substantial evidence cannot be set aside on appeal.

* * *

McFadzean, Crowe & Mitchell, Visalia for appellant.

Maddox & Abercrombie and Erling H. Kloster, Visalia, for respondent.

MUSSELL, Justice.

[1] This is an appeal by plaintiff from a judgment and order denying a new trial in an action to quiet title against the executor of the estate of Arthur H. Kelly, the appellant's deceased father. The order is not appealable. Estate of Dopkins, 34 Cal.2d 568, 569, 212 P.2d 886; Fay v. Norquist, 60 Cal.App.2d 218, 219, 140 P.2d 141.

Plaintiff's claim to title is based upon a gift deed to him from his father, Arthur H. Kelly. The deed is dated July 9, 1943, signed and acknowledged by the grantor and was manually delivered to and accepted by plaintiff on said date. The principal defense pleaded by defendant was that the said gift deed was invalid for want of a delivery with the required intent of the grantor to presently part with title. The trial court found for defendant on this issue and entered judgment in favor of the defendant, declaring that the plaintiff has no right, title or interest in said real property adverse to the estate. The principal question for our determination is whether there is any substantial evidence to support the findings and judgment.

Facts

A few days prior to July 9, 1943, Arthur H. Kelly called at the offices of an attorney for the purpose of having a gift deed to the property involved herein prepared in favor of his son, Everett O. Kelly. The attorney advised Kelly that "He needed to deliver the deed to his son with the intent then and there to pass all his title to the property and that no conditions or secret understandings could be had by him or by his son with respect to the property; that after he had so delivered the deed, his son would be the owner of the property; that he could, if he cared to do so, request his son not to record the deed until after his death without vitiating the effect of the deed, but that his son would not necessarily have to abide by that request." The attorney stated that he did not believe in the execution of such a deed and advised Kelly "not to do it." Having been so advised, Mr. Kelly stated that he wanted to give the property to his son and instructed the attorney to prepare the deed. Thereafter, on July 9, 1943, Mr. Kelly returned to the offices of the attorney with his son. Mr. Kelly was then instructed, for the second time, that it would be necessary for him to deliver the deed after he had executed the same, with the intent then and there to pass title to the property in question to his son; and that when he had so delivered the same, his son would be the owner of the property and that he would have no further interest therein; and that he could not thereafter recall said deed and could have no conditions or secret intentions with respect to the same. The attorney called in his secretary and asked her to witness the remainder of the transaction. He then handed the deed to Arthur H. Kelly and stated "Here is the deed. You may now do as you wish with it." Arthur Kelly thereupon, holding the deed in his hand, stated to his son "Here is the deed to the home property which I am giving to you without any strings attached. The only request I want to make is that you do not record the deed until after my death." He then handed the deed to his son, who accepted it, put it in his pocket and after having been advised that gift tax returns would have to be made and that probably a gift tax would have to be paid, Mr. Kelly and his son left the attorney's office.

Everett O. Kelly testified that "On July 9, 1943, Mr. Mitchell and Miss Francis and my Dad and myself were present. And Mr. Mitchell handed Dad the deed after he signed and notarized it and told him he could do as he wished with it. Thereupon Dad handed me the deed and said, 'I want you to have this ranch, Everett. I am giving it to you with no strings attached whatsoever. The only thing that I ask is that you don't record it for a couple of days after my death;'" that he accepted the deed and placed it in his filing cabinet where it remained until December of 1947, when it was delivered to Arthur Kelly, at his request, and by him delivered to the attorney who prepared his will.

In December of 1947, during his last illness, Arthur Kelly requested an attorney to prepare his will and, after several conversations with a trust officer of defendant bank and the attorney, Arthur Kelly, on December 15, 1947, executed a will, under the terms of which plaintiff and decedent's wife, Winnie Kelly, were given certain personal property and all remaining property, including the 14-acre ranch now in dispute, was placed in trust with defendant bank as trustee and executor.

During the conversations had with Arthur Kelly prior to the execution of his will he was questioned as to the title of the ranch property. He mentioned the 1943 gift deed and stated it had no value; that it was in his possession, and there would never be any trouble over it; that "He anticipated a rather severe operation and that he made the deed with the understanding that if he did not survive, it was to be used; if not, why it wasn't to be used." Arthur Kelly, being unable to find the deed among his papers, stated that he knew who had it and that he would get it back. Upon ascertaining that it was in plaintiff's possession, he asked plaintiff to "bring it down" so that he could check it over. Upon receiving the deed, Arthur Kelly handed it to his attorney, saying "Here it is. You can destroy it."

At the time the deed was executed Arthur Kelly was in poor health. He expected to have a severe operation and did not think that he would survive. A few months later the operation was performed, after which his health improved for a time and he was able to do some work on his ranch. In 1947 he was again very ill and died from cancer within a month or two after executing his will.

Arthur Kelly and his wife were living on the ranch property involved at the time of the execution of the deed and continued to live there until the time of his death, during which time he exercised all of the usual rights and duties of ownership in connection with his property. Insurance on the buildings was carried only in decedent's name, the premiums were paid by him and the plaintiff was not named as insured or beneficiary in the policy. Decedent borrowed money from a local bank on three occasions to finance the operation of the property and gave written financial statements to the bank showing that he claimed to be the sole owner thereof. He paid all expenses of operating the property, kept all income from it, and in his income tax return reported all the income, claimed all deductible expenses of ranch operation and took credit for all allowable depreciation on the property. Plaintiff did not occupy the ranch property after the execution of the gift deed other than to assist his father with the crops on a few occasions, for which he received $50 expense money in 1947. He took no income from the property, paid no gift or other taxes on it, and did not otherwise exercise rights of ownership over it. He did not record the gift deed and in obtaining bank loans, did not claim ownership of the property in financial statements which he furnished to the bank. Other financial statements were introduced in evidence showing that in 1945 plaintiff stated that he owned no real property and that in 1947 his only real property was at Badger, California.

Mrs. Arthur Kelly, who had married the decedent in 1937, worked on the ranch and also took employment in local stores during her husband's ill health. A joint bank account was established, and a bank loan on the property was paid from it in 1947. The property was improved through the efforts of Mrs. Kelly and the decedent. During his last illness, at decedent's request, his wife transferred $4,000 from their joint account into an account in decedent's name alone so that ranch expenses could be paid and the executor would have funds to operate it after decedent's expected death.

Decedent did not inform his wife that he had made any transfer of the property in 1943 and the plaintiff at no time told her that he had any claim to the property until after decedent's death.

It was shown that the decedent had been in the lumber business for several years and was an experienced, capable and intelligent business man.

The trial court found, among other things, that Arthur H. Kelly, on July 9, 1943, signed, acknowledged and manually handed the gift deed to plaintiff but that he did not deliver it for the purpose of conveying the property to plaintiff or with the intent of then passing any title or interest therein to him; that plaintiff did not accept conveyance of the property, as alleged in plaintiff's complaint, except that he did accept the manual tradition of said deed; that plaintiff returned the deed to Arthur Kelly without restriction or qualification; that plaintiff has never owned or been in possession or seized of all or any part of said real property or any interest therein under or by reason of said purported gift deed; that the said deed was and is invalid and of no force or effect; that plaintiff never asserted any right, title, claim or interest in or to said property under said purported gift deed until more than four months after the death of Arthur H. Kelly; that at the time of the purported delivery of the deed it was the mutual intent, understanding and agreement of said Arthur H. Kelly and plaintiff that said deed did not pass title to the property therein described to the grantee therein at the time or by reason of the purported delivery thereof; that plaintiff surrendered said deed to Arthur H. Kelly prior to his death and that said property was thereafter disposed of by the last will and testament of the decedent.

[2, 3] The evidence of acts and declarations of Arthur Kelly and his son, subsequent to the execution of the gift deed, was admitted over strenuous objection of counsel for plaintiff and it is contended that such evidence was inadmissible since there was a plain and unequivocal delivery of the deed accompanied by a clear and unmistakable expression on the part of the grantor to presently pass title to the property to plaintiff. However, where, as here, the issue is whether the grantor intended that the deed should be presently operative, such testimony is admissible. Huth v. Katz, 30 Cal.2d 605, 608, 184 P.2d 521. As was said in Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530, 531:

> "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; Donohue [Donahue] v. Sweeney, 171 Cal. 388, 153 P. 708; DeCou v. Howell, 190 Cal. 741, 214 P. 444; see [McBaine, Admissibility in California of Declarations of Physical or Mental Condition.] 19 Cal. L.Rev. 231, 251."

The quoted language was stated to be a succinct statement of the rule in Hansen v. Bear Film Co., 28 Cal.2d 154, 174, 168 P.2d 946.

In Huth v. Katz, supra, the plaintiff sought to establish a delivery of an unrecorded gift deed and an assignment of a promissory note secured by a deed of trust. The plaintiff had for several years gone to decedent's home twice a week to clean his house and to do his washing and ironing. About a year before his death decedent told her that he intended to transfer his property to her and that Mr. Webb (a real estate broker) would "draw up the papers for it." On or about June 29, 1943, plaintiff went with decedent to Webb's office, where Webb handed the deed and assignment to decedent, who in turn handed them to plaintiff, saying "They are all yours, kid, they belong to you now." Webb testified that the decedent had called at his office and requested him to prepare the necessary papers to transfer the property to plaintiff. Webb prepared the deed and assignment and a few days later the papers were signed and acknowledged by decedent in the presence of a notary public. When decedent informed Webb that he desired to make the transfer, Webb told him that "There must be a delivery" and after the papers were signed, decedent said to Webb "I want delivery." The papers were left with Webb at his office and a few days later decedent returned with plaintiff. The decedent then gave the deed and assignment to plaintiff and said "Now it is all yours." Plaintiff took the deed and assignment home but later decided that it was unsafe to keep the documents there and put them in decedent's safety deposit box, where they were found after his death. The decedent continued to live on the property after the execution of these documents until his death and collected the rentals therefrom and had the principal and interest of the promissory note credited to his account. The court affirmed a judgment for the defendant and held that a valid delivery of a deed depends upon whether the grantor intended that it should be presently operative; that a manual transfer is not conclusive evidence of such intention; that when the question at issue is whether or not there has been a valid delivery, the possession of the deed by the grantor and his exercise of dominion and control of the property after manual transfer of the deed are facts which may be considered in determining whether he intended presently to pass title; that the fact that the deed and assignment were found in decedent's safety deposit box to which he alone had access, and the further facts that decedent continued to live on the property, collect the rentals and have the principal and interest of the note credited to his account were matters which the trial court could consider in determining whether decedent intended the deed and assignment to operate as a present transfer of the property described therein.

[4–6] The question of delivery or nondelivery of a deed is a question of fact to be determined from the surrounding circumstances of the transaction and to constitute a valid, effective delivery, it must be shown that the grantor intended to divest himself of title. Miller v. Jansen, 21 Cal. 2d 473, 477, 132 P.2d 801; Williams v. Kidd, 170 Cal. 631, 638, 639, 151 P. 1, Ann. Cas.1916E 703. The act of the delivery of the deed must be accompanied with the intent that it shall become presently operative as such and presently pass title. Fay v. Norquist, supra, 223; Williams v. Kidd, supra, 170 Cal. at pages 638, 639, 151 P. 1. Whether or not the requisite intent exists is a question of fact for the trial court or jury. Counter v. Counter, 104 Cal.App.2d 786, 789, 232 P.2d 551.

[7–10] The evidence shows that the decedent was advised by his attorney that to make a gift deed effective it was necessary that there be no conditional delivery. When the deed had been signed and acknowledged, Arthur H. Kelly handed it to his son, saying "Here is the deed to the home property which I am giving to you without any strings attached. The only request I want to make is that you do not record the deed until after my death." While the fact that such a request was made would not necessarily affect the validity of the deed, Stewart v. Silva, 192 Cal. 405, 410, 221 P. 191, it is a strong circumstance indicating the intent of the grantor at the time, when considered with the decedent's later statement that he anticipated a rather severe operation and that he made the deed with the understanding that it was to be used only if he did not survive such operation. These statements, with the evidence showing that the decedent was then in poor health and did have such an operation, together with the evidence of his subsequent acts and declarations, support a reasonable inference that he did not intend to presently pass title to the property at the time the deed was handed to his son. In this connection it may be observed that the record does not show that the question of possession of the property after the execution of the deed was discussed at this time. If it were the intention of Arthur H. Kelly that the title to the property would pass to his son only in the event that the grantor did not survive his operation, then the deed is entirely inoperative as constituting an attempt to make a testamentary disposition of the property. This may only be done by a will executed as required by law. A deed, the purpose of which is intended to be testamentary, cannot be given effect. Williams v. Kidd, supra, 170 Cal. at pages 637, 638, 151 P. 1; Cox v. Schnerr, 172 Cal. 371, 381, 156 P. 509.

[11] Plaintiff argues that when, as here, an unequivocal delivery of a gift deed has been established by unquestioned and unquestionable proof of a manual tradition of said deed to the grantee therein named, accompanied by words of the grantor which clearly and unmistakably indicate his intention to vest title in said grantee, evidence of subsequent acts and declarations of the grantor is never admissible for the purpose of proving the intention of the grantor at the time of the delivery of the deed. This argument is based upon the assumption that there was an unequivocal delivery of the deed in question. The trial court found against plaintiff on this issue and we cannot say, as a matter of law, that its finding in this respect is unsupported by the evidence. When delivering the deed to his son, Arthur Kelly's last request was that it remain unrecorded until after his death. A condition was thereby attached to the delivery, which opened the door to a determination of the significance of that request. No explanation was sought or given as to the intent of the grantor when such request was made. The subsequent acts and declarations of the grantor and the grantee furnished ample evidence to support the trial court's finding that there was a delivery of the deed without intent to immediately pass title to the property.

Plaintiff relies principally upon the decision in Shaver v. Canfield, 21 Cal.App.2d

734, 70 P.2d 507, to support his position in the instant case. In that case the trial court found that the deeds involved were delivered with the intention to pass title and the contention of appellant is that the evidence was insufficient to support that finding. The court stated, at page 736 of 21 Cal. App.2d, at page 508 of 70 P.2d:

> "In considering the facts in this case we must keep in mind, as said in Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157, 1158, that '* * * in examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion.'"

An examination of the facts stated therein showed that the deeds involved were deeds delivered without equivocation and nothing was said by the grantor from which the court could conclude that the grantor did not then intend to pass title. Under such circumstances the court properly excluded offered testimony of declarations of the grantor prior to the delivery of the deeds where the language of the grantor at the time of the manual tradition and his actions were plain and unambiguous. The court, in commenting upon the situation presented in Stone v. Daily, 181 Cal. 571, 185 P. 665, stated, at page 740 of 21 Cal.App.2d, at page 510 of 70 P.2d:

> "(D)eeds were signed by husband and wife and placed in escrow with the the court considered the previous agreement of the parties and found that the delivery was not absolute and was conditional upon the grantee surviving the grantor. There is no doubt that the law will examine the surrounding circumstances, that is the *res gestae*, and if two conflicting inferences arise, one as to the delivery and the others as to nondelivery, declarations by a decedent both before and after delivery are admissible for the purpose of throwing light upon these conflicting inferences."

[12–15] In determining the validity of the deed involved we must consider not only the intent of the grantor but also whether the deed was delivered to and accepted by the grantee as an unequivocal transfer of title to him. As was said by this court in Reina v. Erassarret, 90 Cal.App.2d 418, 426, 203 P.2d 72, 77, 7 A.L.R.2d 1309:

> "'Delivery' is a word of well-defined meaning in law. The elements are that the writing must be meant by the maker to take immediate effect and be presumably or in fact, *accepted* by the other party. The delivery and acceptance are of necessity simultaneous and correlative acts. The law does not force a man to take title to real property against his will. Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am.St. Rep. 726. Hence, the assent of the grantee is necessary in order to make a delivery effective and the deed operative as such."

The evidence shows beyond question that there was a manual delivery of the deed. However, it also shows that the grantee did not assume possession of the property, pay taxes thereon, report the gift taxes, and did not seek a return of the deed after its delivery to his father. Proof of these circumstances was admissible to show lack of delivery and acceptance by the grantee. The determination of whether there was a delivery and acceptance were questions of fact for the trial court.

[16] Considering the entire record before us under the familiar rule stated in Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557, we cannot here set aside the findings of the trial court.

The judgment is affirmed and the attempted appeal from the order denying a motion for a new trial is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

112 Cal.App.2d 409

PEOPLE v. DEL'MARMOL.

Cr. 4808.

District Court of Appeal, Second District, Division 3, California.

July 24, 1952.

Hearing Denied Aug. 21, 1952.

Defendant was convicted in the Superior Court of Los Angeles County of burglary, and he filed in that court a petition for writ of error coram nobis, claiming insufficiency of the evidence. The Superior Court, Thomas L. Ambrose, J., entered an order denying the petition, and defendant appealed. The District Court of Appeal, Per Curiam, held that coram nobis did not lie since claim of insufficiency of evidence could have been presented and reviewed on appeal.

Order affirmed.

1. Criminal Law 🔑997

Writ of error coram nobis did not lie to review burglary conviction, on ground that evidence was insufficient to sustain conviction, since claim of insufficiency of evidence could have been presented and reviewed on appeal.

2. Criminal Law 🔑997

Petition for writ of error coram nobis to review burglary conviction was properly denied, where no excuse was offered for long delay in filing petition.

3. Criminal Law 🔑997

A showing of diligence is prerequisite to the availability of relief by motion for writ of error coram nobis.

◆

Edwin J. Del'Marmol, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

PER CURIAM.

On October 31, 1945 Edwin J. Del'Marmol was convicted in the Superior Court of Los Angeles County of burglary; in December, 1951, he filed in said court a petition for writ of error *coram nobis;* the sole ground was claimed insufficiency of the evidence; the petition was denied and Del'Marmol appealed from the order.

[1–3] The appeal is without merit. Since the claim of insufficiency of the evidence could have been presented and reviewed on appeal, *coram nobis* does not lie. People v. Coyle, 88 Cal.App.2d 967, 970, 200 P.2d 546; People v. Reid, 195 Cal. 249, 255, 232 P. 457, 36 A.L.R. 1435. No excuse was offered for the long delay in filing the application. "It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis.*" People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330, 336.

The order is affirmed.

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112 Cal.App.2d 333

PEOPLE v. BARBER.

Cr. 4773.

District Court of Appeal, Second District, Division 1, California.

July 21, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Ellsworth Meyer, J., of burglary, and he appealed from the judgment and from an order denying motion for new trial. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain the conviction.

Affirmed.

1. Criminal Law 🔑1159(2, 4)

The District Court of Appeal is not authorized to retry a criminal proceeding and cannot determine weight of evidence nor credibility of witnesses.

2. Criminal Law 🔑1144(13)

In reviewing a conviction, the District Court of Appeal must assume in favor of the verdict the existence of every fact which jury could have reasonably deduced from evidence and decide only whether upon face of evidence it can be held that sufficient facts could not have been found to warrant inference of guilt.

3. Burglary ⚷42(1)

In absence of an explanation sufficient to raise a reasonable doubt, the mere possession of stolen property by an accused is not of itself sufficient to justify a conviction of burglary, but it is a circumstance which, when taken in connection with other incriminating evidence, may be considered in determining question of guilt or innocence of the accused.

4. Burglary ⚷42(4)

In prosecution for burglary, explanation by accused of his possession of stolen television set, to effect that a friend who regularly used accused's automobile left television set in trunk of automobile and refused to tell accused how it came to be there, but accused, later, and without asking friend, took television set and left it with his son-in-law, was so improbable as to warrant conclusion that it was, in fact, no explanation.

5. Burglary ⚷41(1)

Evidence was sufficient to sustain conviction of burglary.

◆

George D. Sphier, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for plaintiff.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County defendant was accused of the crime of burglary, in that he entered the home of Donald Calundan at Walnut Park, in the County of Los Angeles, with the intent to commit theft. Following the entry of his plea of not guilty a jury found defendant guilty of burglary and found the offense to be burglary of the second degree. Defendant's motion for a new trial was denied. From the judgment of conviction and from the order denying his motion for a new trial, he prosecutes this appeal.

Concerning the factual background surrounding this prosecution the record reveals that on November 15, 1950, Donald L. Calundan moved into a house at Walnut Park. In the living room thereof he installed a television set which he had purchased during the preceding August for $175. It was a Zenith table model with a 12½ to 14 inch screen and weighed approximately 100 pounds.

During the latter part of November, 1950, Mr. Calundan hired a woman named Artilla Fox to help the former's wife wash the walls of the house. Artilla Fox worked there for two days and the defendant, who at that time was not working elsewhere, accompanied her and helped her in the washing of the walls. He was there for about a day and a half. The television set was in the living room of the Calundan house at the time Artilla Fox and defendant were working there.

On the morning of December 2, 1950, Mr. Calundan locked up his house and left about 10:30 o'clock. Nobody remained on the inside of the house after he had locked it and departed, leaving his television set in the living room. He returned home that evening about 5 o'clock. He then discovered a hole in the rear screen door, measuring an inch or inch and a half across. The hook of the screen door had been lifted up and the door had been entered. The television set was missing. Mr. Calundan reported the matter to the police immediately.

About December 15, 1950, defendant gave the television set which had been taken from the Calundan house to the former's son-in-law.

The first time Mr. Calundan saw Artilla Fox after she had worked at his house was four or five weeks thereafter, when he visited her in Banning, California, where she was living in a motor court cabin with defendant. She mentioned the television set first, saying, "I understand that your set is missing". Mr. Calundan said that it was and the defendant thereupon said, "Yes, I know".

Previous to the aforesaid Banning trip, Artilla Fox had telephoned to Mr. Calundan and talked with him about the loss of his television set.

On May 21, 1951, Artilla Fox telephoned to Mrs. Calundan and on that same evening she met Mr. Calundan and told him that if he wanted his television set he could go to a certain address and find it. Later that evening, Mr. Calundan, accompanied by two officers, went to the home of defendant's son-in-law and recovered the television set.

After the defendant was taken into custody Deputy Sheriff O'Neil, one of the arresting officers, had a conversation with him on May 26, 1951. The officer asked him if he knew why he had been arrested and the defendant said he thought it had something to do with a television set. The officer asked defendant how he got the set and he said that on the Saturday before Christmas he arrived in Los Angeles from his job as a truck driver; that he went to get his car on a parking lot where it was parked with one of the brakes stuck; he opened the turtleback to get tools and saw a television set there. He went to Artilla Fox and asked her where she got the set, and she said, "What do you care? It's there, isn't it. Come in and have a drink". They had some drinks together and defendant then, without asking Artilla Fox if he could do so, took the television set and left it at his son-in-law's house. He said that "he was sure in his own mind that something was wrong with the television, but that he didn't want to start an argument with Artie about it".

Defendant stated that about a month after he had given the television set to his son-in-law, Mr. Calundan drove up to the cabin in Banning where he was living with Artilla Fox; that they discussed a television set with Mr. Calundan and defendant said he then came to the conclusion that possibly the stolen television set was the one he had given to his son-in-law. He told the officer that he then intended to take the television set from his daughter and son-in-law and move it to his cabin in Banning because he did not want to get them into trouble. He stated he priced television sets in stores with the intention of buying one for his daughter and son-in-law, but did not do so.

As a witness in his own behalf defendant testified that he met Artilla Fox in 1942, and started to live with her in 1949. That he was a truck driver and during November, 1950, was employed by the Lang Corporation driving a truck between Los Angeles and Las Vegas, Nevada, and that the round trip took about 30 hours. That in the latter part of November, 1950, he went to Mr. Calundan's house with Artilla Fox and assisted her in washing the walls. That they worked from 8 a. m. to about 3 p. m. That while he was there he noticed a television set in the home. That he did not return to the Calundan house on the next day but around Thanksgiving time he went there to pick avocados. That he did not return to the Calundan home thereafter. That his next job was driving a truck between Los Angeles and Banning, California. That he started on the new job about the middle of December. He then recounted that he owned a Buick and that he was living sometimes with his daughter and sometimes with Artilla Fox. That when he was away Artilla Fox had the use of his automobile. A couple of weeks before Christmas he arrived from Las Vegas about 7 in the morning and parked his truck at Third and Alameda Street. That he then telephoned Artilla Fox to come and get him in his car. That she did not do so and he then went to the cafe where she worked. He then detailed his conversations and actions in much the same fashion as he had related them to Deputy Sheriff O'Neil, as hereinbefore narrated.

Defendant then testified that in December he moved to Banning, California, and that Artilla Fox followed him driving in his automobile. He then detailed the visit of Mr. Calundan as heretofore set forth. Defendant testified that at the time of the visit just referred to "the thought occurred to" him that the television set he had given to his son-in-law might be the set Mr. Calundan had lost. Defendant further testified that he remained in Banning until May 15, 1951 when, after an argument with Artilla Fox, he left for Los Angeles, leaving her in Banning. That she subsequently came to Los Angeles and he had another argument with her, after which she left him and that he had never seen her thereafter. Defendant denied that he had taken the television set from the Calundan home.

It is conceded that both the prosecution and defendant's counsel made efforts to locate Artilla Fox but to no avail.

The sole contention advanced on this appeal is that the evidence is insufficient to support the judgment of conviction, in that it shows no more than possession by the accused of property stolen in the burglary which, contends appellant, is not sufficient to show his participation therein.

[1, 2] In approaching a consideration of the question as to whether there is sufficient evidence to support a guilty verdict, we are not authorized to retry the cause. That is the function of the trial court. We cannot determine the weight of the evidence nor the credibility of the witnesses. We can decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the triers of fact to warrant the inference of guilt. And, we must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence. From such facts we must determine whether they are sufficient to support the verdict. When an appellate tribunal has concluded that sufficient facts reasonably justify the verdict of the jury, we are without warrant to interfere because in our opinion the circumstances might also reasonably be reconciled with the innocence of the accused, People v. Latham, 43 Cal.App.2d 35, 38, 110 P.2d 101; People v. Hennessey, 201 Cal. 568, 571, 258 P. 49; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Common knowledge teaches that burglary is practically always committed in the absence of the occupants of the burglarized premises or while they sleep. Manifestly, in cases such as the one now before us, the guilt of the perpetrator must be proved by circumstances. That the *corpus delicti* in the case at bar was proven is conceded. The sole remaining question therefore is, whether the facts and circumstances shown in evidence reasonably justified the deduction by the jury that appellant was the perpetrator of the proven crime.

There was evidence that appellant worked at the Calundan home with his friend Artilla Fox shortly before the burglary, and to that extent, was familiar with the premises, and by his own admission, he was aware of the presence of the television set in the Calundan home.

The burglary occurred on December 2, 1950, and within some two weeks thereafter appellant was shown to have been in possession of the stolen property.

[3] While the mere possession of stolen property unexplained by an accused is not of itself, and standing alone, sufficient to justify a conviction of burglary, yet such possession of stolen property is a circumstance which, taken in connection with other incriminating evidence in the case, may be considered by the court or jury in determining the question of guilt or innocence of a defendant so charged.

And, by "unexplained", as used in the rule just mentioned, is meant the absence of an explanation sufficient to raise a reasonable doubt, People v. Miller, 54 Cal.App.2d 384, 386, 128 P.2d 785. In other words, an improbable explanation stands on the same footing with no explanation. In the case now engaging our attention, when asked where he obtained the stolen property, appellant said that he found it in his automobile when he returned from a trucking job, and that his friend Artilla Fox had used his automobile while he was gone. He maintained that she refused to tell him where she got the television set and admitted that he thought there was something wrong about the matter, but that he had given it to his son-in-law without asking Artilla Fox whether or not he might do so. He also said that when he learned about a month after the burglary that Mr. Calundan's television set had been stolen, he came to the conclusion that the set in question was the one he had given to his son-in-law, and that while he intended to take that set to his own cabin in Banning and get his son-in-law a new one, he never did so.

[4] We are satisfied that the jury was warranted in concluding that the foregoing explanation was, in fact, no explanation, thereby leaving appellant's possession of the stolen property as aforesaid, a strong circumstance pointing to his guilt as the perpetrator of the burglary.

There is also substantial evidence of the consciousness of guilt on the part of appellant in his statement to Deputy Sheriff

O'Neil wherein he said, "that he was sure in his own mind that something was wrong with the television but that he did not wish to start an argument with Artilla". And again, on the occasion at Banning, California, during the last week in December, 1950, when the owner of the stolen property and his family visited appellant and Artilla Fox in the latter's home, on which occasion, according to appellant's own testimony given at the trial, "the thought occurred to him" that this television set that he had given to his son-in-law and daughter might be the set that came out of Mr. Calundan's home. This course of conduct lends support to the action of the jury in rejecting appellant's proffered explanation of the manner in which he came into possession of the stolen property in question.

[5] From the foregoing it appears, therefore, that the evidence was sufficient as a matter of law to sustain the conviction.

The judgment and the order denying a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

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112 Cal.App.2d 324

PEOPLE v. BECKER.

Cr. 4741.

District Court of Appeal, Second District, Division 1, California.

July 21, 1952.

Hearing Denied Aug. 14, 1952.

Action to remove a member of the Board of Education for wilful and corrupt misconduct in office. The Superior Court, Los Angeles County, William B. Neeley, J., found defendant guilty and adjudged his removal from office and he appealed. The District Court of Appeals, Second Appellate District, Drapeau, J., held that the trial court's finding was supported by the evidence.

Affirmed.

See also, Cal.App., 239 P.2d 898.

1. Officers 🔑66

The phrase "wilful or corrupt misconduct in office", as used in statute providing for removal of officer found guilty of such conduct, does not necessarily imply corruption or criminal intention but means simply a purpose or willingness to commit the act, a wrongful design to acquire or cause some pecuniary or other advantage to person guilty of the act. Government Code, § 3072; Pen.Code, § 7, subds. 1, 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful or Corrupt Misconduct in Office".

2. Appeal and Error 🔑991

It is the province of trial courts to decide questions of fact, and of appellate courts to decide questions of law.

3. Appeal and Error 🔑1003, 1012(1)

Findings of a jury or a court decided upon weight of evidence will not be reviewed by an appellate court.

4. Schools and School Districts 🔑53(5)

Evidence sustained finding of superior court that member of board of education was guilty of wilful and corrupt misconduct in office in receiving commissions on insurance premium paid on policy issued to corporation engaged in the transportation of school children. Government Code, § 3072.

5. Schools and School Districts 🔑53(5)

In action to remove member of board of education, fact that the member accepted insurance commission in reliance on advice of attorneys that it would be proper, would not solely decide whether member's act was wilful or corrupt, misconduct in office, but was only to be considered and weighed in conjunction with all of the evidence. Government Code, § 3072.

6. Schools and School Districts 🔑55

A member of board of education may not participate in insurance premiums paid by private corporation transporting school children. Education Code, § 1011.

◆

S. V. O. Prichard, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty. of Los Angeles County, and Marcus R. Brandler and Thomas P. Finnerty, Jr., Deputy Dist. Attys., Los Angeles, for respondent.

DRAPEAU, Justice.

The Board of Education of the City of Los Angeles contracts with private corporations for the transportation of children to and from the city schools. In 1950 and in 1951 the Board made three such contracts with Landier Management Company. Other such contracts were made during, before, and after the period mentioned, with which we are not concerned in this case.

The contracts here under consideration required the Landier Management Company to insure its busses against public liability and property damage, and for workmen's compensation. The company procured this insurance.

Commissions on the premiums under two of the contracts were paid to three insurance brokers, who shared them equally. One of these brokers was Mr. Roy J. Becker, who was a member of the Board of Education when the contracts were made. No commissions had been paid on the third contract when this case developed.

The premiums were computed upon the gross income of Landier Management Company under the contracts. Thus as the gross income increased, the premiums, and that part of the commissions paid to Mr. Becker, increased.

The Grand Jury presented an accusation of wilful and corrupt misconduct in office against Mr. Becker for his part in the above transactions. Section 3072 of the Government Code provides that if such an accusation is found true by the Superior Court the accused shall be removed from office.

The trial judge found the accused guilty and adjudged his removal from office. Mr. Becker appealed from the judgment, and then resigned. Motion to dismiss the appeal was denied by this Court. So the case is now before us upon the merits.

On behalf of Mr. Becker this is to be said: He was and is a man of unquestioned honesty and integrity. He is a layman, not an attorney. He has been in the insurance business for many years. He was a member of the Board of Education for many years. And for many years he was insurance broker for the Landier companies, and wrote insurance of every kind here involved—all without question as to the propriety of his serving on the Board of Education and at the same time acting as insurance broker for transportation companies contracting with the Board.

When charges were made that it was unlawful for him to participate in insurance premiums of the Landier companies in their contracts with the Board of Education, Mr. Becker talked with a lawyer, a deputy of the Los Angeles County Counsel, assigned to advise the Board of Education. That lawyer advised Mr. Becker several times that in his opinion his conduct was not illegal—at least from the facts as the lawyer understood them. And in discussions among members of the Board of Education, two of them lawyers, the same opinion was expressed in the presence of Mr. Becker.

Mr. Becker earnestly argues that he was not guilty of wilful or of corrupt misconduct in office, and that he should not have been branded as criminally corrupt. The argument has a genuine appeal to the sympathies of this Court.

[1] However, the phrase "wilful or corrupt misconduct in office" does not necessarily imply corruption or criminal intention. It means "simply a purpose or willingness to commit the act",—"a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act". Penal Code, section 7, subds. 1 and 3; People v. Harby, 51 Cal.App.2d 759, 767, 125 P.2d 874. As Mr. Presiding Justice Moore says in People v. Pearson, 111 Cal.App.2d 9, 244 P.2d 35, 42: "The mere doing of an act forbidden by the statute is the sum total of the judgment against him."

[2–4] In any event, and wherever our sympathies may lie, this Court is bound by the findings made and the inferences drawn from the facts by the trial judge. Under our legal system it is the province of trial courts to decide questions of fact, and of appellate courts to decide questions of law. Commencing with Payne v. Jacobs, 1 Cal. 39, it has been consistently held that the findings of a jury or a court, decided upon the weight of the evidence, will not be reviewed by an appellate court. A careful review of the record discloses substantial evidence to support the findings of the trial court.

[5] The substantial evidence rule is also determinative of Mr. Becker's contention that he should not have been removed from office because whatever he did was in good faith and in reliance upon the advice of counsel. The testimony is in conflict as to whether he made a fair and complete disclosure of all the facts to the deputy for the county counsel or in the meetings of the Board of Education. This conflict was resolved against him by the court. Nor would the case be determined solely on whether Mr. Becker acted under advice of counsel or not. This fact, if it be a fact, is to be weighed and considered in conjunction with all of the evidence in the case. People v. Wyatt, 101 Cal.App. 396, 281 P. 629.

[6] One thing more remains for decision: Whether or not, as a matter of law, a public officer may participate in insurance premiums in the circumstances in this case. Section 1011 of the Education Code reads: "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

It was the plain intent of the legislature, plainly expressed in the statute, to prohibit even such an indirect interest as Mr. Becker had in the contracts of the Board of Education with Landier Management Company. To hold otherwise would be to introduce into the law an exception not intended or expressed by the law-making power.

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, Justice.

I concur. The issue herein revolves around the meaning and application of the phrase "interested in any contract" as provided in section 1011 of the Education Code. That section reads, "No member of the governing board of any school district shall be *interested in any contract* made by the board of which he is a member." (Italics added.) The word interest has numerous meanings and applications but the obvious purpose contemplated by the section refers to an actual, specific and official interest as distinguished from a perfunctory or casual interest. Thus interpreted the provision is applicable, for the record reveals that those transporting the pupils must have liability insurance in companies approved by the board. It also appears from the record that in such insurance policies the school district is named as one of the beneficiaries, as well as the transportation company. This being so the appellant was "interested in any contract made by the board", within the meaning and application of section 1011, as above quoted.

112 Cal.App.2d 213

ERWIN v. CITY OF SAN DIEGO et al.

Civ. 4277.

District Court of Appeal, Fourth District, California.

July 14, 1952.

Action for declaratory relief and injunction by Robert E. Hoffman and another against the City of San Diego and others. Ambrose Erwin was substituted as plaintiff. Defendants filed a cross-complaint. The Superior Court of San Diego County, Dean Sherry, J., entered judgment for cross-complainants and plaintiff appealed. The District Court of Appeal, Mussell, J., held that the premises constituted hotel rather than an apartment house and that kitchen sinks were only required in those individual apartments, rooms,

suites of rooms or living units wherein food was cooked, prepared and consumed.

Judgment reversed.

1. Evidence ⚷20(1)

It is common knowledge that hotels, in addition to guest rooms, sometimes contain apartments which include kitchen facilities and are designed and intended for occupation for persons or families for living or sleeping purposes.

2. Health ⚷32

The presence in hotel building designed and used primarily for accommodation of guests, of apartments which include kitchen facilities and are designed and intended for occupation for persons or families for living or sleeping purposes, does not make entire building an "apartment house" within the State Housing Act. Health and Safety Code, § 15002.

See publication Words and Phrases, for other judicial constructions and definitions of "Apartment House".

3. Innkeepers ⚷8

Guests in hotel are not tenants and have no interest in realty; they are mere licensees and the control of the rooms, halls and lobbies remains in the proprietor.

4. Health ⚷32

Evidence was sufficient to show that premises constituted hotel, rather than apartment house required by Health and Safety Code to have certain sanitary facilities, kitchen sinks, and bathtubs and showers. Health and Safety Code, §§ 15002, 15003, 15020, 17501, 17551, 17580, 17700.

5. Health ⚷32

Under statute, operators of hotel would be required to install kitchen sinks only in those individual apartments, rooms, suites of rooms or living units wherein food was cooked, prepared and consumed. Health and Safety Code, § 17580.

◆

Wright, Thomas, Dorman & Fox, San Diego, for appellant.

J. F. DuPaul, City Atty., and Alan M. Firestone, Deputy City Atty., San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs and cross-defendants appeal from a judgment in favor of cross-complainants and respondents in an action for declaratory relief and injunction.

Plaintiffs Robert E. Hoffman and wife were the lessees and operators of premises known as the Leland Hotel in the city of San Diego. The hotel is situated in a business building of three stories and occupies one-half of the second floor and the entire third floor of the building. There are thirty-one single sleeping rooms for rent as guest rooms, which were and are rented by the day, week or month. A substantial number of the occupants of the rooms were permanent or semi-permanent guests who pay rent on a monthly basis, substantially less than the daily or weekly rate. The services provided by the management are: supplying of linens, towels, bedspreads and blankets and cleaning of rooms for guests staying less than seven days. Linens only are furnished permanent guests. Two community laundries and three community kitchens are provided by the management for the convenience of hotel guests. The community kitchens are each in separate and distinct rooms and are not directly connected with the guest rooms. Each community kitchen is equipped with cooking units, refrigerators, sinks, tables and individual food lockers for use of guests utilizing these conveniences.

On or about September 29, 1949, defendants served notices on plaintiffs, stating that the maintenance of said community kitchens in the Leland Hotel constituted operation of the premises as an apartment and was in violation of the State Housing Act. Plaintiffs were threatened by said notices with prosecution and condemnation of said premises as unsanitary and unfit for human habitation.

On October 11, 1949, plaintiffs, Robert E. Hoffman and Mary J. Hoffman brought the present action for a declaration of their rights under said act and for injunctive relief. Later Ambrose Erwin was by order of this court substituted in the place and stead of said plaintiffs as plaintiff, cross-defendant and appellant in said cause. Defendants answered and filed a cross-complaint alleging, among other things, that the said premises consist of the upper two stories of a three story structure, which portion is rented by plaintiffs for occupation as a home to more than three families, each family living and sleeping in a separate room or suite of rooms and cooking within the structure; that plaintiffs have failed to install or provide baths or showers as required by section 17551 of the State Housing Act and have failed to install or provide any kitchen sink within any of the apartments on the premises, thus violating section 17580 of said act; that plaintiffs permit members of families who make their homes in said premises to cook and prepare food in certain rooms which plaintiffs call "community kitchens", contrary to the provisions of section 17700 of said act and have failed to provide or install a water closet within each apartment in violation of section 17501 of said act. The prayer of the cross-complaint is that the court order plaintiffs to provide all facilities, sanitary or otherwise, which are required by law for an apartment house or be enjoined from operating said premises as an apartment house.

The trial court found, in substance, that the plaintiffs are the operators and lessees of an apartment house known as the Leland Hotel; that cooking and dining facilities are provided and used as community kitchens by ten or more families who occupy apartments in said apartment house; that the plaintiffs failed and refused to install and provide therein sanitary facilities required by law for apartment houses and did not provide kitchen sinks within each apartment of said premises, as required by law, and did not provide a sufficient number of bathtubs and showers in said premises.

In the modified judgment, from which this appeal is taken, it was ordered that the plaintiffs be enjoined and restrained from occupying and operating the said premises as an apartment house unless and until they have installed therein at least one kitchen sink within each apartment of said premises. The injunction was made effective on June 30, 1951, if plaintiffs had not installed said kitchen sinks on or before that date.

Appellants contend that the installation of a kitchen sink within each single sleeping room of the Leland Hotel would serve no practical purpose, is not a technical requirement contemplated by the legislature, and that the Leland Hotel is not an apartment but is a hotel under the provisions of the Health and Safety Code.

Respondents contend that the installation of a kitchen sink within each apartment of the Leland Hotel comes within the purview of the legislature in enacting section 17580 of the Health and Safety Code; that the Leland Hotel is an apartment house and, as such, should be required to meet the requirements of the Health and Safety Code for apartment houses or close the kitchen facilities within the structure and become a hotel as defined by the Health and Safety Code, section 15020.

[1-4] The first question to be determined is whether the evidence supports the trial court's finding that the Leland Hotel is in fact an apartment house.

An "apartment" is defined in section 15002 of the State Housing Act, as follows:

> "'Apartment'. 'Apartment' means a room or suite of rooms in an apartment house or dwelling occupied, or intended or designed for occupation, by one family for living or sleeping purposes."

An "apartment house" is defined in section 15003, as follows:

> "'Apartment house.' 'Apartment house' means any structure more than one story in height, or any portion of any such structure occupied, or designed, built, or rented for occupation, as a home by three or more families, each living in a separate apartment and cooking within the structure."

A "hotel", as defined in section 15020 of said act, means any structure, or any portion of a structure, including any lodging house, rooming house, dormitory, turkish bath, bachelor hotel, studio hotel, public club, or private club, containing six or more guest rooms and which is occupied, or is intended or designed for occupation, by six or more guests, whether rent is paid in money, goods, labor, or otherwise. A "guest" is defined in said act as any person who rents a room or occupies a room for sleeping purposes, and a "guest room" is defined as a room occupied, or intended, arranged or designed for occupation by one or more guests.

The evidence before us conclusively shows that more than six rooms in the Leland Hotel are guest rooms, rented to guests who occupy rooms or suites of rooms for sleeping purposes for hire by the day, week or month.

The record clearly shows that the premises involved constitute a hotel as defined in section 15020 of the State Housing Act. It is a matter of common knowledge that hotels, in addition to guest rooms, sometimes contain apartments which include kitchen facilities and are designed and intended for occupation for persons or families for living or sleeping purposes. Under such circumstances, the entire hotel building would not necessarily be denominated an apartment house where it is designed and used primarily for the accommodation of guests. The guests in the hotel are not tenants and have no interest in the realty; they are mere licensees and the control of the rooms, halls and lobbies remains in the proprietor. People v. Vaughn, 65 Cal.App.2d Supp. 844, 852, 150 P.2d 964. Where, as here, the evidence shows that the building was known as the "Leland Hotel"; that it was under the control and supervision of the plaintiffs; that the rooms were furnished and attended to by plaintiffs and that they retained the keys thereto, renters of such rooms were and are lodgers and not tenants. Fox v. Windemere Hotel Apartment Co., 30 Cal. App. 162, 164–165, 157 P. 820. The premises here involved were not divided into separate sets of apartments, rooms or suites of rooms intended to be used as homes within which persons or families live independently of one another and in which each person, family or household was provided with rooms, including kitchen, bathroom and toilet. As was said in Fox v. Windemere Hotel Apartment Co., supra, 30 Cal.App. 164, 157 P. 821: "These are elements which would tend to constitute an apartment house." The dominant characteristics of the premises involved are those of a hotel or lodging house and the property is operated as such.

[5] The next question presented is whether the trial court erred in decreeing that the plaintiffs be restrained from occupying and operating the premises as an apartment house unless and until they have installed therein at least one kitchen sink within each apartment of said premises. The statute (Section 17580, Health and Safety Code) provides as follows:

> "Installation of kitchen sinks: In apartment houses. At least one kitchen sink shall be installed within each apartment in an apartment house."

We conclude that under this section kitchen sinks are only required in those individual apartments, rooms, suites of rooms or living units wherein food is cooked, prepared and consumed. The adjective "kitchen" modifies the word "sink", as used in section 17580, and obviously, the legislature was considering the installation of sinks in kitchens or places used or intended to be used for cooking and preparing food. The judgment requiring the installation of kitchen sinks in each individual room or suite of rooms compels the performance of a useless act and is erroneous.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

112 Cal.App.2d 371

PENESKI et al. v. LEDFORD et al.

Civ. 4285.

District Court of Appeal, Fourth District, California.

July 22, 1952.

Action by Sarah Peneski and another against Earline Ledford and others for injuries sustained by occupants of automobile in collision at street intersection with automobile driven by named defendant. The Superior Court of San Diego County, C. M. Monroe, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that whether defendant was negligent and whether such negligence was a proximate or concurring cause of collision, under the circumstances presented, were questions of fact for trial court.

Judgment affirmed.

1. Appeal and Error ⟹931(1)

Generally, an appellate court will view the evidence in the light most favorable to respondent, will not weigh the evidence, and will indulge all intendments and reasonable inferences which favor sustaining the finding of trier of facts, and will not disturb the trier's finding if there is substantial evidence in the record in support thereof.

2. Appeal and Error ⟹989, 1011(1)

It is not reviewing court's province to analyze conflicts in the evidence, and when a finding of fact is attacked as being unsupported, appellate court's power begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will uphold the disputed finding.

3. Appeal and Error ⟹991

In action for injuries sustained in collision at street intersection between automobile in which plaintiffs were riding and automobile driven by defendant, whether defendant, having first entered intersection at which there were no stop signs, was negligent in attempting to cross intersection in front of automobile approaching from her right or in increasing speed in effort to avoid collision when defendant realized she was in a position of danger and whether such negligence, if any, was a proximate or concurring cause of collision, under the circumstances presented, were questions of fact for trial court.

4. Automobiles ⟹244(11)

In action for injuries sustained in collision at street intersection between automobile driven by defendant and automobile in which plaintiffs were riding, approaching intersection from defendant's right, the evidence was sufficient to support findings and judgment for defendant.

◆

Arthur F. H. Wright and David S. Casey, San Diego, for appellants.

Luce, Forward, Kunzel & Scripps, San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from a judgment entered in favor of defendant in an action for damages for personal injuries received in an automobile accident. The collision occurred at the intersection of Hermosa and Anita Streets, public highways in the county of San Diego. Both streets are surfaced with oil and gravel and at the time of the accident there were no stop signs at the intersection and neither street was divided by a marked center line. Hermosa Street is 21 feet wide and extends north and south and Anita Street is 15 feet in width and runs east and west. The point of impact was established as approximately 3 feet south of the north edge of Anita Street and 12 feet west of the east curb line of Hermosa Street.

Plaintiffs were traveling south on Hermosa Street in a 1937 Chevrolet automobile, being driven by a Mr. Flaskerud, when the car struck the right rear fender of a 1946 Plymouth sedan then being driven by the defendant Earline Ledford in a westerly direction across the intersection. Following the collision, the Ledford car skidded broadside, overturned and came to a rest off the highway approximately 100 feet west of the point of impact.

Mrs. Ledford testified that she first observed the Flaskerud automobile when it was about 75 feet from the intersection;

that she was then approximately 40 feet from the intersection and proceeding west at an approximate speed of 25 miles per hour; that just as she entered the intersection, she observed the Flaskerud automobile approximately 30 feet north of the intersection; that during the time the Flaskerud car was in her vision, its speed was not reduced; that after entering the intersection and when she was about at the center of it, she saw that the Flaskerud car was coming too fast and that she then increased the speed of her car.

There was evidence introduced that the Flaskerud car was being driven at a rate of speed of 40 miles per hour when approximately 100 feet from the intersection and that the driver (Mr. Flaskerud) admitted that he was traveling 30 miles per hour at the time of the collision.

The cause was tried by the court without a jury and the only contentions presented by the appellants are (1) That the findings of fact are contrary to and unsupported by the evidence; and (2) That the concurrent negligence of the defendant was conclusively shown by her own testimony. These contentions are untenable.

[1, 2] The general rule by which we must be governed is stated in Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557, 561, as follows:

> "As has so frequently been said, it is the general rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. (Citing cases.) It is not the province of the reviewing court to analyze conflicts in the evidence. Berger v. Steiner, 72 Cal.App.2d 208, 213, 164 P.2d 559. Rather, when a finding of fact is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will uphold the disputed finding. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689."

[3] The trial court found, in effect, that the defendant, Earline Ledford, was not guilty of negligence which contributed proximately to the occurrence of the collision and entered judgment accordingly. This finding is supported by substantial evidence and the reasonable inferences to be drawn therefrom. Whether the defendant was negligent and whether her negligence, if any, was a proximate or concurring cause of the accident, under the circumstances presented, were questions of fact for the trial court.

[4] The evidence supports a reasonable inference that the defendant entered the intersection first and at that time the Flaskerud car was some 30 feet north of it. It cannot be said as a matter of law that the defendant was negligent in then attempting to cross the intersection. Under the circumstances the trial court could and did find that the defendant was not negligent in proceeding across Hermosa Street. The evidence indicates that she slowed down from a speed of 25 miles per hour when entering the intersection. Then realizing that the other car was coming too fast; that Mr. Flaskerud was not going to slow down and that she was in a position of danger, she increased the speed of her car in an attempt to avoid a collision. Whether she acted as a reasonable and prudent person would have acted under the circumstances, was a question of fact for the trial court to decide. Almanerz v. San Diego Electric Ry. Co., 15 Cal.App.2d 423, 426, 59 P.2d 513. If the defendant had continued to slow down after observing that the speed of the other car was not being decreased, it is quite probable that the Flaskerud car would have struck her automobile broadside, with much more serious consequences. The evidence was sufficient to support the findings and judgment.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

112 Cal.App.2d 314

LOPEZ et al. v. SURCHIA.

Civ. 18897.

District Court of Appeal, Second District,
Division 1, California.

July 21, 1952.

Hearing Denied Sept. 18, 1952.

Action by Paul Lopez, by his guardian ad litem, Isabel Lopez, against Joseph Surchia, for assault. The Superior Court, Los Angeles County, Eugene P. Fay, J., who heard the cause without a jury and entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding that defendant, who shot plaintiff while plaintiff was fighting with defendant's son, had used excessive force in defense of his son.

Judgment affirmed.

1. Assault and Battery ⟹35

In action of assault against defendant who shot plaintiff while plaintiff was fighting with defendant's son, evidence sustained finding that defendant used excessive force in defense of his son.

2. Appeal and Error ⟹1010(1)

Where findings of trial court were supported by substantial evidence, they could not be disturbed on appeal.

3. Assault and Battery ⟹2

Civil assault and battery is established by showing that plaintiff's injury was caused by defendant's violence, or that defendant acted with wanton, wilful or reckless disregard of plaintiff's rights.

4. Torts ⟹15

Every person is presumed to intend the natural and probable consequence of his acts.

5. Assault and Battery ⟹3

Intent is the gist of the action for assault and battery only where battery was committed in performance of an act not otherwise unlawful, and if alleged battery is committed in performance of an unlawful or wrongful act, intent of wrongdoer to injure is immaterial, and he is answerable for consequences which directly and naturally result from the conduct, even though he did not intend the particular injury which followed.

6. Assault and Battery ⟹3

Where defendant is guilty of gross or culpable negligence, this may supply the element of intent for assault and battery so as to create liability for an unintentional injury which is the natural proximate consequence of defendant's conduct.

7. Assault and Battery ⟹26

In action of assault against defendant who shot plaintiff while plaintiff was fighting with defendant's son, defendant had burden of proving he was acting in lawful self-defense of his son.

◆

Nicholas Ferrara, Los Angeles, for appellant.

David C. Marcus, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff, a minor, brought an action through his guardian ad litem to recover damages for personal injuries resulting from an assault by the defendant. The defense to the action was that the assault was committed by defendant in defense of himself, his son, and his home. The trial court, hearing the cause without a jury, gave judgment for the plaintiff for $2,500 damages, from which judgment defendant appeals.

The plaintiff testified that at the time of the incident he was 18 years of age; that he, Robert Ramus and Joe Garcia were looking for Ramus' "girl friend" and parked their automobile in front of the premises of defendant where the assault took place. Plaintiff and Garcia proceeded up the street about three-quarters of a block from where the car was parked, Ramus remaining in the car. Returning to the car, they observed Ramus fighting with another man on the front lawn of the defendant's property; that the defendant came out of his house with a gun in his hand and fired two shots, one of them striking the plaintiff. The plaintiff testified that he took no part in the fight and at no time entered on the defendant's property. The testimony of Joe Garcia, called as a witness on behalf of plaintiff, was substantially the same as that of the plaintiff. On examination by the court he stated that the plaintiff was five or six feet from the two boys who were fighting.

The defendant, Joseph Surchia, testified that he, his wife and his son were in the kitchen when there was a knock at the door. He went to the door and saw a young man (Ramus) who said he was looking for "Jessie", and defendant told him he had the wrong place; that Ramus said, "No, they tell me she is here, I am coming in if I have to come in by force"; that Ramus then forced his way into the front room of the house, breaking the screen door hook. That upon Ramus' refusal to leave, defendant's son tried to eject Ramus by force, and the two of them fought in the front room, out the front door and into the front yard; that plaintiff and Garcia took sides with Ramus in the fight; that all of them were beating his son; that he yelled at them to stop but they would not do so; that defendant had a broken arm and could not defend himself; "I went and got my gun and I went out there and I was yelling and I said, 'Leave my boy alone,' I had the gun. I just intended to scare those boys and I don't know how it happened, but the first thing I saw the gun went off and I heard the scream and they all ran." He further testified that the plaintiff was "pounding my boy from the back." The defendant introduced in evidence a written report which he made to the police department, in which he stated in part: "I shot to protect my son, who was fighting with a Mexican boy. Then another came running up just as I shot and I guess I hit him. I only fired one shot. * * *."

The defendant's testimony was corroborated by that of his wife and his son.

The trial court found that the defendant committed an assault upon the plaintiff; that plaintiff did not assault defendant or his son or attempt to break into defendant's dwelling; that the assault was not committed in defense of defendant, his son, or the peaceable possession of his dwelling; and that "the use of the gun by defendant was unlawful and excessive under the circumstances, and without due regard or care for others."

Appellant urges that there was no proof of an assault, for the reason that there was no proof of intent to commit any injury to the person of plaintiff; that the gun was not aimed at plaintiff or anyone else and the shooting was accidental. Further, appellant contends that "even if there was proof of an assault and battery, it was privileged, because defendant acted in lawful self-defense," the circumstances justifying the defendant in using the force he actually exercised in the defense of his family and his home. Further, it is argued, the evidence does not disclose any wilful act on the part of defendant, but at most negligence. Finally, that the findings are inconsistent and contradictory, it is urged, because the court in effect found that plaintiff was an innocent bystander, and that defendant used excessive force; that a finding that he used excessive force "would imply that defendant was entitled to use some force" and consequently contradicts the finding that defendant did not act in self-defense.

[1, 2] None of the contentions on appeal may be sustained. Defendant's version of the occurrence was contradicted by the testimony of the plaintiff and his companion. Defendant's testimony that the gun went off accidentally, as well as his testimony that several boys were attacking his son, was impeached by his own statement to the police. The conflicting accounts of the circumstances surrounding the shooting presented questions of fact for determination by the court below. The findings of the trial court are supported by substantial evidence, and hence may not be disturbed on appeal.

In denying defendant's motion for a new trial, the trial judge filed a memorandum opinion which completely answers the contentions made by appellant herein, and from which we quote as follows:

> "All of the authorities relied upon by the defendant in support of his motion involve situations where the defendant was acting *lawfully*, and unintentionally struck an innocent bystand-

er. In the case at bar, the court found that the defendant, in shooting the gun, was acting *unlawfully* in that the evidence did not warrant a finding that the defendant had cause to believe that his son was in imminent danger of death or great bodily harm. In the court's judgment, the shooting was the use of excessive force under the circumstances. There was no evidence of the boy who fought with defendant's son being armed in any way; rather, it appeared to be nothing more than the not unusual fist fight between men or boys. It is true that defendant and his wife and son testified to there being three or four boys attacking his son. This evidence was not believed by the court. The police report received in evidence by stipulation contains a statement by the defendant: 'my son who was fighting with a Mexican boy.' This confirms the testimony of plaintiff and his witness that but one boy went to defendant's door to inquire and but one boy fought with defendant's son.

[3–5] "In order to establish a case of civil assault and battery, all that is necessary is that the evidence show that plaintiff's injury was caused by defendant's violence, or that defendant acted with wanton, willful or reckless disregard of plaintiff's rights. 6 C.J.S., Assault and Battery, § 38 et seq. The general rule is that every person is presumed to intend the natural and probable consequences of his acts. The true rule is that intent is the gist of the action only where the battery was committed in the performance of an act not otherwise unlawful * * *. If the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial. In other words, if the defendant did an illegal act which was likely to prove injurious to another, he is answerable for the consequence which directly and naturally resulted from the conduct, even though he did not intend to do the particular injury which followed. 6 C.J.S., Assault and Battery, § 10 If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act. 6 C.J.S., Assault and Battery, § 10, sub. 2 Since the court found, in the case at bar, that the defendant was acting unlawfully and not in justifiable self-defense, the intent to commit the injury is presumed.

"It is interesting to note that even if intent must be proved, the same text quoted states:

[6] "'Where defendant is guilty of gross or culpable negligence, this may supply the element of intent, so as to create a liability for an unintentional injury which is the natural proximate consequence of defendant's conduct.' 6 C.J.S., Assault and Battery, § 10, sub. 3.

[7] "The burden was upon the defendant in this case to prove he was acting in lawful self-defense of his son. The court concluded that the force used was more than would appear reasonably necessary judged by the situation as it reasonably appeared to the defendant at the time of the assault."

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

112 Cal.App.2d 363

JOHNSON v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8174.

District Court of Appeal, Third District, California.

July 22, 1952.

Proceeding by Ernest V. Johnson against Industrial Accident Commission of the State of California, and another, for review of commission's award of increased compensation to employee who was injured in fall from scaffold which was over nine feet but less than ten feet from the ground. The District Court of Appeal, Schottky, J. pro tem., held that evidence was sufficient to sustain commission's determination that employer was guilty of serious and wilful misconduct in failing to provide guard rails on the open side and ends of the scaffold.

Award affirmed.

1. Workmen's Compensation 🔑941

Under Administrative Code provisions that standard railings shall be provided on all open ends and sides of rolling scaffolds ten feet or more above the ground, fact that scaffold was less than ten feet from ground might be presumptive evidence that safe place to work had been provided, but employer would not be relieved as a matter of law from complying with the general safety provisions of the Labor Code nor would Industrial Accident Commission be precluded from determining that, under circumstances, the general safety regulations had not been complied with. Labor Code, §§ 4553, 6400–6403, 6507; Administrative Code, § 1596.

2. Workmen's Compensation 🔑1939

In workmen's compensation proceedings, question whether injury occurs from serious and wilful misconduct of employer is essentially one of fact, and the Industrial Accident Commission's determination will not be disturbed on review if it has any evidentiary support. Labor Code, §§ 4553, 6400–6403, 6507.

3. Workmen's Compensation 🔑941

Employer's failure to comply with safety provisions of the Labor Code, if knowingly and wilfully done, constitutes serious and wilful misconduct within statute providing for increase by additional one-half of the workmen's compensation otherwise recoverable where such conduct exists. Labor Code, §§ 4553, 6400–6403, 6507.

4. Workmen's Compensation 🔑939

Under the general safety provisions of the Labor Code, "serious and wilful misconduct" is conduct which the employer knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize safety of his employees. Labor Code, §§ 4553, 6400–6403, 6507.

See publication Words and Phrases, for other judicial constructions and definitions of "Serious and Wilful Misconduct".

5. Workmen's Compensation 🔑1674

In proceeding by employer for review of Industrial Accident Commission's award of increased compensation to employee who was injured in fall from scaffold which was over nine feet, from the ground, evidence was sufficient to sustain commission's determination that employer was guilty of serious and wilful misconduct in failing to provide guard rails on open side and ends of the scaffold. Labor Code, §§ 4553, 6400–6403, 6507.

◆

Forrest E. Macomber, Gordon J. Aulik, Stockton, for petitioner.

Edmund J. Thomas, Jr., Alvin L. Dove, Deputy Attys. Gen., Richard E. Macey, Stockton, for respondents.

SCHOTTKY, Justice pro tem.

Petitioner, a plastering contractor, seeks a review and annulment of respondent Industrial Accident Commission's award of increased compensation to respondent employee, Robinson. The award was based upon a finding that the injury was caused by the serious and wilful misconduct of the employer.

Charles D. Robinson, while employed by petitioner as a plasterer at Stockton, California, on February 14, 1951, was injured when he fell from a scaffold. On March

5, 1951, the said employee filed an application before respondent Commission, claiming compensation under Labor Code, Section 4553, on the ground that his injury had been caused by the serious and wilful misconduct of his employer. It was alleged the employer had exposed "the employee to an obvious and flagrant hazard in connection with his work", and that the employer had violated certain safety orders.

We shall summarize briefly the factual situation, as shown by the evidence adduced at the hearings before the Commission. At the time of injury Robinson was working on a so-called "rolling steel scaffold," standing on blocked wheels. The scaffold was neither suspended nor hanging. It was over 31 feet long and 5 feet wide. The height of the platform of the scaffold upon which the employee was working when he fell was over 9 feet. The scaffold was set up against a building with an overhanging marquee, upon the under portion of which the employee was plastering. The marquee was 8 feet wide, and slanted slightly upward from the building. The distance from the sidewalk to the inner edge of the marquee was 15 feet 1 inch, while the distance from the sidewalk to the outer edge of the marquee was 15 feet 6 inches.

The employee testified that he was 5 feet 8 inches tall, that he "was reaching out, as well as up" in order to plaster the outside edge of the marquee; that he had to reach outward approximately 3 feet and at the same time upward from his 5 foot 8 inch height to "at least 6 foot 6 inches"; that he had to stretch "to the fullest extent, both upward and outward"; that when he fell he was facing away from the building, working off the right edge and the end of the scaffold.

The employee further testified that there was no railing, toe board, or other kind of protection on the outer side of the scaffold; that he had to place his left hand against the ceiling itself, to put the mortar on the ceiling at the outer edge of the marquee; that a guard rail would have prevented him from falling, as "having to reach out like I was doing, it would have given some support to lean against thereby being able to maintain my balance," and that normally he would probably have had one hand on the guard rail. A prior worker, a Mr. Shaw, had told Johnson, the employer, that the scaffold "should have a guard rail or some provisions of safety on it."

The employer, Johnson, testified that the scaffold had been up two or three weeks before the accident, and that among others, he himself had worked off the scaffold, and that he also had to reach out over 12–14 inches.

The respondent Commission found that the employee had sustained injury arising out of and occurring in the course of his employment, and found further that:

> "2. Said injury was caused by the serious and wilful misconduct of the employer in this; the employer caused to be furnished and erected a scaffold over 9′ in height which was unsafe and improper for the work required to be done by the employee therefrom and said employer failed or omitted to provide guard rails on the open side and ends of said scaffolding; by reason of the employer's conduct in furnishing such unsafe and improper scaffolding and his omission to provide guard rails therefor, the employee was placed in a position of obvious peril of falling and risk of bodily injury from slight misstep or loss of balance; and the employer knew or should have known had he put his mind to it that such conduct and omission was likely to result in serious injury to the employee."

Following the denial of his petition for reconsideration of the award, petitioner-employer filed in this Court his petition for a writ of review.

Petitioner contends that the respondent Commission acted in excess of its powers and that the findings and award are unreasonable and that the evidence does not sustain the findings of fact and that the findings of fact do not support the award and that the award is not supported by substantial evidence. More particularly, he contends that the extra compensation awarded Robinson on the basis of the finding is erroneous as a matter of law because he has complied with the applicable safety statutes and regulations.

The general industry safety orders provide that:

> "Platforms * * * or other working levels four (4) feet or more above the floor * * * shall be guarded by a railing on all open sides. Standard railing shall be provided where overhead clearance permits. * * *
>
> "Exceptions. * * *
>
> "(8) Portable platforms * * * where used in close quarters * * * may be provided with removable or hinged railings which can be either removed or swung out of the way during such work. * * *" 8 Cal.Adm. Code, Sec. 3237(b).

Construction safety orders have been issued, however, which are applicable to the "construction, alteration, repairing, renovating * * * of buildings * * *." 8 Cal.Adm.Code, Sec. 1506. In these rules provision is made for the general requirements for scaffolds. 8 Cal.Adm.Code, Art. 18. "Scaffolds shall be provided for all work that can not be done safely by workmen standing on permanent * * * construction, * * *." 8 Cal.Adm.Code, Sec. 1591. "(a) Standard railings shall be provided on all open sides and ends of all * * * rolling scaffolds * * * ten feet (10′) or more above the ground * * *." 8 Cal.Adm.Code, Sec. 1596(a).

The scaffold here was 9 feet high. Petitioner maintains that the statutory rule of construction of the specific controlling the general, the general safety orders, 8 Cal. Adm.Code, Sec. 3202, are not applicable to him, and the maxim "expressio unius est exclusio", the enumeration of particular things excludes the idea of something not mentioned, the express requisite of handrails for platforms over 10 feet high in his business necessarily means they are not necessary for platforms under that height. Using this reasoning, petitioner maintains he has complied with all the safety rules and for that reason cannot be found guilty of serious and wilful misconduct, citing Labor Code, Section 6507, which is to the effect that compliance with the rules of the commission shall in any prosecution for violation of any provisions be conclusively presumed to be reasonable and lawful and to fix a reasonable and proper standard requirement of safety.

The respondent contends the petitioner has had the extra compensation assessed against him as permitted by Labor Code, Section 4553, not by reason of failure to comply with any applicable safety regulations, but for violation of Labor Code, Sections 6400–6403. These sections require the employer to furnish a safe place of employment; to furnish and use safety devices, etc.; not to require or permit an employee to go or be in an unsafe place of employment; and to do every other thing reasonably necessary to protect life and safety of employees. It maintains that serious and wilful misconduct may be found even though there is no safety order shown to have been violated, Vega Aircraft Corp. v. Industrial Acc. Comm., 77 Cal.App.2d 786, 176 P.2d 947; Henry J. Kaiser Co. v. Industrial Acc. Comm., 81 Cal.App.2d 818, 185 P.2d 353; that failure to comply with Labor Code Sections 6400–6403 constitutes serious and wilful misconduct, Chick v. Industrial Acc. Comm., 107 Cal.App.2d 292, 237 P.2d 8; and that the question of whether an injury has been sustained by reason of serious and wilful misconduct is one of fact which will not be disturbed on review if there is evidence to support it. Chick v. Industrial Acc. Comm., supra.

The issue in the instant case is whether or not, where there is no safety regulation requiring guard railings where the platform on which the employee is standing while working is under 10 feet high, an employer is relieved from the duty of supplying such guard railings as a safety measure where practicable in the work being performed, and whether or not the failure to provide such guard railings can be made the basis of a finding of serious and wilful misconduct.

[1] We do not believe that the specific requirement in Section 1596 of the Administrative Code that standard railings shall

be provided on all open sides and ends of all rolling scaffolds ten feet or more above the ground, can be held as a matter of law to protect an employer against failure to comply with the general safety regulations of Sections 6400–6403 of the Labor Code, hereinbefore summarized. To agree with petitioner's argument upon this point, we would be required to hold that if the platform were 9 feet 11½ inches above the ground there could be no finding of serious and wilful misconduct, while if it were exactly 10 feet above the ground such a finding would be supported. As we view the matter, an employer is never relieved as a matter of law from complying with the general safety regulations above set forth. The fact that the scaffold was less than 10 feet in height might be presumptive evidence that a safe place to work had been provided, but this would not preclude respondent Commission from determining in a proper case that under the circumstances and conditions existing on a particular job, the general safety regulations had not been complied with unless guard rails were provided.

As was stated in Bethlehem Steel Co. v. Industrial Acc. Comm., 23 Cal.2d 659, at page 664, 145 P.2d 583, at page 586:

> "'* * * *In the final analysis, the circumstances presented by the evidence in any case will be determinative of the question of whether or not the employer's act* may properly be characterized as "serious and wilful misconduct." What would amount to no more than simple negligence in one situation may well be denominated serious and wilful misconduct in another. * * * In the instant case the continued presence upon and about the derrick of so slippery a substance as crude oil would seem to point unmistakably to the necessity of strict compliance with the provisions of the commission's Safety Order 1618 and to suggest to the person in charge of the oil well that a ladder utilized by workmen should be provided with secure handholds rather than with such makeshift supports as the end of a bolt or an upright post supporting a railing. At all events, *the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to jeopardize the safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to* whom the evidence in the case was submitted.' (Emphasis added.)"

And in Henry J. Kaiser Co. v. Industrial Acc. Comm., supra, the court said in 81 Cal.App.2d at page 826, 185 P.2d at page 357:

> "* * * Similarly, if the representative of the employer in this case had not forgotten but had '*turned his mind to the matter*' of the employee under the grading cage, the action of pressing the operating button would not have occurred. In Vega Aircraft v. Industrial Acc. Comm., supra, 27 Cal. 2d at pages 533, 534, 165 P.2d [665] at page 667, it is said: 'Serious and wilful misconduct is conduct which the employer knew, or should have known, was likely to result in serious injury or which evinced reckless disregard for the safety of the employee.' The misconduct on the part of the employer must be serious *and* wilful. Labor Code, § 4553. '"Serious misconduct" of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, *if he had turned his mind to the matter,* to be conduct likely to jeopardize the safety of his employes.' (Emphasis added). E. Clemens Horst Co. v. Industrial Acc. Comm., supra, 184 Cal. at page 188, 193 P. [105] at page 108, 16 A.L.R. 611; see, also, Beven on Workmen's Compensation, Fourth Ed., p. 401. 'It is so well settled as to require no citation of authority that petitioner was charged with the duty of maintaining a safe place for its employes to work, and we do not think it can be said the evidence is insufficient to establish serious misconduct, in that petitioner's officers

> knew, or ought to have known, *if they had turned their minds to consider* the matter, of the conditions under which Mrs. Hamilton was required to work. [Emphasis added] Next, as to whether such serious misconduct was "willful." It has frequently been said that willful misconduct involves the *knowledge* of the person that the thing which he is doing is wrong. [Citing cases] Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as "evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." Louisville, [N. A. & C.] etc. Ry. Co. v. Bryan, 107 Ind. 51, 7 N.E. 807.' E. Clemens Horst Co. v. Industrial Acc. Comm., supra, 184 Cal. at page 189, 193 P. at page 108, 16 A.L.R. 611; see, also, Dawson v. Ind. Acc. Comm., supra [54 Cal.App.2d 594, 129 P.2d 479]; Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447. In Johannsen v. Industrial Acc. Comm., 113 Cal.App. 162, 166, 298 P. 99, 100, it is said: 'Had he turned his mind to a consideration of the subject, he must have known that a person working in the trench was in jeopardy, which danger could readily have been obviated by the necessary bracing.'"

[2–4] And as this Court said in Chick v. Industrial Accident Commission, supra, 107 Cal.App.2d at page 295, 237 P.2d at page 10:

> "The scope of a review of an award of the Commission has been frequently stated and is not disputed here. It is not necessary to restate it. Adequate statements thereof will be found in such cases as Bethlehem Steel Co. v. Ind. Acc. Comm., 23 Cal.2d 659, 145 P.2d 583, and Parkhurst v. Ind. Acc. Comm., 20 Cal.2d 826, 129 P.2d 113. And these cases also hold that the question of whether an injury has occurred by the serious and wilful misconduct of an employer is essentially one of fact, so that the Commission's determination will not be disturbed on review if it has any evidentiary support; that the failure of an employer to comply with the quoted sections of the Labor Code, if knowingly and wilfully done, constitutes serious and wilful misconduct which has long been defined as 'conduct which the employer * * * knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employes.' E. Clemens Horst Co. v. Ind. Acc. Comm., 184 Cal. 180 [188], 193 P. 105, 108, 16 A.L.R. 611."

[5] Applying these well-settled principles to the instant case, we believe that although it is no doubt true that a finding by the commission that the employee's injuries were not suffered by reason of serious and wilful misconduct of the petitioner-employer would have been amply supported, it cannot be held that the determination of the commission that petitioner-employer was guilty of serious and wilful misconduct lacks substantial support in the record.

The testimony and photographs in the record show fully the conditions under which the employee was working. Taking into consideration the height of the employee, the location of the scaffold, the height of the ceiling and the nature of the work he was performing, as hereinbefore set forth, we believe that the question of whether petitioner-employer was guilty of serious and wilful misconduct in omitting to provide guard rails on the open side and ends of said scaffolding was one for respondent commission to decide, and that their determination against petitioner is amply supported by the record.

The award is affirmed.

ADAMS, P. J., and PEEK, J., concur.

112 Cal.App.2d 228

PEOPLE ex rel. ROWE v. WEST SIDE COUNTY WATER DIST.

Civ. 18809.

District Court of Appeal, Second District, Division 2, California.
July 15, 1952.

Hearing Denied Sept. 11, 1952.

Quo warranto proceeding by the people of the State of California upon the relation of Antoinette Rowe against West Side County Water District, a de facto county water district claiming to be a county water district of the State of California, to oust district of all corporate rights and privileges. Of the 490 votes cast, 242 were for and 241 against formation of district, and remaining seven electors did not vote on question of formation but only for district's directors. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeals, Fox, J., held that formation of district failed.

Judgment affirmed.

1. Statutes 🔑255

Where statute declaring county water district to be properly formed and legally organized under the County Water District Law was passed June 22 and approved July 23, 1951, but did not carry an emergency clause, its effectiveness did not accrue until September 22, 1951. Const. art. 4, § 1.

2. Waters and Water Courses 🔑183½

In election to authorize formation of county water district and to designate its directors in event its formation was authorized, where of 490 votes cast, 242 were for and 241 were against formation of the district, and remaining seven electors did not vote on question of formation but only for directors, vote in favor of formation was less than the majority of the votes cast, and the formation failed. Water Code, §§ 30000 et seq.; Code Civ.Proc. § 809; Elections Code, §§ 3813, 3827, 3830; St. 1952, c. 31; Const. art. 4, § 1.

3. Quo Warranto 🔑8

Where vote on proposed formation of county water district failed to receive requisite majority, and declaration of formation was unauthorized and void, judgment of ouster in quo warranto was proper. Code Civ.Proc. § 809.

4. Waters and Water Courses 🔑183½

Under Water Code provision requiring question whether county water district should be formed and determination of persons to be its first directors to be submitted to vote, a single election and single ballot is provided for. Water Code, §§ 30290 to 30297, 30320, 30776, 30778; Elections Code, §§ 3813, 3827, 3830.

5. Waters and Water Courses 🔑183½

Judgment declaring that proposed county water district failed of formation and ousting district of its corporate rights and privileges was self-executing. Water Code, § 30000 et seq.

6. Waters and Water Courses 🔑183½

Where proposed county water district had failed of formation because of insufficient favorable votes, and vested rights did not exist to prevent repeal of curative statute which was subsequently passed to declare district properly formed, on repeal of curative statute, district ceased to have vitality. St.1951, c. 1717; Water Code, § 30000 et seq.

◆

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., R. L. Chamberlain, Deputy Atty. Gen., Richard A. Perkins, Trippet, Newcomer, Yoakum & Thomas, Los Angeles, for respondent.

FOX, Justice.

This is a proceeding in *quo warranto* alleging that defendant water district failed of formation and demanding it be ousted from all corporate rights and privileges. The district appeals from an adverse judgment.

The organization of the district in the Malibu section of Los Angeles County was attempted by an election under the County Water District Law. (Sec. 30000 et seq. of the Water Code.) At the election the electors in the territory were privileged to vote on two propositions: (1) the formation of the district, and (2) the directors to serve the district in the event its formation was authorized. The result of the election showed that a total of 490 votes were cast, 242 in favor of the formation of the district, 241 against its formation, while seven electors failed to vote at all on the question of the formation of the district but voted only for directors. Based upon the affirmative and negative votes cast upon the question of the formation of the district, the Board of Supervisors made an order declaring the formation of the district, and the County Clerk filed with the Secretary of State a certificate stating that the formation of said proposed county water district had been approved by the voters. Relying on this certificate, the Secretary of State issued his certificate stating that the defendant had been duly incorporated. Thereafter the People instituted this proceeding on the relation of the complainant.

[1] Judgment was entered June 20, 1951, declaring that the proposed county water district failed of formation and ousting it of corporate rights and privileges. In apparent disregard of the orderly processes of the law certain parties caused the Legislature during the 1951 regular session to enact Chapter 1717, providing as follows: "The West Side County Water District is hereby declared to be a properly formed and legally organized county water district under the County Water District Law." This act was passed June 22 and approved July 23. Since it carried no emergency clause, whatever effectiveness it had did not accrue until September 22, 1951. (Art. IV, sec. 1, California Const.)

At the special session of the 1952 Legislature Chapter 31, Statutes of 1952, was unanimously passed, and approved by the Governor, and has now become effective. (Art. IV, sec. 1, California Const.) It repealed Chapter 1717 of the Statutes of 1951 which purported to validate the formation of defendant district.

[2] The People contend that the formation of the district failed because a majority of the electors *voting at the election* did not vote in favor of it. Appellant, however, argues that by virtue of the fact that a majority of those voting on the question of the formation of the district voted in the affirmative the proposal was carried. The position of the People must be sustained.

With respect to the formation of a county water district, the Water Code provides that after certain preliminary proceedings the Board of Supervisors is authorized to call an election at which the formation measure is to be submitted and the first directors for the proposed district are elected, to take office in the event the district shall be created. (Water Code, secs. 30292, 30294.) Section 30320, Water Code, provides as follows: "If a majority of the votes cast at the election * * * is in favor of forming the district, the board of supervisors shall * * * declare the territory formed as a district * * *." It is also provided that: "In case less than a majority of the votes cast * * * are in favor of the measure, the formation fails * * *." (Water Code, sec. 30297.)

[3] Thus the power of the Board of Supervisors to declare a proposed water district formed depends upon the existence of a favorable "majority of the votes cast at the election" (sec. 30320), or a "majority of the votes cast" (sec. 30297). If the formation measure failed to receive the requisite statutory majority, then the formation failed, the declaration of formation was unauthorized and void, and the judgment of ouster in *quo warranto* was proper. (Code Civ.Proc., sec. 809.)

[4] The Water Code provides for but one election, at which the formation measure is to be submitted and the first directors of the district are to be elected to take office if the district is formed. Thus, reference is made to "an election" (sec. 30290), "the election" (secs. 30291, 30292, 30295, 30296, 30320), "that election" (sec. 30292), and "the formation election" (secs. 30292, 30293, 30294). All of these expressions obviously mean the same thing. A single ballot is used, upon which both the proposition and the names of the candidates for

directors appear. (Secs. 30295, 30776, 30778, Water Code; secs. 3813, 3827, 3830, Elections Code.)

Thus a single election is provided for, and a single ballot. In order to authorize the formation of a county water district the formation measure must receive a favorable "majority of the votes cast at the election". (Sec. 30320, Water Code.) Since there were 490 votes cast, it required at least 246 to constitute a majority. Here there were only 242 favorable votes. Because this was "less than a majority of the votes cast" the formation of the district failed. (Sec. 30297.)

If the Legislature had intended to authorize the formation of a county water district upon a favorable majority of the votes on the proposition rather than upon a favorable majority of the votes cast at the election it would have been a very simple matter to say so in concise terms. For example, at the same session of the legislature at which the County Water District Law was adopted it was enacted that if joint city water supply plans "are approved by *a majority of the voters voting on the proposition* at the election, the cities may begin developing or acquiring the water supply * * *." (Italics added.) (Stats.1949, ch. 79, sec. 38735, p. 187.) Other unequivocal language has been employed to accomplish the same result when the Legislature had such an intent. Thus, a proposition for the appointment of certain officers of sixth class cities carries "if a majority of the votes cast on the proposition is for it". (Gov't Code, sec. 36510. See, also, to the same effect, secs. 36616 and 43230, Gov't Code.) A proposition for the abandonment of public park property is adopted "if a majority of the electors voting on the proposition are in favor of it". (Ibid, sec. 38451.) Similar language is used to express the intention to authorize adoption of a city or county ordinance by initiative upon a favorable majority of those voting on the proposed ordinance. (Elections Code, secs. 1617 and 1715.) Since no such language appears in either sections 30320 or 30297 of the Water Code, it is evident that the Legislature had no intention of permitting the creation of a new taxing body unless at least a majority of those who cast ballots clearly signified their desire to create it.

The decision of the trial court finds clear support in People ex rel. Smith v. City of Woodlake, 41 Cal.App.2d 119, 106 P.2d 71, 72. In that case the court was called upon to construe an essentially similar provision of the general city incorporation law which provided as follows: "'The Board of Supervisors shall meet on the Monday next succeeding such election, and proceed to canvass the votes cast *thereat*; and if, upon such canvass, it appears that the *majority of the votes cast* are for the incorporation, the board shall, * * * declare such territory duly incorporated * * *.'" (Italics added.) (2 Deering's Gen.Laws, 1937, Act 5233, sec. 3.) The court construed "votes cast" to be equivalent to "votes cast thereat," i. e., "votes cast at the election," including ballots which were marked for municipal elective officers but neither for nor against incorporation. Although a majority of the electors who voted on the proposition to incorporate voted in favor thereof, the court held the incorporation failed because it did not receive a favorable majority of the votes cast at the election. The legislative intent is even clearer in section 30320 of the Water Code, for instead of the words "votes cast" referring back to "votes cast thereat" and hence back to "election" there appears the more explicit language "votes cast at the election." Other cases in accord with People ex rel. Smith v. City of Woodlake are People v. Town of Berkeley, 102 Cal. 298, 36 P. 591, 23 L.R.A. 838; City of Santa Rosa v. Bower, 142 Cal. 299, 75 P. 829, and Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

The County Water District Law in the present form was enacted in 1949. (Stats. 1949, Chaps. 274, 284.) The Woodlake decision was published in 1940. The other cases cited herein as being in accord with it because they construed similar language to the same effect were all decided prior to People ex rel. Smith v. City of Woodlake. The use of language in the Water

Code essentially similar to that which had received judicial construction strongly indicates that a like construction was intended in the later legislation. City of Long Beach v. Payne, 3 Cal.2d 184, 191, 44 P.2d 305; City of Long Beach v. Marshall, 11 Cal. 2d 609, 620, 82 P.2d 362; Perry v. Jordan, 34 Cal.2d 87, 93, 207 P.2d 47.

It is therefore clear that the proposed district failed of formation because of a failure to meet the basic statutory requirement of a favorable majority of those who voted at the election. Such deficiency is one of substance and fatal to the organization of the district as distinguished from defects which are technical in nature and a matter of form. Hence the so-called curative statute (Stats.1951, ch. 1717) was more creative than curative. Miller & Lux v. Board of Supervisors, 189 Cal. 254, 276, 208 P. 304.

[5, 6] The judgment entered on June 20, 1951, was self-executing. People v. City of Westmoreland, 135 Cal.App. 517, 519, 27 P.2d 394. Consequently whatever, if any, vitality (and it is not here necessary to determine the character thereof) the district has since enjoyed has been due to the "curative" statute which went into effect September 22, 1951. (Stats.1951, ch. 1717.) That legislative life-line, however, was effectively severed by the passage and approval of Chapter 31, Statutes of 1952, repealing the "curative" statute. The authority for this action is found in section 9606 of the Government Code which reads as follows: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." No claim is made that any rights have become vested in the district since the effective date of the "curative" statute. Certainly no vested right could be acquired by those claiming to have been elected to the board of directors of the district, or by any one who may have attempted to deal with it, for it is clear from the language of section 9606, supra, that any person acting under the "curative" statute does so with the knowledge that the statute may be repealed and the legal foundation for any asserted rights wiped out. There were therefore no impedimenta to prevent the repeal of the "curative" statute.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

112 Cal.App.2d 350

PEOPLE v. SCOTT.

Cr. 4971.

District Court of Appeal, Second District, Division 2, California.

July 21, 1952.

Rehearing Denied July 30, 1952.

Prosecution for grand theft. From judgment of conviction in Superior Court, Los Angeles County, Philip H. Richards, J., defendant appealed. The District Court of Appeal, McComb, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law 🔑814(1)

In prosecution for grand theft, giving instruction on subject of embezzlement was not error.

2. Criminal Law 🔑829(21)

Trial court did not err in failing to instruct as to difference between grand theft and petty theft when court gave instruction that three counts in indictment charged accused with grand theft.

3. Larceny 🔑14(1)

Larceny by trick and device is committed by fraudulently obtaining possession of property with intent to steal at time property is received from owner who does not intend to transfer title but parts with possession for a specific purpose.

4. Larceny 🔑65

Evidence sustained conviction for grand theft. Const. art. 6, § 4½.

Mark F. Jones, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was convicted after trial before a jury on three counts of grand theft. From the judgment and order denying his motion for new trial, he appeals.

[1–3] Defendant does not question the sufficiency of the evidence to sustain the finding of guilty on each count but claims that the court erred in (a) giving the jury an instruction on the subject of embezzlement,[1] and (b) refusing to instruct the jury as requested by defendant (1) as to the difference between grand theft and petty theft,[2] (2) that to constitute theft by trick and device the fraudulent intent to convert the property must exist at the time it is received,[3] and (3) that if several acts of taking were done pursuant to one design, the same constitutes one offense only.[4]

[4] Article VI, Section 4½ of the Constitution of the State of California reads in part as follows: "No judgment shall be set aside, or new trial granted, *in any case*, on the ground of *misdirection of the jury*, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Italics added.) We have examined the record and are of the opinion the evidence fully sustains the verdict of guilty on each count and there has not been a miscarriage of justice in the present case. Hence, since it needs no citation of authorities to support the thesis that this court is bound by the mandate of the Constitution of the State of California, it follows the judgment and order must be affirmed.

It is likewise apparent no useful purpose would be subserved by an extended discussion of the errors alleged by defendant, which would only be, as indicated in the cases cited in the footnotes a repetition of principles of law well established in this State and repeatedly reiterated in opinions of the appellate courts. We therefore refrain from further discussion of the alleged errors. (Cf. Thatch v. Livingston, 13 Cal. App.2d 202, 203, 56 P.2d 549.

Affirmed.

MOORE, P. J., and FOX, J., concur.

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[1] That such an instruction was properly given, see: People v. Murakami, 122 Cal. App. 221, 224, et seq., 9 P.2d 583; People v. Pierce, 110 Cal.App.2d 598, 243 P.2d 585; People v. Fewkes, 214 Cal. 142, 149, et seq., 4 P.2d 538; People v. Caldwell, 55 Cal.App.2d 238, 255[9], 130 P.2d 495; People v. Jones, 61 Cal.App.2d 608, 622[12], 143 P.2d 726.

[2] The court fully covered this request by this instruction, which it gave:

"You are instructed that Count I charges the defendant with Grand Theft of $1500.00 from John W. Simpson on July 23, 1949; that Count II charges the defendant with Grand Theft of $500.00 from Charles E. Murray and Mrs. Ethel Mae Murray on July 25, 1949 and that Count IV charges the defendant with Grand Theft of $500.00 from Charles E. Murray on July 27, 1949."

[3] The court correctly instructed the jury upon this subject in the following instruction:

"The form of theft known as larceny by trick and device is committed when a person, by means of fraud, artifice, trick, device, or false promises, which he has no intention of performing, obtains possession of property owned by another person with the felonious intent to steal it from such owner, and the owner of the property does not intend to transfer his title to the property to the person so obtaining its possession. If such owner parts with the possession of the property intending that it shall be used for or applied to a specific purpose, and the person receiving the property, at the time it is received, feloniously intends to convert it to his own use and steal it and not to apply the same to the use or purpose for which it was received, knowing that the owner parted with it only for such specific use or purpose, then the owner of the property, in legal contemplation, does not part with his title to the property. When property is thus unlawfully taken the crime is that of larceny by trick and device."

[4] That the requested instruction is not the law, see: People v. Ellison, 26 Cal.App.2d 496, 498[2], 79 P.2d 732; People v. Miles, 37 Cal.App.2d 373, 378[4], 99 P.2d 551.

112 Cal.App.2d 342

DUBOSCLARD v. DUBOSCLARD.

Civ. 18887.

District Court of Appeal, Second District, Division 2, California.

July 21, 1952.

Rehearing Denied Aug. 20, 1952.

Hearing Denied Sept. 18, 1952.

Suit for divorce by husband against wife upon the ground of cruelty. The Superior Court, Los Angeles County, Ellsworth Meyer, J., granted plaintiff an interlocutory decree of divorce, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence supported finding that defendant had been guilty of extreme mental cruelty towards plaintiff.

Decree affirmed.

1. Divorce ⚷124

In husband's proceeding for divorce, fact that wife, who had available advice of competent counsel, elected to represent herself at trial, had no bearing upon her contention that there was no substantial evidence to sustain finding that she had been guilty of extreme mental cruelty towards her husband.

2. Appeal and Error ⚷989

When a finding is attacked on ground that there is not any substantial evidence to support it, power of an appellate court begins and ends with a determination as to whether there is any substantial evidence to sustain it.

3. Divorce ⚷130

In husband's divorce proceeding, evidence sustained finding that wife had been guilty of extreme mental cruelty toward her husband.

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A. Brigham Rose, Los Angeles, for appellant.

Manley C. Davidson, Hollywood, for respondent.

McCOMB, Justice.

Defendant appeals from an interlocutory decree of divorce granted plaintiff upon the ground of cruelty.

[1] Defendant in her opening brief states: "At the time of trial Appellant, whose original counsel had departed this planetary hunk of matter known as the Earth, elected to represent herself." This statement, although literally accurate, is misleading. The record discloses that on April 5, 1950, Willis Sargent and Sidney H. Wyse were substituted as attorneys in the place and stead of Werner O. Graf, defendant's deceased attorney. They continued as such until February 20, 1951. The record also discloses that thereafter the firm of Hahn, Ross, Goldstone & Saunders appeared as attorneys for defendant and remained as such until they were substituted out of the case on April 9, 1951. It is therefore apparent that defendant had available the advice of competent counsel. The fact she chose to represent herself at the time of trial has no bearing upon defendant's contention that there is no substantial evidence to sustain the trial court's finding: "That since said marriage, and also since the filing of the original complaint herein, the defendant has been guilty of extreme mental cruelty towards the plaintiff in that defendant has treated plaintiff in a cruel and inhuman manner and inflicted upon him grievous mental suffering, and that by reason thereof plaintiff has suffered extreme mental anguish and his health has been impaired."

[2] When a finding is attacked on the ground there is not any substantial evidence to support it the power of an appellate court *begins and ends* with a determination as to whether there is any substantial evidence to sustain it. (In re Estate of Bristol, 23 Cal.2d 221, 223[2], 143 P.2d 689.) Viewing the record pursuant to the foregoing rule it discloses the questioned findings are amply supported by the following evidence which was fully corroborated by two witnesses who heard defendant reproach her husband with vile and indecent accusations none of which was proved to be true. Plaintiff testified:

1.

> "One day I got a phone call from the Police Department saying: 'We have got something here that belongs to you—your wife. She jumped in the lake.' So I went to the Police Station and she insisted that she tripped and fell in the lake. Then, after that she said: 'Well,

you told me to go jump in the lake, so I did.' The effect of this was that I didn't know what her next move was going to be. She tried suicide all the time, and I understand from her that she used to do that as a young child to bother her mother."

2.

"Well, there was another scene in public. I was at a restaurant and she made a remark that I couldn't tie a tie. My son was present, and I said, 'Any more remarks like this and I will have to leave the table.' She repeated it and I left the table. She rolled on the floor and screamed and I kept going."

3.

"Then one day she came in and said, 'You think you are an artist. You don't do anything right. First you have supported me, but I hate the idea of your being toothless and hairless. I don't want to live with you any more. I want to get a divorce. I met ———.' She told me that before, she had met a nice gentleman in Buffalo who was very sorry that she was not free and she intended to go back to Buffalo and marry the gentleman, so she wanted to get a divorce.

"I, knowing that she was not always sure of herself, said, 'Well, if you ask again, we will do it. In the meantime, sleep over that question.'

"And she came back and said she wanted a divorce. Thirty years with a bum was enough."

4.

"The effect, as I said before, was to make me jittery, jumpy and inattentive in my work. I have always tried to be at peace with the world, and if I got somebody who was disagreeing with everything—black is black—I told my wife—she said, 'I want to go to France * * *'"

"The Court: The question was what effect did her conduct have on you?

"The Witness: The effect was disturbing loss of sleep, keeping mulling ideas in my head for hours at night.

"Q. By Mr. Davidson: Did it affect your appetite in any way? A. It did. I was eating cotton. I didn't know what I was eating.

"Q. Did you lose any weight as a result of this? A. I lost some weight in 1949, quite a bit of it; about fifteen pounds."

[3] The foregoing is a fair sample of the testimony received at the trial and clearly supports the trial judge's findings.

Affirmed.

MOORE, P. J., and FOX, J., concur.

DANIELS et al. v. CITY & COUNTY OF SAN FRANCISCO et al. *

Civ. 14855.

District Court of Appeal, First District, Division 2, California.

July 15, 1952.

Rehearing Denied Aug. 14, 1952.

Hearing Granted Sept. 11, 1952.

Action by Laura E. Daniels and others against City and County of San Francisco, and another, for injuries to Laura E. Daniels and Kathaleen Smith when automobile occupied by them collided with bus owned by defendant city. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., denied plaintiffs' motion for new trial and entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Goodell, J., held that evidence warranted giving of last clear chance instruction.

Judgment reversed.

1. Trial 🔑203(1)

Court is not bound to model instructions solely upon the evidence given on behalf of plaintiff, but it is duty of court to give instructions expounding the law upon any reasonable theory of the case finding support in the evidence.

2. Appeal and Error 🔑928(1)

In determining whether trial court erred in refusing to instruct on doctrine of last clear chance, evidence must be viewed in light most favorable to appellant's contention that the doctrine is applicable and that instruction should have been given.

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* Subsequent opinion 255 P.2d 785.

3. Negligence ⚷83.4

The last clear chance doctrine is applicable when evidence shows that plaintiff's negligence had placed him in a position from which he could not escape by the exercise of ordinary care, and defendant had knowledge of plaintiff's situation and had last clear chance to avoid accident by exercising ordinary care, but defendant failed to exercise same and accident resulted which caused injuries to plaintiff.

4. Automobiles ⚷244(59)

In action for injuries resulting from collision between defendant's bus and automobile of plaintiff, wherein it appeared that plaintiff's automobile had proceeded into path of bus when bus was some distance off, and question existed as to applicability of last clear chance doctrine, evidence would have warranted finding that plaintiff who operated automobile had, as a result of her own negligence, placed herself in a position of danger from which she could not escape by the exercise of ordinary care.

5. Negligence ⚷83.7

Knowledge of defendant of plaintiff's condition, necessary to invoking of last clear chance doctrine, need not be such that defendant actually knew that an accident was inevitable if he failed to exercise care, but it is enough if circumstances of which he had knowledge were such as to convey to the mind of a reasonably prudent man a question as to whether plaintiff would be able to escape a collision.

6. Automobiles ⚷245(91)

In action for personal injuries as result of collision between defendant's bus and automobile of plaintiffs, wherein it appeared that plaintiff-driver had entered path of bus while bus was yet some distance away, and that automobile had come to full stop in middle lane, whether circumstances were such as to alert a reasonable man concerning plaintiffs' position of peril, was question for jury.

7. Automobiles ⚷11, 245(40)

Determination of whether a given area of roadway is in a residence district which has a 25-mile per hour speed limit is not a question for jury, but signposting is the sole criterion, in that 55-mile limit prevails unless different speed is established and signs are posted giving notice thereof. Vehicle Code, §§ 90, 90.1, 511.

8. Automobiles ⚷246(56)

In action for injuries resulting from collision between defendant's bus and automobile occupied by plaintiffs, wherein it appeared that automobile had entered onto highway in path of bus, instruction that as a matter of law, the prima facie speed limit for the defendant's bus was, under the circumstances, 55-miles per hour, was warranted by the evidence. Vehicle Code, §§ 90, 90.1, 511.

9. Judgment ⚷199(3)
Trial ⚷140(2), 165, 178

Testimony of witness called under statute as adverse is to be disregarded insofar as unfavorable when considered on motions for nonsuit, directed verdict, and judgment notwithstanding the verdict, but such rule is not applicable when the case is submitted on its merits, in which case such testimony is to receive the same consideration as is given to any other testimony. Code Civ. Proc. § 2055.

10. Trial ⚷236(3)

In action for injuries to plaintiffs as result of collision between automobile occupied by them and bus of defendant city, wherein driver of bus was called and examined as an adverse witness, and case was submitted to jury on its merits, instruction that testimony given by bus driver was to receive same consideration as any other testimony, was proper. Code Civ.Proc. § 2055.

11. Negligence ⚷93(8)

Negligence of operator of automobile is not imputed to guest, but a guest is bound to use reasonable care for his or her own safety.

12. Automobiles ⚿181(1)

A guest in an automobile is not charged with the responsibility of observing the condition of the traffic upon highway.

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Tobriner & Lazarus, San Francisco, for appellants.

Dion R. Holm, City Atty. of City and County of San Francisco, George E. Baglin, Deputy City Atty., San Francisco, for respondents.

GOODELL, Justice.

Appellants sued for personal injuries sustained by plaintiffs Laura E. Daniels and Kathaleen Smith and for property damage to the Daniels' Kaiser sedan, arising from a collision between a municipal bus driven by respondent Urdahl and the Kaiser driven by Mrs. Daniels. The verdict was for defendants and plaintiffs appealed from the judgment against them after a new trial was denied.

On Saturday, March 5, 1949 in the late afternoon Mrs. Daniels was driving the automobile in a general northerly direction on Congdon Street approaching its intersection with Alemany Boulevard, in San Francisco.

The boulevard is a signposted "through highway" see §§ 82.5, 552, 577, Vehicle Code, running in a general easterly-westerly direction. It is quite winding, changing direction every few feet, and is divided by long concrete "Islands". The roadway for eastbound traffic has three lanes, the outer one 17 feet 6 inches wide, the middle one 10 feet wide, and the inner one 10 feet 6 inches wide. Congdon Street ends at the boulevard.

The northerly terminal block of Congdon Street is on a hillside which slopes downward from Turnbull Street to its foot at the boulevard. At the southeasterly corner of Congdon and Alemany there is an arterial stop sign directed to traffic traveling northerly down Congdon, posted a few inches inside the curbstone of the sidewalk. The Mission Street viaduct crosses Alemany 750 feet westerly of Congdon. Easterly from the viaduct the boulevard slopes slightly toward Congdon and curves to the southeast. At the southwest corner of Alemany and Congdon there were several large bill-boards which obstructed the view toward the southeast of eastbound drivers on Alemany and the view toward the west of northbound drivers on Congdon.

The bus was gasoline-propelled, about 35 feet long and a little less than 8 feet wide. It was traveling easterly in the middle lane of Alemany, having just made a stop at the viaduct, when its driver first saw the Daniels' car. His first view of it was fleeting. He said "I could see it between the billboard and the house for a few scant seconds." His reference is to the billboards already mentioned and the last house on Congdon, as plaintiff's car passed that opening in coming down the hill and approaching Alemany. According to Urdahl's testimony when next he saw the car it had entered Alemany and was moving across the boulevard where, he said, it stopped in the middle lane, headed northerly. He testified that he applied his (air) brakes for about 30 or 40 feet, then released them, accelerated and steered for the inside lane to try and pass in front of the car, and finally, when a collision seemed inevitable, again applied his brakes.

Mrs. Daniels testified that when she saw the bus to her left she accelerated her speed in attempting to avert a collision. The left front of the bus hit the left rear of the Kaiser just forward of its rear bumper, and spun it around so that it came to rest in the boulevard's 3-lane roadway for westbound traffic. A 72-foot skid mark on Alemany tells the tale of the last braking of the bus and a 24-foot "brush" mark of the car's tires on the pavement tells the tale of the spinning around of the Kaiser.

Mrs. Daniels was thrown from her car by the impact and injured. Mrs. Smith, who was riding beside her suffered less serious injuries than Mrs. Daniels. The car had to be repaired, and was later sold.

Other facts appear later.

Appellants' first contention is that the only reasonable inference from the evidence is that the accident proximately resulted from the bus driver's negligence, without any contributory negligence of the appellants. Their second contention is that there is not the slightest evidence of contributory negligence on the part of Mrs. Smith. The discussion of these matters will be deferred.

The most serious question presented for decision is appellants' third contention, namely, that their proposed instruction on the last clear chance doctrine should have been given.

Appellants tendered an instruction, patterned after that given in Root v. Pacific Greyhound Lines, 84 Cal.App.2d 135, 190 P.2d 48, and following BAJI 205, p. 310 which the court refused. Respondents do not question its correctness as a statement of the doctrine but contend that the evidence does not make out a case justifying any last clear chance instruction.

[1] With respect to instructions in general the court said in Raymond v. Hill, 168 Cal. 473, 479, 143 P. 743, 745: "But the court was not under duty to model its instructions solely upon the evidence given on behalf of plaintiff. Its duty was to give instructions expounding the law *upon any reasonable theory of the case finding support in the evidence.*" (Emphasis added).

[2] With respect to last clear chance instructions in particular, the court in Bonebrake v. McCormick, 35 Cal.2d 16, 18, 19, 215 P.2d 728, 729, cites Raymond v. Hill, supra, and says: "In determining whether the court erred in refusing to instruct on the doctrine of last clear chance, the evidence must be viewed in the light most favorable to plaintiff's case. Brown v. McCuan, 56 Cal.App.2d 35, 36, 132 P.2d 838."

In the Bonebrake case the judgment was reversed on the sole ground that a last clear chance instruction should have been given. In Brown v. McCuan, [132 P.2d 839] in discussing a last clear chance instruction, this court said: "Contrary to the usual practice on appeal, therefore, the facts will be viewed in the light most favorable to plaintiff and appellant on the above theory in order to determine whether they would have supported a verdict in plaintiff's favor."

In Alberding v. Pritchard, 97 Cal.App.2d 443, 445, 217 P.2d 1012, 1013, where a last clear chance instruction was given, the court in affirming said: "In considering whether the record contains evidence sufficient to justify the court in giving an instruction upon the doctrine of last clear chance, the reviewing court must consider all the evidence admitted by the trial court. *It must ignore conflicts and view the evidence in the light most favorable to the contention that the doctrine is applicable,* indulging every reasonable inference supporting the application of the doctrine. If after such review and consideration the doctrine can apply *under any reasonable view of the evidence the instruction is proper.*" (Emphasis added.)

The recent case of Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645, cites Alberding v. Pritchard approvingly and follows Bonebrake v. McCormick, supra. In Selinsky v. Olsen the trial court granted a new trial because no last clear chance instruction had been given and the ruling was affirmed. See, also, Jones v. Yuma Motor Freight Terminal Co., 45 Cal.App.2d 497, 498, 114 P.2d 438 and Overacker v. Key System, 99 Cal.App.2d 281, 283, 221 P.2d 754; Hopkins v. Carter, 109 Cal.App.2d 912, 241 P.2d 1063.

The rule just discussed, and restated in these recent cases, is not mentioned at all by either side in their briefs on this appeal.

Respondents open their discussion as follows: "Urdahl, the bus driver, had neither the last chance nor a clear chance to avoid this accident. Mrs. Daniels, on the contrary, could have remained stopped or could have stopped her automobile at any time within one foot. She it was who had the last clear chance. Instead of availing herself of her opportunity to avoid the accident, she blindly accellerated into the path of the bus which she had previously observed swinging north to pass in front of her."

The function of the trial court when considering the propriety of a last clear chance instruction was not to pass upon those questions but simply to determine whether there was any substantial evidence to support plaintiffs' theory. Whether, as counsel say, "Urdahl * * * had neither the last chance nor a clear chance * * *" and whether "Mrs. Daniels * * * it was who had the last clear chance" were ultimate issues of fact for the jury under plaintiffs' theory of the case. The rejection of the instruction removed them from the jury.

The problem of this court is to determine from the record whether there is substantial evidence to support plaintiffs' theory and on such an examination "We must view the evidence most favorable to the contention that the doctrine is applicable * * *", Selinsky v. Olsen, supra, [38 Cal.2d 102, 237 P.2d 646] "under any reasonable view of the evidence". Alberding v. Pritchard, supra.

[3] One of the most recent statements of the elements of the last clear chance rule is found in the Selinsky case, 38 Cal.2d 102, at pages 104, 237 P.2d 645, 646, as follows: "'(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.' Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917."

[4] We are satisfied that there was ample evidence to have supported a finding that plaintiff Laura Daniels as a result of her own negligence got herself into a position of danger from which she could not escape by the exercise of ordinary care. Three defense witnesses testified that she went through the stop sign at the entrance to Alemany Boulevard, a through highway, a violation of § 552, Vehicle Code, and stopped in the middle lane thereof, a 55-mile-per-hour highway.

Defendant Urdahl testified that as plaintiff's car emerged into Alemany at about 10 miles per hour he continued to watch it (having had a glimpse of it "a few scant seconds" before as it came down Congdon) as it continued directly straight across the street and slowed down to a complete stop "almost in the center lane." And in a report, made the day after the accident, he wrote: "This car as far as I could see did not make a stop at arterial * * ."

The witness Jester testified that he first saw the car as it came down Congdon and "rolled into the street"; that it did not stop before entering Alemany, but stopped momentarily in the center lane with its front therein. He testified that "when it reached Alemany I would say it was going about ten miles an hour, and slowed right down to nothing." Instead of stopping at the corner he testified it went out into the middle of the street and stopped. He said he was absolutely sure it did not stop before proceeding into the intersection.

Betty De Angelis, a passenger on the bus, testified that she was seated just behind the driver, facing southerly, and first saw the car when it was at the top of the hill on Congdon, again saw it when it appeared between the signboards and the house (where Urdahl testified he too saw it) and saw it again when it had entered the intersection. She said "it moved out slowly to the intersection, and when it got to about the middle, the second lane, it stopped. It came to a dead stop" for "about a second". She testified elsewhere that the car was in the middle lane when it stopped. After coming into the intersection at about 5 to 10 miles an hour she said it continued at that speed until it got out in the middle and then stopped.

Mrs. Daniels and Mrs. Smith testified that they stopped at the arterial stop sign, within a foot of the curb line, for at least 30 seconds. However, under the rule all conflicts must be ignored.

[5] In considering the second element of the doctrine, namely, "that defendant has knowledge that the plaintiff is in such a situ-

ation, [of danger] and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation," the following rule quoted approvingly in Peterson v. Burkhalter, 38 Cal.2d 107,237 P.2d 977, 979, from Cady v. Sanford, 57 Cal.App. 218, 226, 207 P. 45 is of guidance: "'It was not necessary that appellant should actually know that an accident was inevitable if he failed to exercise care. It is enough if the circumstances of which he had knowledge were such as to convey to the mind of a reasonably prudent man a question as to whether respondent would be able to escape a collision.'"

In Jones v. Yuma Motor Freight Terminal Co., 45 Cal.App.2d 497, 501–502, 114 P.2d 438, 440 the court said "Knowledge of the dangerous situation of the plaintiff can be imputed to the defendant when the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril. Nicolai v. Pacific Electric Ry. Co., 92 Cal.App. 100, 267 P. 758." The Yuma case was followed in Alberding v. Pritchard, supra, 97 Cal.App.2d 443, 445, 217 P.2d 1012.

[6] Urdahl first saw the car in the brief interval as it passed between the billboard and the house, and next when it entered Alemany. He kept his eyes on it. However, when it commenced to slow down while crossing his path an altogether different situation confronted him. In the nature of things he could not possibly know why it was slowing down, whether from mechanical trouble or not, in other words, whether it was in a trap. It slowed to a stop in the middle lane. Whether under the rule last cited this was enough to alert a reasonable man, was a jury question.

The time, then, when Urdahl first saw the car slowing down across his path, became of primary importance since upon that factor depends the ultimate jury question whether he then had a last chance or a clear chance to avert a collision. And the question of time of course means the distance of the bus from the intersection.

In attempting to distinguish Root v. Pacific Greyhound Lines, 84 Cal.App.2d 135, 190 P.2d 48, respondents say: "There the plaintiff did not jump his truck forward from a standing position into the path of the bus when the bus was so close that it was impossible for its driver to avoid a collision. * * * The evidence in that case failed to show that the plaintiff there could have done anything to avoid the accident, for example, that he could have stopped in one foot." These arguments do not touch the point. The question is not what the bus could have done *after* the car suddenly started up or "jumped" from its stop in the middle lane. The real question concerns the situation before the car even stopped, when Urdahl admittedly saw it slowing down in his path. The question which the jury would have had to solve—had last clear chance been laid before them—would have concerned the distance of the bus from the car when it first showed signs (to Urdahl) of slowing down.

Urdahl testified that he did not see whether there were any passengers in the car and frankly said that he "was not particularly interested who was in it". He saw that a woman was driving, but that was as far as he remembered observing. Obviously he had no way of telling whether she was aware of her peril, or wholly oblivious.

Mrs. Daniels testified that when she first saw the bus approaching she was in the middle lane and it was about 200 feet away, or with the front of the bus at about the west end of the "island", which would be about 180 feet. Mrs. Smith testified that when she first saw the bus they were "well into the second lane" and it was approximately half a block away (she used as a measure not the long block from Congdon to the viaduct, but a Hayes Street block which counsel agreed is 412 feet) which would mean about 200 feet. If the driver of the car could see the bus, then Urdahl could see the car. Under the rule discussed earlier the testimony of the two women would be that which was most favorable to their last clear chance theory. Betty De Angelis testified that the bus was "about half way in the island when it started slowing down" (the "island" being about 180 feet long). And there was a 72-foot skid mark leading into the point of collision. We are satisfied that there was substantial evidence to bring the case within the second element. That being so, and the instruction being proper, the question was for the jury whether Urdahl had the last clear chance to avoid the accident by exercising ordinary care. See Hopkins v. Carter, supra, 109 Cal.App.2d 912, 241 P.2d 1063.

We think this is a stronger last clear chance case than that of Root v. Pacific Greyhound Lines, supra, where the giving of the instruction was approved. The slowing down of plaintiff's car to a stop in the middle lane of a 55-mile, 3 lane highway, makes this the stronger of the two cases.

In our opinion it was prejudicial error to reject the instruction.

We deferred the discussion of appellants' first contention, that "The only reasonable inference from the evidence is that the accident * * * resulted from negligence on the part of the bus driver, without contributory negligence by the injured appellants."

We are satisfied that sufficient facts have been stated to make it apparent *(as far as this heading is concerned* and eliminating of course all last clear chance questions) that the record presents a typical fact case in which the evidence, and the reasonable inferences therefrom, would support a verdict either way. There was a sharp conflict as to whether the car stopped before entering Alemany and on other questions involving negligence and contributory negligence.

In appellants' second attack on the instructions they contend that the court erred in instructing as a matter of law that the prima facie speed limit for the defendants was 55 miles per hour.

Such questions usually arise when the claim is made that the limit has been exceeded, but here it arises for the reason that the jury was told that "Because of the 55-mile * * * limit on Alemany Boulevard, the driver of a vehicle northbound * * * is required to exercise a greater amount of care than she would in entering a highway on which there was a lower speed limit."

[7, 8] Appellants claim that the jury was misinformed and that the question whether the area was a residence district with a 25-mile limit, § 511 Vehicle Code, "would be a jury question and not one for judicial notice." This problem has been definitely settled by the recent cases of Reynolds v. Filomeo, 38 Cal.2d 5, 236 P.2d 801, 805, and Guerra v. Brooks, 38 Cal.2d 16, 236 P.2d 807, which hold that signposting is the sole criterion. In the Reynolds case the court quotes § 511 which (after specifying various lower speed limits) prescribes a 55-mile limit " 'under all other conditions unless a different speed is established as provided in this code *and signs are in place giving notice thereof.*' " (The emphasis is the Supreme Court's). The court then says that "now, as before, no area has the prima facie speed limit of a * * * residence district unless it is signposted."

Respondents' witness Jester testified that a 25-mile sign was posted for west-bound Alemany traffic "right at the edge of the viaduct." He did not believe any signs were posted for east-bound traffic, but was not sure. If there had been a 25-mile sign for traffic approaching the Congdon Street intersection the defense could have readily proved it, and it would have been to their interest to do so. Jester's testimony supplied sufficient foundation for the 55-mile instruction, to say nothing of the other evidence showing that Alemany Boulevard lacked the requisite dwelling house density under §§ 90, 90.1 Vehicle Code. The sign "right at the edge of the viaduct" directed to *west-bound* traffic marked the entrance of Alemany traffic into a business or residence district lying to the *west* thereof and meant nothing to traffic eastward of it on either side of Alemany.

There was no error in giving the 55-mile instruction.

[9] Appellants' third attack on the instructions is that the one given on the effect of § 2055, Code Civ.Proc. was erroneous and misleading. Defendant Urdahl was called by plaintiffs as an adverse witness and questioned at considerable length. The follow-

ing instruction was given: "I instruct you that testimony given under section 2055 * * * is just as much evidence in the case as any other testimony properly received. Such testimony is to receive the same consideration from the jury in determining the facts as any other testimony. Such testimony, if believed by the jury and if otherwise sufficient, will sustain a verdict against the plaintiffs in this case."

Appellants argue that "the instruction should have explained that any such testimony elicited by the plaintiffs should weigh for them in so far as it was favorable, *but that it should be disregarded in so far as it was unfavorable,* if the matters to which it referred were not satisfactorily established by other evidence". (Emphasis added.) They cite People v. Mahoney, 13 Cal.2d 729, 736, 91 P.2d 1029, 1033, and Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 722, 38 P.2d 825.

The emphasized language is a correct statement of the rule *when it comes to a consideration of motions for (a) nonsuit, (b) directed verdict, and (c) judgment notwithstanding the verdict,* but *not* when the case is submitted on its merits. The Mahoney and Dempsey cases illustrate what we have just said.

People v. Mahoney was an appeal by the plaintiff from a judgment on a directed verdict in favor of defendant. In reversing, the court in discussing § 2055 testimony, said that "*on the motion for a directed verdict* it would weigh for the plaintiff in so far as it was favorable. *In so far as it was unfavorable it would be disregarded.* Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825." (Emphasis added.)

The Dempsey case was an appeal from a judgment of nonsuit. There a defendant while being examined under § 2055 gave testimony which unquestionably was favorable to his own side. In reversing, the court held that it was evidence in the case "to be considered together with any other evidence in the light most favorable to plaintiff *when the court is determining a motion for nonsuit.*" [Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 826.] Citing the Smellie Case; emphasis added.

Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529 (nonsuit reversed), is cited in both the Dempsey and Smellie cases. There, 204 Cal. at page 686, 269 P. at page 532, the court said: "While the two trainmen, who were called for cross-examination under section 2055 * * testified that they gave the required signals, both by ringing the bell and sounding the whistle, the plaintiffs, *especially upon a motion for a nonsuit, would not be concluded by their evidence; it being the duty of the court upon a motion for a nonsuit to accept the evidence most favorable to the plaintiffs.*" (Emphasis added.)

Appellants cite Smellie v. Southern Pacific Co., 212 Cal. 540, 556, 299 P. 529, an appeal from a judgment entered on a directed verdict (which was reversed) where at pages 555–559 of 212 Cal. at pages 535–537 of 299 P. the court extensively discusses § 2055. At page 558 of 212 Cal. at page 536 of 299 P. it quotes from Marchetti v. Southern Pacific Co. what we have quoted above and concludes the discussion, 212 Cal. at page 559, 299 P. at page 537, by saying that testimony cited under § 2055 "is, of course, evidence in the case and may be considered in determining the issues of the case *upon the trial or final hearing by the court, or, if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict.*" (Emphasis added.)

In Dorn v. Pichinino, 105 Cal.App.2d 796, 234 P.2d 307, § 2055 is again discussed at some length. There testimony favorable to the defense was given by one of the defendants while on the stand, called by plaintiff under § 2055. In holding that such testimony was in the case for all purposes we took pains to say, 105 Cal.App.2d at page 800, 234 P.2d at page 310:

> "We hasten to add, parenthetically, that this rule is confined to the weight

and effect of such evidence *at the time when a cause is finally submitted after a trial on the merits,* and has nothing to do with the situation presented on a motion for nonsuit or a directed verdict, where such evidence is viewed quite differently. This cause was submitted by defendants for decision on its merits as soon as plaintiff rested, hence the rule is fully operative in this case." There the testimony favorable to the defense (the prevailing parties) was given by a defendant while testifying under § 2055 during plaintiff's case in chief.

[10] The present case was submitted to the jury on its merits. In such circumstances the language of the instruction was correct under the authorities.

Appellants' second contention, namely, that "There was not the slightest evidence * * * upon which to base a finding of contributory negligence on the part of appellant Kathaleen Smith", and their last attack on the instructions, namely, that the ones submitting the issue of contributory negligence on her part were contrary to both the law and the evidence, may be properly discussed together.

[11, 12] In the first place, there is no claim, and could be none, that the negligence of Mrs. Daniels, if any, could be imputed to her guest, Mrs. Smith, Edwards v. Freeman, 34 Cal.2d 589, 592–593, 212 P.2d 883. Any negligence chargeable to Mrs. Smith would have to be based on her own conduct.

The only words or acts of Mrs. Smith which, by any possibility, could be pertinent to the present inquiry are the following:

> "Q. When you looked to your left did you see any traffic coming at all down Alemany? A. No.
>
> "Q. And I understand there was some conversation between Mrs. Daniels and yourself before you started up? A. Well, to the effect that Mrs. Daniels said that it all looked clear and we might just as well go across.
>
> "Q. Were those remarks made before the machine started? A. Yes * * *
>
> "Q. And now, did you make any observation for traffic or did you leave that up to Mrs. Daniels? A. She said to me, that 'It looks pretty clear', and I said, 'Yes, it does.'
>
> "Q. Did you look yourself? A. Yes, I glanced both ways * * *
>
> "Q. And you saw nothing coming? A. I didn't see anything coming.
>
> "Q. And you agreed with Mrs. Daniels that was clear? A. Yes, I did."

The Supreme Court has recently said that "an automobile passenger is bound to use reasonable care for his own safety". Miller v. Peters, 37 Cal.2d 89, 94, 230 P.2d 803, 806; see, also, 3 Cal.Jur. p. 853, § 83. That being a jury question, a general instruction to that effect would have been proper, but the court went further and instructed as follows: "If you find that the plaintiff Kathaleen Smith did not look carefully for traffic eastbound on Alemany Boulevard, and that she told Mrs. Daniels that Alemany Boulevard looked clear when in fact the bus was approaching so closely as to constitute an immediate hazard, the plaintiff Kathaleen Smith was in such case guilty of negligence." Since it has been held that a guest is not "charged with the responsibility for observing the condition of the traffic upon the highway", Murphy v. National Ice Cream Co., 114 Cal.App. 482, 489, 300 P. 91, 94, citing Martinelli v. Poley, 210 Cal. 450, 292 P. 451 and Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529, the instruction perhaps went too far. On a new trial we think it will be sufficient to instruct only on the general proposition indicated above, that a guest is bound to use reasonable care for his or her own safety.

The reversal herein is based solely on the refusal of the last clear chance instruction which, in our opinion, was prejudicial error for the reasons and on the authorities discussed earlier.

The appeal from the order denying a motion for new trial—a non-appealable order—is dismissed.

The judgment appealed from is reversed.

NOURSE, P. J., and JONES, Justice pro tem., concur.

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112 Cal.App.2d 516

JUSTICE et al. v. OROVILLE-WYANDOTTE IRR. DIST. et al.

Civ. 8130.
Sac. 6248.

District Court of Appeal, Third District, California.
Aug. 4, 1952.

Action by Lillian B. Justice, and another, against Oroville-Wyandotte Irrigation District, an irrigation district of the State of California, and others, for cleaning and rebuilding reservoir and for placing materials therefrom on plaintiffs' land. Judgment was entered upon stipulation therefor, and shortly thereafter plaintiffs moved to set judgment aside. The Superior Court, Butte County, Dudley G. McGregor, J., denied motion, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that evidence established that plaintiffs consented to stipulation, and that denial of motion to vacate was not abuse of trial court's discretion.

Judgment and order affirmed.

1. Appeal and Error 🔑931(1)

In action against irrigation district for cleaning and rebuilding reservoir and for placing materials therefrom on plaintiffs' land, where affidavits constituted only evidence before the court when judgment in question was entered, following oral stipulation therefor, and plaintiffs' motion to set stipulation aside was denied, the District Court of Appeal would assume that the Superior Court resolved all conflicts in favor of defendants, and, therefore, would refer only to those portions of the affidavits which support the order.

2. Stipulations 🔑21

In action against irrigation district for cleaning and rebuilding reservoir and for placing materials therefrom on plaintiffs' land, where judgment in question was entered following an oral stipulation therefor, evidence established that plaintiffs consented to the stipulation.

3. Judgment 🔑90

In action against irrigation district for cleaning and rebuilding reservoir and for placing materials therefrom on plaintiffs' land, where plaintiffs consented to stipulation upon which judgment was entered, the Superior Court did not abuse its discretion in denying plaintiffs' motion to vacate the judgment.

◆

McAllister & Johnson, Walter Frame and Frank H. McAuliffe, Sacramento, for appellants.

Minasian & Steadman, Oroville, for respondents.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment in favor of defendants and from an order denying plaintiffs' motion to vacate and set aside the same.

By their action plaintiffs sought to recover damages alleged to have resulted from acts of the defendant district in cleaning and rebuilding a reservoir located on plaintiffs' land. Defendants' answer admits the cleaning of the reservoir and the placing of materials therefrom on appellants' land, but alleges that such work was done with the consent of plaintiffs and in accordance with their agreement as to the manner in which it should be done.

[1] The judgment in question was entered following an oral stipulation therefor which was placed in the record by the then counsel for plaintiffs. Shortly thereafter plaintiffs moved to set the stipulation aside, averring in their affidavit in support thereof that the stipulation was without their consent; that the judgment entered does not contain the provisions of the stipulation made in court; that certain provisions of the judgment as entered

would cause further damage to their land. The affidavit of defendants in opposition thereto sets forth in detail the acts of the parties leading up to the stipulation. It appears from the record before us that said affidavits constituted the only evidence before the court. Since the trial court on the identical record denied the motion we must assume that it resolved all conflicts in favor of defendants and hence we will only refer to those portions of the affidavits in support of the order.

[2, 3] From the affidavit of defendants' counsel it appears that plaintiffs have been represented by various attorneys and that at the request of plaintiffs the cause had been postponed on numerous occasions during the period from November, 1946, when the action was originally filed, and April, 1951, when the parties actually appeared in court. On the last-mentioned date, and after the jury had been sworn in, Mr. E. T. Manwell, the then counsel for plaintiffs, asked for a continuance. In accordance therewith, the cause was continued until May 2, 1951, at which time Manwell stated that the parties had arrived at a compromise and that the jury could be dismissed. Thereupon Manwell dictated, for the record, the stipulated agreement of the parties. Findings were waived and it was agreed that P. J. Minasian, counsel for defendants, should prepare the judgment. Concerning the question of consent it further appears from Minasian's affidavit that when the case was called on April 30th both plaintiffs were sitting next to their attorney at the counsel table, heard the discussion between court and counsel relative to a continuance for the purpose of reaching a compromise; that thereafter counsel for both parties adjourned to Minasian's office and there worked out the stipulation which was later put in the record; that upon completion of the stipulation plaintiffs' counsel took a copy thereof for presentation to plaintiffs and on the following day Manwell informed Minasian that he would call at the latter's office early the next morning in order to work out certain minor changes in the stipulation; that the following morning both counsel met at Minasian's office; that the directors of the defendant district were also in attendance, as was plaintiffs' engineer; that plaintiffs did not participate in the meeting but remained in their car which was parked near said office; that the parties were unable to reach an agreement and the meeting broke up; that as defendants were leaving the office they were met by plaintiffs and their counsel who stated they had agreed to the stipulation as originally proposed, with certain minor changes; that thereupon the respective parties and their counsel proceeded to the court room; that thereafter and while plaintiffs were in said court room their attorney dictated into the record the stipulation heretofore referred to; that at no time during the course of this proceeding did either of appellants express any dissatisfaction with the same; that at the conclusion of the hearing Manwell suggested to Minasian that he believed that if defendants would pay plaintiffs the sum of $1,000 plaintiffs would assume responsibility for doing the grading contemplated, thereby relieving the defendant district of the responsibility therefor; that Minasian agreed to so advise his client, stating that if such procedure was approved by all parties the stipulation as dictated into the record could be modified by filing a written amendment thereto; that Manwell agreed that if the same was not satisfactory the original stipulation would stand; that subsequently a letter was written by Minasian to Manwell, wherein it was stated that in accordance with the suggested change the district was willing to pay to plaintiffs the money in question; that if plaintiffs were satisfied would Manwell secure their signatures to the amended stipulation which was inclosed and a check would immediately be forwarded to them; and that the letter concluded with the comment that if counsel encountered "any difficulty in connection with this stipulation * * * so advise us, we will carry out the terms of the stipulation as set forth in the record of the court * * *"; but that no response was made to this letter nor was the amended stipulation executed. On June 11, 1951 defendants entered judgment based on said stipu-

lation of May 2, 1951, and on June 18, 1951 plaintiffs' petition to have the judgment set aside was filed. The motion was denied on June 25th and the present appeal followed.

It is appellants' contention that nowhere in the record does it affirmatively appear that they consented to the oral stipulation which was placed in the record and since substantial rights of theirs were involved such consent was necessary and hence the stipulation is not binding on them.

We can not agree with such interpretation of the evidence. Plaintiffs do not deny the averments of attorney Minasian's affidavit that they knew of, and participated in, each step of the proceedings which culminated in the oral stipulation which was put in the record. The only allegation to the contrary is that "certain stipulations were made by counsel for both parties which were not agreed to" by plaintiffs; that the judgment as entered "does not contain the provisions of the stipulation made in Court" and that it does not "contain the provisions of the stipulation" attached to their affidavit as Exhibit "A". It would appear that said exhibit was the amended stipulation drafted by defendants' counsel following the appearance of the parties in court on May 2d, but which was never executed. However, nowhere in said affidavit have plaintiffs made any attempt to show wherein the stipulation appearing in the judgment as entered was not the one dictated into the record on May 2d.

Thus the question for determination is not the extent of the authority of Mr. Manwell to bind his clients, but solely whether or not plaintiffs consented to the stipulation. And as to this question the record before us is wholly barren of any showing by plaintiffs of any dissent on their part. To the contrary, the record clearly shows full knowledge of the discussions looking towards a compromise which began with their court appearance on April 30th and ended with their complete acquiescence and consent to the stipulation placed in the record on May 2d.

Under such facts and circumstances it can not be said that the trial court abused its discretion in denying the motion to vacate the judgment.

The judgment and order are affirmed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

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112 Cal.App.2d 201

OOSTERVEEN et al. v. BOARD OF MEDICAL EXAMINERS et al.

Civ. 18905.

District Court of Appeal, Second District, Division 3, California.

July 14, 1952.

Hearing Denied Sept. 11, 1952.

Action by Adolph Oosterveen and another against Board of Medical Examiners of the State of California, and others, for declaration of plaintiffs' rights to practice naturopathy without securing a license. The Superior Court, Los Angeles County, Stanley Mosk, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that naturopaths were not the subject of unjust and unconstitutional discrimination.

Judgment affirmed.

1. Physicians and Surgeons 🔑6(1)

The practice of naturopathy as such may not be licensed under existing laws and the system may not be practiced without a license, but physicians and surgeons, osteopaths, chiropractors and all those who hold licenses as drugless practitioners may employ naturopathic methods. Gen.Laws, Acts 4811, 5727; Business and Professions Code, §§ 2000–2497, 2137, 2141, 2232, 2395, 2497.

2. Physicians and Surgeons 🔑6(1)

One holding a license as a "drugless practitioner" may not use the title "Dr." or "N.D.", and a physician and surgeon or a chiropractor, unless licensed as a naturopath, may not use the title "naturopath" or "N.D.". Business and Professions Code, §§ 2137, 2141, 2232, 2395, 2497; Gen. Laws, Acts 4811, 5727.

3. Evidence ⚷20(1)

It is of common knowledge that nature is the indispensable healing agency and that practitioners of medicine and surgery, osteopathy and chiropractic make use of the curative qualities of light, air, water, rest, diet, and physical and mental culture, in connection with the agencies peculiar to their several systems of healing.

4. Constitutional Law ⚷208(6)
Physicians and Surgeons ⚷2

That naturopaths may not be licensed under existing laws and that they must become licensed either as physicians and surgeons, which includes osteopaths, or as chiropractors in order to employ naturopathic methods, does not make naturopaths the subject of unjust and unconstitutional discrimination, notwithstanding that courses of study for naturopathy and for practitioners of chiropractic may be substantially the same. Business and Professions Code, §§ 2137, 2141, 2232; Gen. Laws, Acts 4811, 5727.

5. Physicians and Surgeons ⚷1

The courts cannot properly undertake the legislative and administrative functions that are involved in the regulation of practice of medicine, surgery and drugless healing, and they cannot absolve naturopaths from duty of complying with licensing statutes which establish not only standard qualifications for applicants to practice but also the procedure for testing their qualifications. Business and Professions Code, §§ 2000–2497.

6. Physicians and Surgeons ⚷2

The provision in Medical Practice Act that nothing therein shall be construed so as to discriminate against any particular school of medicine or surgery or any other treatment applies primarily to the administration of the Act and does not modify other specific sections which do not call for interpretations such as the section prohibiting practice of naturopathy without being properly licensed in one of the healing arts. Business and Professions Code, §§ 2000–2497, 2141.

Macbeth & Ford, Norman Macbeth, Patrick H. Ford, for appellants.

J. Robert Meserve, Los Angeles, for Board of Osteopathic Examiners.

Edmund G. Brown, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for Board of Medical Examiners of California State Board of Chiropractic Examiners and Edmund G. Brown.

SHINN, Presiding Justice.

Plaintiffs Oosterveen and Olson are graduate Naturopaths and Chiropractors. Neither has been licensed to practice in California. They brought this action against Board of Medical Examiners of the State of California, State Board of Chiropractic Examiners, Board of Osteopathic Examiners of the State of California, and Edmund G. Brown, as Attorney General of the State of California, to secure a declaration that they have a right to practice naturopathy without securing a license from any of defendant boards. They appeal upon a settled statement from a judgment that they take nothing by their action.

The claims asserted by plaintiffs are the following: (1) The practice of naturopathy is beneficial and not harmful; (2) naturopaths are subject to prosecution for practicing without a license; (3) they cannot, under existing laws, obtain a license to practice naturopathy; and (4) they are thus made the subject of unjust and unconstitutional discrimination. Defendants do not dispute that the practice of naturopathy by qualified persons is beneficial and harmless; they concede that naturopaths are subject to prosecution if they are unlicensed, but they deny that under existing laws naturopathists cannot become licensed, contending that licensees of the Board of Medical Examiners, the Board of Osteopathic Examiners, and the Board of Chiropractic Examiners, may practice the system of naturopathy. And they contend further that while the practice is regulated it is not prohibited.

Physicians and surgeons licenses are issued under the Medical Practice Act, Bus & Prof. Code, Ch. 5, Div. 2, §§ 2000–2497.

The Board of Osteopathic Examiners, under the Osteopathic Law, Deering's Gen. Laws, Act 5727, 1944 Ed., issues licenses which authorize the holders to practice medicine and surgery the same as licensed physicians and surgeons. The holders of these licenses may also use "any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions." Section 2137. The Board of Chiropractic Examiners, under the Chiropractic Act, Deering's Gen. Laws, Act 4811, issues licenses which entitle the holders "to practice chiropractic in the state of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica."

There is no law under which plaintiffs may be licensed as naturopaths. Brief reference to earlier laws will disclose how the present situation arose. Under Statutes 1907, page 252, licenses were issued for the practice of medicine and surgery, osteopathy and "other systems or modes of treating the sick or afflicted". Under Statutes 1909, page 418, holders of certificates from the Board of Examiners of the Association of Naturopaths of California, incorporated August 8, 1904, and who had been practicing naturopathy, were given the right to continue in the practice. Thereafter, until 1949, drugless practitioners were licensed by the Board of Medical Examiners, by the Board of Osteopathic Examiners after it was created, Deering's Gen. Laws, Act 5727, 1944 Ed., and licenses were also issued under the Chiropractic Law, an initiative measure approved November 7, 1922, Deering's Gen. Laws, Act 4811, 1944 Ed. The classification of drugless practitioner was abolished by the addition of § 2232 of the Business & Professions Code, Stats. 1949, Ch. 233, and by section 2497 of the Business & Professions Code, added by Statutes 1943, Chapter 1047, the Board of Osteopathic Examiners also was deprived of authority to issue drugless practitioners certificates. These enactments preserved to holders of drugless practitioners certificates the right to practice. It was stipulated that there are 13 naturopaths licenses issued by the Medical Board, 129 drugless practitioners licenses issued by the Medical Board, and 179 by the Osteopathic Board; also that there are some 5600 chiropractors in the State of California. The court found that naturopathy is practiced in California by more than 1000 persons, almost all of whom are licensed chiropractors who practice chiropractic and who have displayed somewhere within their offices a certificate or degree of Doctor of Naturopathy.

The trial court concluded from the findings that "any duly licensed practitioner may employ naturopathic methods if he so desires" and "it cannot be maintained that the requirement that one prefers naturopathy as a healing method must be licensed as a physician and surgeon, osteopath or chiropractor, is unreasonable, arbitrary or unconstitutional"; also, "that the practice of naturopathy in the State of California without being properly licensed in one of the healing arts is in violation of Business & Professions Code, § 2141 and is thereby prohibited."

Plaintiffs contend the court was in error in these conclusions; that they cannot obtain any license under which they can practice naturopathy without qualifying and passing an examination for a physicians and surgeons certificate, and that as a matter of regulation it would be unreasonable to require a drugless practitioner to equip himself with the required education and training in medicine and surgery in order to practice naturopathy. Defendants agree with the conclusion of the trial court that the methods of naturopathy may be employed by licensed chiropractors and they say that to require naturopaths to obtain physicians and surgeons or chiropractors licenses in order to practice their system is merely regulation, and not unreasonable.

A distinction must be drawn between the practice of naturopathy and the use of drugless methods of healing. Naturopathy is a system which is deemed by those who practice it to be self sufficient, that is to say, that although naturopaths do not treat all diseases or injuries, they use only their own methods of treatment, as far as it goes. Whenever the word "naturopathy" is used in the findings or conclusions or in the briefs, with relation to practices permitted by licensees other than naturopaths, we construe it to mean merely the employment of drugless methods commonly used by naturopaths. Section 2137, Business & Professions Code, does not authorize physicians and surgeons to practice "naturopathy" or any other system of drugless healing, but only to use "any and all other methods in the treatment of diseases," etc. The court did not hold that a chiropractor may practice naturopathy, as such, but that he may employ naturopathic methods if he so desires.

The court defined naturopathy as set out below.[1]

[1–3] The practice of naturopathy, as such, may not be licensed under existing laws, nor may the system be practiced without a license.

Section 2141, Business & Professions Code, reads as follows: "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor." And § 2395: "The use by the holder of any certificate of any letter, letters, word, words, or term or terms either as prefix, affix or suffix indicating that he is entitled to practice a system or mode of treating the sick or afflicted for which he is not licensed in this State constitutes unprofessional conduct within the meaning of this chapter."

One holding a license as a "Drugless Practitioner" may not use the title "Dr." or "N.D." Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304. A physician and surgeon or a chiropractor, unless licensed as a naturopath, may not use the title "Naturopath" or "N.D." There was no evidence that physicians and surgeons use these titles, but it was in evidence that the Board of Chiropractic Examiners conducts a system of inspection and does not permit chiropractors to use either of these titles, although if they have diplomas as naturopaths they may display them.

The use of natural methods of healing is not forbidden by law. Physicians and surgeons, osteopaths, chiropractors and all those who hold licenses as drugless practitioners may use them. It is of common knowledge that nature is the indispensable healing agency and that practitioners of medicine and surgery, osteopathy and chiropractic make use of the curative qualities of light, air, water, rest, diet, and physical and mental culture, in connection with the agencies peculiar to their several systems of healing.

[4] The several medical practice acts have never had application to the treatment by prayer or the practice of religion, but with this exception they have forbidden the practice of any of the healing arts by those who were unlicensed. Plaintiffs, being un-

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[1] "That Naturopathy is a mode of healing that attempts to restore and maintain health by the use of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, and does not advocate the use of drugs and medicines but does advocate the use of 'dietary supplements', which said dietary supplements includes all substances found in nature, including those substances found in herbs, the earth and animal tissues, whether raw or refined, and it does not include the use of surgery or the penetration of the tissues; it is practiced in the State of California by persons who were licensed as naturopaths by the Board of Medical Examiners in 1909 and have thereafter been continuously licensed as such thereafter; in addition, it is practiced in the State of California by over 1,000 persons, almost all of whom are licensed chiropractors and who practice chiropractic but who have displayed somewhere within their offices a certificate or degree of Doctor of Naturopathy."

licensed, may not, under the present law, practice at all. Even if they should become licensed as physicians and surgeons or chiropractors, they could not practice naturopathy in its true sense, inasmuch as they could not use the title "Naturopath" or "N.D." nor hold themselves out as such. But they must become licensed either as physicians and surgeons (which now includes osteopaths) or as chiropractors in order to employ their methods.

We do not discover in this situation a sound basis for the claim of unreasonable discrimination with respect to these plaintiffs. The court found that plaintiff Oosterveen holds degrees of doctor of chiropractic and doctor of naturopathy from schools not accredited by the Board of Chiropractic Examiners. In this respect he is in the same unfortunate position as the holder of a degree in any other school of healing from an institution not approved in California.

Plaintiff Olson produced a certificate as set out below[2] from a college that is approved by the Board of Chiropractic Examiners. The educational requirements of that board are as set out below.[3]

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[2] "To Whom It May Concern: "April 24, 1951

"This is to certify that Frederick H. Olson completed a four year course at the National College of Drugless Physicians. Dr. Olson began his course of study on September 22, 1947 and the "Doctor of Naturopathy" degree was conferred on September 8, 1950. Subjects and hours as follows:

SUBJECTS:	HOURS:
Anatomy, including Dissection	648
Histology and Embryology	120
Chemistry, including Toxicology	252
Bio-Chemistry	36
Physiology	336
Pathology	336
Bacteriology	96
Hygiene and Sanitation	72
Manipulative Technic	408
Abnormal Psychology	72
Obstetrics and Gynecology	120
Diagnosis: Symptomatology, X-Ray, Physical, Clinical and Laboratory Technic	718
Eye, Ear, Nose and Throat	48
Dermatology	48
Orthopedics	48
Pediatrics	48
First-Aid and Minor Surgery	48
Physio-Therapy	96
Massage, Hydro-Therapy and Colon Therapy	72
Phyto-Therapy	48
Advanced Therapeutics	72
Dietetics	72
State Board Review	120
Principles and Practice of Naturopathy, including Clinic	830
Total sixty minute hours	4764

[signed] Registrar M. De Voto
NATIONAL COLLEGE OF DRUGLESS PHYSICIANS"

[3]

"Anatomy, including embryology and histology	800 hours
Physiology	320 hours
Biochemistry, inorganic and organic chemistry	320 hours
Pathology and bacteriology	480 hours
Public health, hygiene and sanitation	160 hours
Diagnosis, pediatrics, dermatology, syphilology, serology, X-ray and psychiatry	720 hours
Obstetrics and gynecology	160 hours
Principles and practice of chiropractic, physiotherapy, dietetics and office procedure	1040 hours
TOTAL	4000 hours"

The evidence as to courses of study in the basic sciences and drugless healing in naturopathic colleges, is that contained in the certificate of plaintiff Olson, and in the testimony of several naturopaths, all of whom had had at least 4500 hours of study in various colleges. It will be seen from a comparison of the curriculum of a college of naturopathy with the requirement for study in the basic sciences prescribed by the Chiropractic Act, that there is slight difference between the two. Defendants say that the two courses of study are substantially the same, and this, we suppose, upon the assumption that the courses of study of the better naturopathic schools are comparable to those of the National College of Drugless Physicians in Chicago, Illinois, which plaintiff Olson attended, and those mentioned by the other witness.

It is somewhat difficult to understand why one who has received the same education in the basic sciences in a naturopathic college as a student of chiropractic would receive in a chiropractic college, should be required to pursue further study in chiropractic in order to obtain a license under which he would be privileged to employ drugless healing methods without resorting to manipulation of the joints. But this was a matter for the legislature, and we think it was within the legislative power to require naturopaths to acquire the education and pass the examination demanded of applicants for chiropractors licenses, and that there is no undue discrimination against them.

[5] The courts cannot properly undertake the legislative and administrative functions that are involved in the regulation of the practice of medicine, surgery and drugless healing. They cannot absolve naturopaths from the duty of complying with licensing statutes which establish not only standard qualifications for applicants to practice, but also the procedure for testing their qualifications. In Gamble v. Bd. of Osteopathic Examiners, 21 Cal.2d 215, 130 P.2d 382, the court considered a legislative requirement that an osteopath during each year must complete a minimum of 30 hours of professional educational work approved by the board, and upheld the regulation, although osteopaths had the same educational qualifications as other practitioners and yet were the only ones of whom the additional study was demanded. The court said 21 Cal.2d at page 219, 130 P.2d at page 384: "It is generally recognized, however, that the power to regulate the treatment of disease is an elastic one and that regulations may vary according to the schools or methods of practice so long as they entail no unreasonable discrimination. In re Rust, 181 Cal. 73, 183 P. 548; People v. Jordan, 172 Cal. 391, 156 P. 451; People v. Ratledge, 172 Cal. 401, 156 P. 455; Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249; People v. Mills, 74 Cal.App. 353, 240 P. 296; People v. Chong, 28 Cal.App. 121, 151 P. 553; Bohannon v. Board of Medical Examiners, 24 Cal.App. 215, 140 P. 1089; Crane v. Johnson, 242 U.S. 339, 37 S.Ct. 176, 61 L.Ed. 348; see cases cited in People v. Love, 298 Ill. 304, 131 N.E. 809, 16 A.L.R. 709. In the light of the foregoing cases the requirement in question in the present case cannot be regarded as unreasonable. In re Rust, supra, held that the Optometry Act of 1913, Stats.1913, page 1097, forbidding osteopaths but not physicians and surgeons, from practicing optometry without a license from the state board of optometry, did not violate article I, section 21 of the state Constitution."

In McNaughton v. Johnson, 242 U.S. 344, 345, 37 S.Ct. 178, 61 L.Ed 352, 353, the court considered the question of the claimed invalidity of an act of the California Legislature, Stats.1913, Ch. 598, p. 1097, which prohibited the practice of optometry by any unlicensed person. The plaintiff, McNaughton, was a regularly graduated ophthalmologist practicing her profession in Los Angeles; she did not use drugs or surgery, but it was indispensable in her practice that she measure the powers and range of human vision by procedures which were within the definition of optometry in the Act. She questioned the constitutionality of the Act in that it would have required her to become licensed as an optometrist, claiming that she was thus denied the right to practice a profession that was in itself lawful and in no sense harmful to the community. The statute was upheld under the general power of the legislature to regulate the practice of medicine. There is much authority to the same effect. It would serve no useful purpose to discuss the authorities relied upon by plaintiffs. Only one of them, Smith v. State Board of Medicine, in the District Court of the Third Judicial District of Idaho, in upholding the claims of a naturopath reached a conclusion contrary to our own. The holding is not in harmony with the California decisions.

During all the time when licenses were issued to drugless practitioners, standards of education in the basic sciences were in effect, and yet the several laws under which such licenses were issued did not define the scope of practices permitted under various systems of drugless healing. Although naturopaths licenses have never been issued except to those who qualified under the statutes of 1909 above mentioned, the regulatory acts have not prohibited the use by all licensed practitioners of the natural methods of healing commonly employed by naturopaths, in connection with and supplementary to other licensed methods of treatment. When we speak of the right to use the methods commonly employed by naturopaths we do not adopt the trial court's definition of naturopathy in all respects. Some of the practices mentioned might in some circumstances be regarded as the use of drugs or medicine, which, of course, is prohibited to chiropractors.

[6] Section 2146, Business & Professions Code, reads in part: "Nothing in this chapter [5] shall be construed so as to discriminate against any particular school of medicine or surgery, or any other treatment" etc. Plaintiffs contend that § 2141, supra, is in conflict with the above and does constitute discrimination against naturopaths and other drugless practitioners. The provision against discrimination has been the law, substantially in its present form, since 1907. It applies primarily to administration of the act and does not modify other specific sections, such as § 2141, which do not call for interpretation. Moreover, no illegal discrimination against naturopaths has been shown.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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112 Cal.App.2d 381

BEVERLY FINANCE CO. v. SUPERIOR COURT IN AND FOR COUNTY OF LOS ANGELES et al.

Civ. 19000.

District Court of Appeal, Second District, Division 3, California.

July 23, 1952.

Original proceeding by Beverly Finance Company against the Superior Court of the State of California in and for the County of Los Angeles, Philbrick McCoy, J., and the People of the State of California, for writ of mandate directing the Superior Court to correct a finding made by it in an action for forfeiture of an automobile in which petitioner claimed interest. The District Court of Appeal, Wood, J., held that in view of fact that petitioner failed to establish that there was a clerical error in the allegedly erroneous findings, Superior Court could not be directed to correct them.

Peremptory writ denied; alternative writ discharged.

1. Forfeiture ⚿10

In forfeiture proceeding against automobile used to transport narcotics, whether claimant of interest in automobile by way of lien or mortgage or conditional sale contract made investigation as to moral responsibility of automobile owner before, or after said interest was acquired, was a material fact to be determined. Health and Safety Code, §§ 11610–11613, 11620.

2. Trial ⚿387(1)

It is the findings of the court, and not statements made by the trial judge during course of trial, which constitute the decision of the court, and such findings are controlling.

3. Trial ⚿400(1)

A court has power to remedy a clerical error in its findings but it has no power, having once made its decision after regular submission, to set aside or amend judicial error except under appropriate statutory procedure.

4. Mandamus ⚿168(4)

In proceeding for mandate to require superior court to amend findings which related to whether petitioner, who claimed interest in forfeited automobile by way of conditional sales contract, had made proper and timely investigation of owner's moral responsibility, record failed to establish that findings as signed did not express actual judicial intention of trial judge. Health and Safety Code, §§ 11610–11613, 11620.

5. Mandamus 168(2)

Where petitioner, who claimed interest in forfeited automobile by way of conditional sales contract, failed to establish that allegedly erroneous Superior Court finding which related to whether petitioner had made timely and proper investigation of owner's moral responsibility, contained a clerical error, District of Court of Appeal could not issue writ of mandate requiring Superior Court to correct said findings. Health and Safety Code, §§ 11610–11613, 11620.

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McCarroll & McCarroll, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent and real party in interest.

PARKER WOOD, Justice.

Petition for writ of mandate directing the superior court to correct a finding made by it in an action for the forfeiture of an automobile.

It was alleged in the petition that: On May 11, 1950, an action was commenced by the People of the State of California against one 1949 Ford V-8 Coupe, pursuant to sections 11610, 11611, 11612 and 11613 of the Health and Safety Code (relating to seizure and forfeiture of a vehicle in which a narcotic is unlawfully transported). Thereafter notice (of intended proceedings) was given to the petitioner herein as lien holder under a conditional sales contract Petitioner filed an answer (in response to said notice). On October 24, 1950, a trial was had. Judgment was for plaintiff (People), and the court directed the attorney for plaintiff to prepare findings and judgment. Thereafter petitioner filed objections to proposed finding V. Said finding was as follows:

> "That at the time of the seizure of said vehicle, Beverly Finance Company, a corporation, claimant herein, had a right, title and interest in and to said vehicle in the sum of Fourteen Hundred and 12/100 ($1400.12) Dollars; that the right, title and interest of said claimant in and to said vehicle was bona fide and was made without any knowledge that said vehicle was being, or was to be, used in violation of the provisions of law relating to narcotics; that *before its right, title and interest in and to said vehicle was acquired by said claimant, said claimant did not make a reasonable investigation of the moral responsibility, character and reputation either of said Mona H. Shaffer or of said James William Shaffer.*" (Emphasis added.)

It was also alleged in the petition that: Petitioner "proposed" that said finding should show that "all of the investigation which was made by petitioner," was made before petitioner acquired its interest in said vehicle.

It was also alleged therein that: "Petitioner made the objection to finding V for the reason that during the trial there was one conflict in evidence pertinent to the issues raised herein. Agnes Conforti, witness for petitioner, testified that she made the investigation for petitioner prior to the time petitioner purchased its interest in and to said 1949 Ford and testified that all of the investigation made by her was made prior to the purchase of said interest, including a telephone call to Leroy Nelson, all of which was shown by her notes, dated and initialed at the time she made said telephone call on October 10, 1949. Leroy Nelson, called as a witness by plaintiff in the aforesaid action, testified that he was contacted one time by a woman from Beverly Finance Company but that it was some time in the latter part of April or May, 1950. * * * The trial judge stated at the conclusion of the trial that he resolved this conflict in favor of the records of Beverly Finance Company and felt that the call was made prior to the time petitioner purchased its interest. Again, on the hearing on the objections to the finding, the trial judge stated * * * that he still felt that all of the investigation that was made by Beverly Finance Company, including the telephone call to Leroy Nelson, was made on October 10, 1949, prior to the time said company purchased the contract from the dealer, but that said investigation * * * was not sufficient under the statute. Thereupon the trial judge agreed with attorney for petitioner * * * that the finding should be changed to reflect this fact, and in attempting to reflect this fact made an interlineation in Finding V so that Finding V as ultimately signed, reads as follows:

> "'That at the time of the seizure of said vehicle, Beverly Finance Company, a corporation, claimant herein, had a right, title and interest in and to said vehicle in the sum of Fourteen Hundred and 12/100 ($1400.12) Dollars; that the right, title and interest of said claimant in and to said vehicle was bona fide and was made without any knowledge that said vehicle was being, or was to be, used in violation of the provisions of law relating to narcotics; that before its right, title and interest in and to said vehicle was acquired by said claimant, said claimant did ~~not~~ make ~~a reasonable~~ *an* investigation of the moral responsibility, character and reputation either of said Mona H. Shaffer or of said James William Shaffer, *but that said investigation was not reasonable.*'" (The judge amended the proposed finding by striking out the words "not" and "a reasonable" and by adding the words which are in italics.)

It was also alleged that: Judgment was entered on January 3, 1951. Thereafter petitioner filed a notice of appeal from said judgment. The appeal is now pending. In its brief on appeal, respondent (the People) contended that finding V, as amended, "held" that a part of the investigation which was made by petitioner, was made prior to its purchase of its interest in said automobile, but that the trial court found that the telephone call to Leroy Nelson was made by petitioner after the purchase of its interest in the automobile. Upon rereading finding V, petitioner believed that it was ambiguous and did not correctly reflect the actual finding of the trial judge. On February 17, 1952, petitioner filed an application for permission to augment the record on appeal and, in support of said application, filed an affidavit of Judge Philbrick McCoy (the trial judge), a copy of which affidavit is attached to the petition. The application was denied. Petitioner then filed a notice of motion in the superior court to correct the finding, which motion was denied. Petitioner alleges, upon information and belief, that the judge refused to correct the finding on the ground that it would be the performance of a judicial act and not the correction of a clerical error.

In the prayer petitioner asks that this court direct the trial court to "correct Finding V" to show: (1) that petitioner made all the investigation it claims to have made, including the telephone call by Agnes Conforti to Leroy Nelson, prior to the time it acquired its interest in said vehicle, but that said investigation was not a reasonable investigation of the moral responsibility, character and reputation of James William Shaffer; (2) that petitioner made no investigation of Mona H. Shaffer; and (3) that petitioner was not informed at the time it purchased its interest in said automobile that the automobile was to be registered in the name of Mona H. Shaffer.

In the affidavit of the trial judge which was attached to the petition it was recited, among other things, that at the time of the hearing on the objections to finding V, he (the judge) stated that he still felt that "all the investigation that was made by Beverly Finance Company, including the telephone call to LeRoy Nelson, was made on October 10, 1949, prior to the time said Company purchased the contract from the dealer, but that said investigation in affiant's opinion was not sufficient under the statute"; and that he (judge) "agreed with attorney for Beverly Finance Company that the Finding should be changed and [he] made the interlineation as it appears in the Findings."

An answer and a demurrer to said petition for writ of mandate were filed by respondents (the superior court, and the People—as the real party in interest). The answer denied that: petitioner had proposed that finding V should show that all of the investigation which was made by petitioner was made before it acquired its interest in said vehicle; petitioner made the objection to finding V for the reason there was a conflict in the evidence; the testimony of Agnes Conforti and Leroy Nelson was as set forth in the petition; the trial judge made the statements which the petitioner alleges he made, relating to an investigation prior to the time petitioner purchased the contract and relating to his (judge's) reason for changing finding V. The answer also denied that the trial court denied petitioner's motion to correct the finding upon the sole ground that it constituted a judicial act and not the correction of a clerical error. The other allegations of the petition above set forth were admitted.

As an additional defense, it was alleged in the answer that the trail court concluded that any information gained by petitioner before its interest in the vehicle was created related only to the credit rating of James Shaffer; that, in granting judgment for plaintiff, the court resolved the conflict in the evidence against petitioner and was of the opinion that, regardless of whether Leroy Nelson was or was not contacted before the creation of petitioner's interest in the vehicle, he was not asked and gave no information concerning the moral character of James Shaffer until after the vehicle was seized by the authorities.

In an affidavit of the trial judge, which was filed herein on behalf of respondents, it was recited in part that: Nelson testified that he had not been contacted on or before October 10, 1949, and that he had been contacted and given information to petitioner following seizure of the vehicle which seizure was on April 20, 1950; the witness for petitioner (Agnes Conforti), in testifying that she did call Nelson on October 10, 1949, testified "from notes, purportedly made at the time of the said call relating to credit information"; information concerning the moral responsibility, character and reputation of said James Shaffer was given by the witness without reference to these notes with the explanation that she had not written this information down at the time; in resolving the conflict, he (judge) concluded that this evidence corroborated the testimony of Nelson that he gave no information concerning the moral attributes of James Shaffer until after the seizure of the vehicle; from this he (judge) concluded that any investigation made before the creation of said interest related only to the credit standing of one of the two purchasers, that no investigation was made of the other purchaser and registered owner, that any information obtained by petitioner relating to the moral responsibility, character or reputation of James Shaffer was obtained after seizure of the vehicle. It was recited further therein that the motion to correct the findings for clerical error was denied for the reason (among others) that no such amendment was required because there was no clerical error in the findings signed by him.

[1] A material fact to be determined in the forfeiture action was whether the investigation as to moral responsibility was made before or after the petitioner (finance company) acquired its interest in the automobile.

Section 11620 of the Health and Safety Code provides:

> "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

[2-4] Petitioner (finance company) contends that the trial judge made a clerical error in finding V. It argues that, in making the interlineation, the judge intended to correct the proposed finding so that it would show, among other things, that all of the investigation which was made by

petitioner was made prior to the time it acquired its interest in the vehicle. As above shown, the petition alleged that the trial judge stated, at the conclusion of the trial and again at the hearing upon the objections to finding V, that he felt that all of the investigation which was made by petitioner, including the telephone call made by Agnes Conforti to Leroy Nelson, was made on October 10, 1949, prior to the time petitioner purchased the contract from the dealer. Statements made by a trial judge during the course of a trial do not constitute the decision of the court. "The findings constitute the decision of the court and are controlling." Forte v. Schiebe, 93 Cal.App.2d 22, 23, 207 P.2d 881, 882. As above shown, the proposed finding V was amended by the judge and then signed by him. A court has no power, having once made its decision after regular submission, to set aside or amend judicial error except under appropriate statutory procedure. See McMahan v. Baringer, 49 Cal.App.2d 431, 432, 122 P.2d 63. A court has power to remedy a clerical error in its findings. Boylan v. Marine, 104 Cal.App.2d 321, 322, 231 P.2d 92. A question herein is whether the finding, with respect to when the investigation was made, was signed as a result of clerical error. Recitals in the affidavits of the trial judge, with respect to the investigation, are conflicting. In the affidavit of the judge (attached to the petition herein), the judge stated that at the hearing upon the objections to finding V, he said that he still felt that "all the investigation that was made" by petitioner was prior to the time it purchased the contract. In the affidavit of the judge (filed herein by counsel for the People), the judge stated that he concluded that any investigation made by petitioner "before the creation of the said interest related only to the credit standing of one of the two purchasers," and that any information obtained by petitioner relating to the moral responsibility, character or reputation of James William Shaffer was obtained after seizure of the vehicle. Upon the record here it cannot be determined that the findings as signed did not express the actual judicial intention of the trial judge with respect to when the investigation regarding moral responsibility was made.

[5] It does appear that a part of finding V is ambiguous. As above shown, the finding as signed (after the amendments and interlineation) stated in part that the claimant "did make an investigation of * * * *either* of said Mona H. Shaffer or of said James William Shaffer, but that said investigation was not reasonable." (Italics added.) An affidavit of the judge was, as above shown, to the effect that there was no clerical error in the finding signed by him. Under the circumstances here, this court cannot direct the trial court with respect to the findings.

In view of the foregoing conclusions, it is unnecessary to discuss other contentions of petitioner.

The demurrer to the petition was on the ground that the petition did not state facts sufficient to constitute a cause of action. The petition alleged in effect that the trial judge made a clerical error in making finding V. The demurrer is overruled.

The peremptory writ is denied. The alternative writ is discharged.

SHINN, P. J., and VALLÉE, J., concur.

In re Guardianship of SMITH et al.

HOWES v. COHEN. *

Civ. 18903.

District Court of Appeal, Second District, Division 2, California.

July 18, 1952.

Rehearing Denied Aug. 1, 1952.

As Modified Aug. 8, 1952.

Hearing Granted Sept. 11, 1952.

Proceeding in the matter of the estate and guardianship of minor children. From an order of the Superior Court of Los Angeles County, Arnold Praeger, J., appointing petitioner guardian of the persons of the minors, their father appealed. The District Court of Appeal, Moore, P. J., held that appointment of older sister as guardian of deceased mother's illegitimate minor children over objections of their natural father was not abuse of discretion.

Order affirmed.

1. Guardian and Ward ⟹10

While Probate Code section providing for the order of preference to be followed in appointment of a guardian of a minor designates the parent as of the first class, appointment of parent as guardian of his minor child is not mandatory. Probate Code, § 1407.

2. Guardian and Ward ⟹10

In order to be entitled to appointment as general guardian of his minor children, father must attain such character and cultivate such traits and qualities as will make his appointment appear most conducive to the best interest of children in respect to their temporal, mental and moral welfare. Probate Code, §§ 1406, 1407.

3. Guardian and Ward ⟹10

In appointing a general guardian of a minor child, the court acts for and on behalf of the child and must regard as of paramount consideration the interest and welfare of child, to which all other claims must yield. Probate Code, §§ 1406 to 1409.

4. Appeal and Error ⟹1010(1)

A judgment based on trial court's finding supported by substantial evidence will not be disturbed on appeal.

5. Guardian and Ward ⟹10

Appointment of older daughter as guardian of the persons of deceased mother's illegitimate minor children on ground that it would be for the best interest of the children and for their temporal, mental and moral welfare that they remain in the custody of sister, was not abuse of discretion, though natural father was also qualified to have the guardianship of his children. Probate Code, §§ 1406 to 1409.

◆

Hahn, Ross & Saunders, Los Angeles, for appellant.

Juaneita M. Veron, Huntington Park, for respondent.

MOORE, Presiding Justice.

Frieda Howes filed her petition to be appointed guardian of Leland and Sharon Smith alleging that she was the daughter of Margaret Smith, deceased mother of the two minors and that their only relatives residing in California are herself, her brother, Paul Smith, and Harry Cohen. Thereafter Mr. Cohen filed his objections to Frieda's appointment and at the same time countered with a petition for his own appointment. He alleged that the mother of the children is deceased; that they are now under the care of Frieda Howes; that the minors are the illegitimate children of himself and Margaret.

The court found that both Frieda Howes and Harry Cohen are qualified to be the guardian of the minors but held that it is for the best interest and welfare of the children that Frieda be appointed guardian of their persons. It was thereupon ordered that letters of guardianship of the persons of Leland and Sharon be issued to petitioner, Frieda Howes.

Harry Cohen now demands a reversal of the order on the grounds that (1) as the natural father of his minor children after the death of their mother, he has a superior right to the care, custody and control of such minors as against all other persons, the court having determined that he is a fit and proper person for such custody; (2) the superior right of such a father to the custody and control of his minor children applies regardless of whether the children are legitimate or illegitimate.

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* Subsequent opinion 255 P.2d 761.

[1, 2] Section 1406 of the Probate Code provides that in "appointing a general guardian of a minor, the court is to be guided by what appears of be for the *best interest of the child in respect to its temporal and mental and moral welfare;* and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. * * *" While section 1407 of the same code provides for the order of preference to be followed in the appointment of a guardian, and designates the parent as of the first class, there is no language of that section or of any other section which makes it imperative for the court to appoint a parent. The only hope for a father to get himself appointed as general guardian of his minor children is to attain such character and to cultivate such traits and qualities as will make his appointment appear most conducive to the best interest of his children in respect of their temporal and mental and moral welfare.

[3] It is a basic principle in guardianship matters that the court acts for and on behalf of the child and must regard as of paramount consideration its interest and welfare, to which all other claims must yield. In re Guardianship of Reynolds, 60 Cal.App.2d 669, 675, 141 P.2d 498; In re Britt, 176 Cal. 177, 182, 167 P. 863; In re Martin, 79 Cal.App.2d 584, 586, 180 P.2d 383; In re Guardianship of Bynum's Estate, 72 Cal.App.2d 120, 121, 164 P.2d 25. This principle is not new to the jurisprudence of California. It was originally expressed in section 246 of the Civil Code which was in 1931 included in section 1406 to 1409 of the Probate Code. When it was in force, section 246 was the rule for guidance of probate courts in appointing guardians. See Guardianship of Allen, 162 Cal. 625, 629, 124 P. 237; In re McDaniel, 90 Cal.App. 307, 309, 265 P. 884; In re Estate of Dellow, 1 Cal. App. 529, 531, 82 P. 558. Neither is the doctrine strange to the decisions of other states. It was held in New York that a surviving parent has a right to the guardianship of the children, particularly when they are of tender age, yet under all the circumstances the chief consideration must always be what will best promote the welfare of the children. In re Bock, 280 N.Y. 349, 21 N.E.2d 186. There an uncle was appointed rather than the mother. In Massachusetts a father was denied custody of a nine-year-old son who had lived all his life with his grandmother. The court pointed out that there is no requirement that the parents must be found unequivocally to be unfit before the custody of the child can be awarded to a suitable third person. Perry v. Perry, 278 Mass. 601, 180 N.E. 512.

In the matter at bar, the Smith children have been reared in the Catholic faith and are accustomed to the teachings, literature and practices of that church. Appellant is a Jew. His wife is a Protestant. While they must both be deemed responsible, intelligent citizens and capable of managing the two children, the vast difference between the social and home life the children have known and now enjoy would be oppressive should they be suddenly taken into the Cohen home. While such a difference is readily adjusted by persons of mature years, it would be a barrier to happiness for little children reared in the Catholic fold. For a lifetime the mother of Leland and Sharon recited the rosary, honored the saints and assisted at holy Mass. They and their elder sister who offered to be their guardian are presumably steeped in that faith. Could Mr. Cohen with calm spirit or Mrs. Cohen with Christian charity accompany the children to the parochial school, sit with them through the celebration of Mass at the cathedral? Frieda Howes, having the same church loyalty as her mother, would suffer no discomfort in keeping about the children the songs, the stories, books and music they have known since birth.

As adolescents they live in the world of emotion. As Catholics they cannot suddenly be adjusted to the ideals, language and daily practices of a Protestant mother and a

Jewish father. See In re Estate of Dallow, supra, 1 Cal.App. at page 532, 82 P. 558. The homing instinct is predominant with those of tender age. They desire the light and shadows of their mother's home, the sympathetic words she spoke, the songs she sang. These things would be absent from the house of Mr. Cohen however kind or wise he might be. To Leland and Sharon the change would be painful. These considerations must have moved upon the mind of the court in selecting the guardian.

Moreover, in determining what is best for their moral welfare, the court must have considered the moral standards of appellant. In violation of the morals that prevail throughout the nation, he brought these children into the world. If they become good citizens, it will not be due to their emulating his moral practices. The trial court, may, therefore, justifiably have considered that the moral concepts he has entertained will not serve to promote the moral welfare of his children. They have not yet conceived the significance of the practice of a father in moving along from one woman to another—from a fireside on K street with Jane Doe to an apartment by the seashore with Alice Roe. The welfare of the children and that of society imperatively demand that no mistake be made in selecting their guardian now.

If entrusted to their sister, Frieda Howes, they will experience no cataclysmic disappointment, no rude awakening from the world they share together under her surveillance. They know and love her. The abode where she lives is the only home they have ever known. It is far better for a child of innocent years to dwell among the people and with the attachments formed in childhood than to be torn away from familiar scenes, friendly faces and kindly voices to be cast into a strange environment. Ex parte De Leon, 59 Cal.App.2d 510, 515, 139 P.2d 109; In re Green, 67 Cal.App. 504, 506, 226 P. 76; Application of Bell, 28 Cal.App. 547, 550, 153 P. 240.

In addition to that which apparently impressed the court as being the preferable environment for the children, the trial judge conferred with them separate and apart from all other persons. That conference evidently persuaded the court that they entertained an intelligent preference for their sister's home as against that of their natural father. The court must have been impressed by their wish to be permitted to abide in the home of their departed mother.

[4, 5] If there is substantial evidence to support the finding of a court, the judgment based thereon will not be disturbed. The same principle is applicable to a guardianship matter. The sole question is whether the court abused its discretion in finding that Frieda should be the guardian. There is nothing in the record to indicate that it did so in determining it to be for the best interest of the children and for their temporal, mental and moral welfare, that they remain in the custody of their sister. In re Guardianship of Walsh, 100 Cal.App.2d 194, 196, 223 P.2d 322, 22 A.L.R.2d 689; In re Estate of Hubbard, 97 Cal.App.2d 321, 325, 217 P.2d 744; Matter of Allen, 162 Cal. 625, 629, 124 P. 237; In re Guardianship of Reynolds, 60 Cal.App.2d 669, 680, 141 P.2d 498; Riesenburg v. Riesenburg, 97 Cal.App.2d 714, 218 P.2d 577. In view of the foregoing authorities and in the absence of a claim by appellant that the court abused its discretion, it would be error to disturb the judgment.

In support of his claim that the natural father, after the decease of the mother, has a superior right to the custody and control of minor children where it is found that he is a fit and proper person to serve as their guardian, appellant has cited a number of California decisions. In re Guardianship of Campbell, 130 Cal. 380, 62 P. 613; In re Guardianship of Salter, 142 Cal. 412, 76 P. 51; Matter of Galleher, 2 Cal.App. 364, 84 P. 352; Matter of Forrester, 162 Cal. 493, 123 P. 283; In re Estate of Tetsubumi Yano's Estate, 188 Cal. 645, 206 P. 995; In re Arkle, 93 Cal.App. 404, 269 P. 689; In re Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103; In re Guardianship of DeRuff, 38 Cal.App.2d 529, 101 P.2d 521; In re Guardianship of Case, 57 Cal.App.2d 844, 135 P.2d

681; Hartman v. Moller, 99 Cal.App. 57, 277 P. 875. Such cases are not persuasive. Those decided prior to 1931 as for example, Estate of Tetsubumi Yano and Guardianship of Campbell, all relied upon section 1751, Code of Civil Procedure, which specifically prescribed that a parent if "competent to discharge the duties of guardianship, is entitled to be appointed a guardian * * *." Such statute was repealed in 1931 and its successor statutes (Probate Code, secs. 1406 et seq.) contain no mandatory language giving a parent this absolute right. Accordingly, the earlier opinions are without authoritative force.

Although statements supporting appellant appear in the later McCoy and DeRuff decisions, an examination of the text of those cases reveals that they are in harmony with the rule that it is the child's welfare that is of paramount importance. In the latter case, a guardianship award to the maternal grandmother was reversed because of the trial court's failure to find the fitness of the mother or to make a finding of any facts proving why she should not have custody. Likewise in Re Guardianship of Case, 57 Cal. App.2d 844, 135 P.2d 681, although this court stated the rule in the language of the former section 1751 of the Code of Civil Procedure, a review of the record indicates that the determinative point was that the minor's welfare was to be best served by awarding the child to its father.

Although decisions hold that before a mother can be deprived of the custody of her infant she must have been found to be an improper guardian, Roche v. Roche, 25 Cal.2d 141, 143, 152 P.2d 999; Stever v. Stever, 6 Cal.2d 166, 169, 56 P.2d 1229; Newby v. Newby, 55 Cal.App. 114, 116, 202 P. 891, the law presumes the interest of a child will best be subserved by awarding its custody to a parent, unless the latter is unfit, In re White, 54 Cal.App.2d 637, 640, 129 P.2d 706 and that it is a natural right of a parent to have the care and custody of his minor child, In re Guardianship of Sloot, 92 Cal.App.2d 296, 298, 206 P.2d 862, yet in no decision does it appear that an illegitimate father was permitted to take his progeny from their home under such circumstances as those disclosed in the instant proceeding.

We conclude as did the court in Re Guardianship of Casad, 106 Cal.App.2d 134, 147, 234 P.2d 647, 654, that "the court is now under statutory mandate to be guided by 'what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare' *in every case, without exception.*" (Italics added.)

Order affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

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112 Cal.App.2d 61

CENTRAL CONTRA COSTA SANITARY DIST. v. NATIONAL SURETY CORPORATION et al.

Civ. 18913.

District Court of Appeal, Second District, Division 1, California.

June 27, 1952.

Hearing Denied Aug. 21, 1952.

Action by the Central Contra Costa Sanitary District against the National Surety Corporation, and others for damages for failure of defendant as successful bidder for sanitary disposal system, to execute and perform a written contract. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that where specifications called for execution of contract calling for personal service of obligor, death of obligor excused execution and performance of contemplated contract, and discharged not only the contractor, but also surety on bid bond.

Judgment affirmed.

1. Health ⚷16

Contract entered into by sanitary district and bidder for sanitary disposal system after acceptance of bid and notice of award, which provided for bid bond conditioned on execution of written contract with district within 10 days and furnishing of performance bond was contract to enter into a written contract, and not one for the construction of sewers.

2. Contracts ⚷311

Executors and Administrators ⚷202½

Where performance bond calls for personal service on part of obligor, the death of the obligor excuses nonperformance, and while ordinarily a building contract is not within class of those contracts which are deemed to have been entered into because of personal skill or taste of person who is to perform it, if the character, credit and substance of party contracted with was an inducement to the contract, building contract may, from character and kind of work to be performed, fall within category of those calling for personal services and as to which death will excuse nonperformance.

3. Health ⚷19

In action by sanitary district for damages for failure of successful bidder for construction of sanitary disposal system to execute written contract and perform same, wherein it appeared that successful bidder had died before execution of contemplated formal contract, record established that it was contemplated by the parties that the successful bidder alone was to perform the contract.

4. Contracts ⚷311

Executors and Administrators ⚷202½

Principal and Surety ⚷91

Where bid which was accepted by sanitary district contemplated that performance of contract for construction of sanitary disposal system was to be by bidder personally, and bidder died after acceptance of bid, but before execution of the contemplated formal contract, death of contractor excused execution and performance of same, not only as to contractor, but also as to surety on bid bond.

John A. Nejedly, Walnut Creek, for appellant.

Guy Richards Crump; Wood, Crump, Rogers, Arndt & Evans, Los Angeles, and Tinning & DaLap, Martinez, for respondents.

DRAPEAU, Justice.

This cause was tried upon an agreed statement, the controlling facts of which may be summarized as follows:

Plaintiff is a sanitary district duly organized under the Sanitary District Act of 1923, Gen.Laws, Act 7107. Its resolution No. 57, authorizing publication for bids for a sanitary disposal system, called for one publication of notice inviting bids. This notice was published on September 15, 1947. Three days later, on September 18, when the bids were opened, Tom L. Gogo was found to be the lowest responsible bidder, and on that day by its resolution No. 62, plaintiff accepted Gogo's bid and authorized its officers to execute a contract with him.

The specifications for the work provided that bids should be made on forms furnished by plaintiff and should be accompanied by check or bidder's bond in an amount aggregating 10% of the bid. It was also provided that such check or bond should be given as a guarantee that the bidder would enter into a contract within ten days after notice of acceptance of his bid by plaintiff, and that the check or bond be declared forfeited in the event the bidder refused or neglected to enter into the contract within the time specified.

Mr. Gogo's bid in the sum of $428,769.00 was presented to plaintiff on September 18, 1947, accompanied by a bid bond of the defendant surety company in the penal sum of $65,000.00, which was conditioned as follows:

> "Now, Therefore, The Condition of the Above Obligation Is Such, that if the said *principal shall execute a contract and give bond for the faithful performance thereof* after being notified in writing of the award of such contract to principal * * * then this obligation shall be void; otherwise it shall remain in full force and effect." (Emphasis added.)

On September 19, 1947, plaintiff mailed to Mr. Gogo the notice of award and copies of the contract for execution. Mr. Gogo received these papers on the morning of September 22, 1947. In the evening of that day he died, without having signed the contract and without having executed or furnished any labor, material or faithful performance bond. At no time did he refuse to execute the contract. In this connection it was stipulated that by the terms of the contract, Mr. Gogo had ten days in which to execute it. After glancing at the papers, he gave them to his bookkeeper and said: "I have got several days to sign this and I am not going to worry about it any more this afternoon; I will take it up in time"; and he went out to take his 3rd degree in Masonry, and while there, he died.

Zora Gogo, widow of decedent, was appointed special administratrix of his estate on September 25, 1947, and on October 20, 1947, general letters of administration issued to her.

No demand was ever made upon the administratrix or other representative of the estate to execute the contract or to perform the contemplated work.

On October 23, plaintiff by its resolution No. 73 issued another call for bids for the same work covered by the award to Gogo; and on that day by resolution No. 74, it declared Gogo's bid bond forfeited and authorized the institution of this action.

Pursuant to the new call for bids, plaintiff received, and on November 13, 1947, opened several bids, the lowest of which was that of Stolte, Inc., for the sum of $486,036.00.

The difference between Stolte's bid and that of Mr. Gogo was $57,267.00. The instant action seeks recovery of that sum.

Among other things, the trial court found that "The execution of the formal contract by Tom L. Gogo was prevented by an irresistible, superhuman cause, namely, the death of Tom L. Gogo before the formal contract was or could be executed."

The court then concluded as follows:

(a) Plaintiff was not entitled to take anything by the instant action;

(b) "The signing of a formal performance contract by Tom L. Gogo, following the award of the contract to him, was a purely personal performance act which could not be, and which it was not contemplated or intended by plaintiff or Tom L. Gogo should be, performed by any one other than said Tom L. Gogo personally."

(c) "The death of Tom L. Gogo before the expiration of the ten day period within which he could sign the performance contract operated to discharge both parties from the obligation of executing the same. It also operated to discharge the estate of Tom L. Gogo and his personal representative from any obligation by reason of his failure to sign the formal contract, and to discharge defendant National Surety Corporation on its bid or proposal bond."

(d) "The bid or proposal executed by Tom L. Gogo, and the award of the contract to him resulted merely in a contract by which he and plaintiff became bound to execute a formal contract for the performance of the work contemplated by the bid or proposal and the award; and until and unless such formal contract was executed there was no obligation on the part of Tom L. Gogo or his personal representative, to perform the work contemplated by the bid or proposal or the award of the contract to him."

From the judgment which followed in favor of defendants, plaintiff appeals.

On this appeal, appellant presents the following propositions:

"1. The contract which was entered into at the acceptance of the bid and subsequent notice of award to Gogo was a contract for the construction of sewers, and was not merely a contract to enter into a written contract.

"2. The contract was not in the nature of a personal service contract and therefore death did not discharge the parties of their obligations thereunder.

> "3. The forfeiture of the bond is within the principles as set forth by the Supreme Court and is therefore not within the common law ruling against forfeitures.
>
> "4. Assuming but not conceding that Gogo as principal was discharged, the surety nevertheless should be held on its obligation."

Appellant asserts that the question posed by its first point "is conclusively determined by United States v. Purcell Envelope Co., 249 U.S. 313, 39 S.Ct. 300, 63 L.Ed. 620", in which the court relied on Garfielde v. United States, 93 U.S. 242, 23 L.Ed. 779.

In the Purcell case, the envelope company was the successful bidder under an advertisement calling for bids to supply the postoffice department with stamped envelopes and newspaper wrappers for a four year term. A contract was drawn and *signed* by the envelope company, but due to a change in postmaster-generals, the company was notified that its contract was cancelled. In the action brought for damages for breach of contract, the court based its decision on the Garfielde case, and held that a contract was consummated by the acceptance of the bid. (Emphasis added.)

In the Garfielde case, pursuant to an invitation of the postmaster-general, Garfielde bid to convey the mails between Port Townsend and Sitka, Alaska, for a certain sum "in safe and suitable steamboats, with celerity, certainty and security." His bid was accepted, but before a formal contract could be prepared, the postmaster-general awarded the contract to another firm. There the court held that "the proposal on the part of Garfielde, and the acceptance of the proposal by the department created a contract of the same force and effect as if a formal contract had been written out and signed by the parties."

These two cases were analyzed in Palo & Dodini v. City of Oakland, 79 Cal.App.2d 739, 742, 180 P.2d 764, 766, where the court stated; in referring to the Garfielde case, 93 U.S. 242, 23 L.Ed. 779: "Practically, what the case holds is that when a bid is accepted, the acceptor is bound by that acceptance and such a contractual relationship immediately comes into being between the bidder and acceptor that the latter cannot withdraw without being liable under the terms of that contract." And with respect to the Purcell case, 249 U.S. 313, 39 S.Ct. 300, 63 L.Ed. 620, said: "It will be noted that again here the court is holding the government to its acceptance of the bid and is referring only to the obligation of the acceptor."

Continuing 79 Cal.App.2d on page 743, 180 P.2d at page 767, the court in the cited case says:

> "In none of the cases cited by plaintiffs was there a situation where the bidder had refused to sign up or to proceed with his contract, or to put up the required bond; nor where a forfeit of his guarantee had been declared. They were either situations in which the acceptor was trying to get out of his bargain, or the successful bidder was trying to enforce conditions not contemplated in the original bid.
>
> "In State v. Howell, 3 Boyce, Del., 387, 84 A. 871, the distinction between the situation in the cases cited by plaintiffs and the case at bar is shown. There the court refers to the rule above mentioned and holds that that rule does not apply where a deposit is required to be made to guarantee the entry into a contract by the successful bidder, for, says the court (84 A. at page 876): 'The provision in the ordinance requiring that the bidder shall furnish a certified check for two hundred dollars to guarantee the execution of the contract *could have no purpose or meaning if a written contract was not required.* It will be observed that such check is not demanded to guarantee the *performance* of the contract. A bond must be given for that purpose. The expressed purpose of the check is to secure the *execution* of the contract.' (First emphasis added.)"

The specifications for construction of main trunk sewer promulgated by appellant district provided, with reference to the cashier's check or bidder's bond to accompany the proposal, as follows:

> "Said check or bond shall be a guarantee that the bidder, if awarded the work, will enter into a contract within ten (10) days after receiving notice of said award. In case of refusal or failure to enter into said contract, the *check or bond,* as the case may be, *shall be forfeited* to the Central Contra Costa Sanitary District, the proceeds therefrom being hereby agreed upon *as liquidated damages* to the said District *on account of the delay in the execution of the contract and required bonds* and the performance of the work thereunder, and the necessity of accepting a higher or less desirable proposal resulting from such failure or refusal to execute the contract and bonds as required. Upon the execution of the contract and the approval on behalf of the Central Contra Costa Sanitary District of the accompanying bonds, all certified checks that accompanied proposals, will be returned each to its maker." (Emphasis added.)

These specifications also provided that "The bidder to whom award is made shall execute a written contract with the Sanitary District within ten (10) days after notice of the award has been sent by mail to him at the address given in his proposal."

When he signed the contract, the successful bidder was required to furnish (1) a bond equal to 50% of the amount of the contract for payment of just claims for materials, labor and subcontractors employed on the job; and (2) a bond in an amount equal to 100% of the contract as surety for the faithful performance of the contract.

The proposal or bid signed by Mr. Gogo bound him "to execute in accordance with such award, *a contract with necessary bonds,* of which this proposal, the notice inviting proposals and the plans and specifications adopted August 7, 1947 and September 11, 1947, shall be a part * * *." The proposal also provided for: (1) commencement of the work within ten days after execution of the contract on behalf of the District and the receipt of a notice from it to proceed with the work; and (2) completion of the work on or before the expiration of 270 days after said notification.

[1] It is quite clear that the execution of a contract for construction of the proposed sanitary system was contemplated and that the proposal and award were only preliminary steps leading thereto.

As hereinbefore stated, appellant also urges that "The contract was not in the nature of a personal service contract and therefore death did not discharge the parties from their obligation thereunder."

[2] The general rule as to the effect of death upon contractual obligations is stated in 8 Am.Jur. 732, § 63, towit:

> "Furthermore, the obligor is excused from performing the conditions stated where it appears that performance is rendered impossible by act of God, except, of course, where such act is reasonably within the contemplation of the parties, or where performance is made impossible by the law or by act of the obligee. Accordingly, the death of the obligor excuses nonperformance where the bond calls for personal services on his part."

> And "Ordinarily, a building contract is not to be brought within that class of contracts which are deemed to have been entered into because of the personal skill or taste of the person who is to perform it. (Citing authorities.) It is otherwise, of course, where it is made to appear, as remarked by Lord Denman, that the 'character, credit and substance of the party' contracted with was an inducement to the contract. A building contract may, from the character and kind of work to be performed, properly fall within the rule of 'personal performance acts.'" In re Estate of Burke, 198 Cal. 163, 167, 244 P. 340, 342, 44 A.L.R. 1341.

[3] The record here supports the view that the parties contemplated not only that the contract following the award should be

executed by the successful bidder, but also that he alone should perform it.

Paragraph 11 of the specifications provides: "The Sanitary District Board will award the contract to the lowest responsible bidder complying with other instructions and with the provisions of the advertised Notice Inviting Sealed proposals. * * * The competency and responsibility of bidders as evidenced by the information accompanying the proposals, which will be subject to verification, will be considered in making the award."

Said specifications also provide that "The Contractor shall not assign, transfer, convey or otherwise dispose of the contract, or his right, title or interest therein, or his power to execute such contract, to any other person, firm or corporation without previous consent in writing of the Sanitary Board of the Central Contra Costa Sanitary District."

The contract which Mr. Gogo agreed to execute if the award was made to him provided: "Fourth: No interest in this agreement shall be transferred by the Contractor to any other party, and any such transfer shall cause annulment of this contract, so far as the Owner is concerned."

The Notice Inviting Bids contained the following recital: "Each bidder shall submit with his bid on the form provided the name and address of each subcontractor including the principal suppliers of materials, and the portion of the work which each subcontractor will do. *If the contractor fails to name the subcontractors in his proposal he shall be deemed to have agreed to perform such portion of the work himself and shall not be permitted to subcontract said portion of work without previous written permission of the Sanitary District Board.*" (Emphasis added.)

Reference to Exhibit D attached to the complaint herein, being a copy of Mr. Gogo's proposal, discloses that no subcontractors are named therein. Hence, if he had survived and executed the contract, he could have subcontracted no portion of the work required thereunder without the consent of the District Board.

[4] Appellant finally suggests that respondent surety should be held, even though the contractor may be personally discharged.

The language used in Petrovich v. City of Arcadia, 36 Cal.2d 78, 82, 222 P.2d 231, 234, conclusively disposes of this argument:

> "Thus in cases such as this the legislature has now made mandatory a deposit of security and forfeiture when the successful bidder *has inexcusably* refused to execute the contract." (Emphasis added.)

In the instant cause, death of the contractor excused the execution and performance of the contract, and this in turn discharged the surety.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

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112 Cal.App.2d 237

DUPUY v. McCOLGAN, as Franchise Tax Commissioner.

Civ. 8107.

District Court of Appeal, Third District, California.

July 16, 1952.

Dorothy S. Dupuy sued Chas. J. McColgan, as Franchise Tax Commissioner, to obtain a refund of personal income taxes paid under protest. The Superior Court, Sacramento County, Grover W. Bedeau, J., rendered judgment in favor of the tax commissioner, and the plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem., held that the corporate recipient of the income from an oil lease was a personal holding company for income tax purposes.

Affirmed.

1. Statutes ⚷226

Where language of state statute was taken verbatim from federal statute, court, in ascertaining meaning of term used in state statute would consider scope of same term as used in federal statute.

2. Mines and Minerals ⚷79(1)

The term "royalty" as referring to a share of the product or profit of a mine or of a forest is deeply rooted in English history, and by common usage the payments of a share of product under oil leases are referred to as "royalties".

See publication Words and Phrases, for other judicial constructions and definitions of "Royalties".

3. Internal Revenue ⚷124
Statutes ⚷188

The words of a statute, including revenue act, should be interpreted, where possible, in their ordinary, everyday senses, in the absence of a clear showing of legislative intent to give the words a special meaning.

4. Internal Revenue ⚷764

The basic purpose of Congress in enacting provisions relating to personal holding companies was to impose a surtax on undistributed incomes of nonoperative family holding corporations, or so-called "incorporated pocket-books", and Congress intended thereby to deter the avoidance of income tax through the formation of a family corporation to receive and hold income from investments. 30 U.S.C.A. § 223.

5. Internal Revenue ⚷764
Taxation ⚷1015

The Congress, in enacting the federal revenue act provisions relating to personal holding companies, and the California legislature, in enacting similar state legislation, understood fully the distinction between rents and royalties, particularly as applied to oil leases, and did not intend to exclude from the term "royalties" payments of a share of the product under oil leases which by common usage are known and referred to as "royalties". St.1935, p. 1090, §§ 2(*o*), 34.

See publication Words and Phrases, for other judicial constructions and definitions of "Royalties".

6. Taxation ⚷1015

A corporation receiving more than 80 percent of its gross income as payments under terms of oil lease, and otherwise conforming to statutory definition was a "personal holding company", for income tax purposes, and mere fact that lease used term "royalties" synonymously with "rent" did not change nature of payments or take such payments without definition of holding company income. St. 1935, p. 1090, § 2(*o*) (1).

See publication Words and Phrases, for other judicial constructions and definitions of "Personal Holding Company".

◆

Morrison, Hohfeld, Foerster, Shuman & Clark and Leon De Fremery, San Francisco, Walker Slack, San Francisco, for appellant.

Ernest P. Goodman, Deputy Atty. Gen., San Francisco, for respondent.

SCHOTTKY, Justice Pro Tem.

Eight actions were commenced against the State Franchise Tax Commissioner to obtain a refund of personal income taxes paid by plaintiffs under protest for the years 1935 and 1936. The eight actions were consolidated for trial and were tried on a stipulation of facts from which the court made findings and drew the following conclusions of law:

> "I
>
> "That the income received by Monarch Investment Company under the oil lease referred to in the findings of fact was income from royalties within the meaning of subdivision (1) of section 2(*o*) of the California Personal Income Tax Act of 1935. (Statutes 1935, ch. 329, p. 1090).
>
> "II
>
> "That the Monarch Investment Company was a Personal Holding Company within the meaning of section 2(*o*) of the California Personal Income Tax Act of 1935.
>
> "III
>
> "That the income of Monarch Investment Company was properly includable in the incomes of all the plaintiffs in these actions under the provisions of section 34 of the Personal Income Tax Act of 1935."

A single judgment was entered in favor of defendant Franchise Tax Commissioner and plaintiffs have appealed.

Section 2(*o*) of the Personal Income Tax Act of 1935, so far as here relevant, provided:

> "The words 'personal holding company' means any corporation (other than a corporation exempt from taxation under section 101 of the Federal Revenue Act of 1934, and other than a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the receipt of deposits, and other than a life insurance company or surety company) if (1) at least eighty per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities, and (2) at any time during the last half of the taxable year more than fifty per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals."

Section 34 of the Personal Income Tax Act of 1935 provided:

> "For the purpose of this act a personal holding company whether or not organized under the laws of this State shall not be recognized as a legal entity separate and distinct from the shareholders thereof. Any such company having more than one shareholder shall be deemed a partnership."

The portion of the act here involved provides that the income of personal holding companies is taxable "if (1) at least eighty per centum of its gross income for the taxable year is derived from royalties". The sole question to be determined upon this appeal is whether the income from the oil lease was "rent" or "royalty". If "rent", it was not part of the income of a holding company; if "royalty", it was. As expressed by appellant: "The solution to the question as to whether Monarch was or was not a personal holding company depends upon whether payments received by Monarch under an oil lease constitute 'royalties' within the meaning of said section. If these payments were not 'royalties', as the word was used in the section, Monarch was not a personal holding company and the decision should have been for the appellants."

The lease here involved was executed on February 14, 1917, between Sunset Monarch Oil Co. (the name of Monarch Investment Company prior to May 28, 1920) and the Standard Oil Co. and reads that "the Lessor has leased, let and demised and by these presents does lease, let and demise unto the Lessee * * * the land hereinafter described, with the sole and exclusive right to the Lessee to drill for, produce, extract and take oil, gas, asphaltum and other hydrocarbon substances" etc.

The lease then provides:

> "The Lessee shall pay to the Lessor as royalty and rent for said premises one-fifth (1/5) part of all oil, asphaltum or other hydrocarbon substances extracted and saved from said premises. For all gas produced and saved and sold off the premises by the Lessee, the Lessee shall pay as rent and royalty one cent (1¢) per thousand (1000) cubic feet * * *. The Lessee shall not be required to account to the Lessor for or pay any rent or royalty on oil, gas or water produced by the Lessee from the premises and used by it in its operations hereunder, but may use such oil, gas and water free of charge.
>
> "Other than the royalty gas, the Lessor's royalty shall be delivered to the Lessor on the part of the land where produced and saved, and, if taken in kind, such royalty shall be delivered as produced and saved into tanks maintained on the land for that purpose by the Lessee, * * * Should the Lessor elect from time to time to have the Lessee purchase such royalty, the Lessee, upon thirty (30) days' notice in writing of such election, hereby agrees to purchase, take and receive all of said rents or royalty, and shall pay therefor the current prices paid by the Lessee from time to time to producers for products

> of like character, gravity and quality, in the Sunset Oil Field, and such payments shall be made to the Lessor on the 15th day of each monh, for all rent and royalty produced during the preceding calendar month.
>
> "The rent and royalty aforesaid shall be ascertained, computed and paid monthly, * * *."

The original term of the lease was 20 years, but by a supplemental agreement dated December 7, 1931, the term was increased to 30 years.

[1] It is agreed by both appellant and respondent that the definition of a personal holding company contained in Section 2(*o*) of the California Personal Income Tax Act of 1935 was taken verbatim from the Federal Revenue Act of 1934. In order to ascertain the meaning of "royalties" in section 2(*o*) we should consider the scope of the term "royalties" in the Federal Revenue Act of 1934.

Webster's New International Dictionary, Second Edition, defines the word "royalty" as "* * * 6. A right, prerogative, due, or perquisite belonging to a king or sovereign; as: a A seigniorage on gold and silver coined at the mint. b(1) *Eng. Law.* Any of the royal rights constituting the regalia (which see), including various rights in land, such as the right to all gold and silver mines (called royal mines); hence, a percentage paid to the crown of gold or silver taken from mines, or a tax exacted in lieu of such share; an imperialty. (2) *Coal Mining. Eng.* A tract of coal-mining land, or a portion thereof. 7. Hence: a A share of the product or profit (as of a mine, forest, etc.) reserved by the owner for permitting another to use the property. b A duty or compensation paid to the owner of a patent or a copyright for the use of it or the right to act under it, usually at a certain rate for each article manufactured, used, sold, or the like; also, a percentage, as an output, paid to the owner of an article, esp. a machine, by one who hires the use of it. * * *."

In Black's Law Dictionary, third edition, the word "royalty" is defined as:

> "A payment reserved by the grantor of a patent, lease of a mine, or similar right, and payable proportionately to the use made of the right by the grantee. (Citations omitted.]
>
> "Royalty also sometimes means a payment which is made to an author or composer by an assignee or licensee in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent."

[2, 3] It would appear from the foregoing definitions that the term "royalty" as referring to a share of the product or profit of a mine or of a forest is deeply rooted in English history, and that by common usage the payments of a share of the product under oil leases are referred to as "royalties". It is a general rule of statutory construction, as stated by the court in Crane v. Commissioner of Internal Revenue, 331 U.S. 1, 6, 67 S.Ct. 1047, 1051, 91 L.Ed. 1301, that "the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses" in the absence of a clear showing of legislative intent to give the words a special meaning.

[4] It is agreed by both parties that the basic purpose of Congress in enacting provisions relating to personal holding companies was to impose a surtax on undistributed incomes of non-operative family holding corporations or so-called "incorporated pocketbooks", and that Congress intended to deter the avoidance of income tax through the formation of a family corporation to receive and hold income from investments.

Appellants contend that Congress regarded the right to receive a specified percentage of all oil and gas produced not as a royalty but as rent which was excluded from the definition of personal holding company income. Respondent in reply asserts that it is difficult to conceive how the objective of Congress would be furthered by the exclusion from the surtax provisions of income from oil and gas royalties, or why oil and gas royalties would be excluded while royalties from patents, copyrights, etc., along with interest, dividends and annuities would be included in the definition of personal holding company income.

Respondent argues that prior to the enactment of the Revenue Act of 1934 Congress, the Federal Courts and the Treasury Department were familiar with the distinction between rents and royalties. He cites the statute enacted by Congress in 1920, 30 U.S.C.A. § 223, empowering the Secretary of the Interior to grant oil leases on government lands, which act provided that:

> "Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they accrue for that year, with the right of renewal as prescribed in section 17 hereof. The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production".

Respondent points out also that in a number of Federal income tax cases heard in the October, 1932, term of the United States Supreme Court, payments under oil and gas leases based on a percentage of production were regarded as "royalties." Palmer v. Bender, 287 U.S. 551, 53 S.Ct. 225, 77 L.Ed. 489; Murphy Oil Co. v. Burnet, 287 U.S. 299, 53 S.Ct. 161, 77 L.Ed. 318; Burnet v. Harmel, 287 U.S. 103, 53 S.Ct. 74, 77 L.Ed. 199. The Supreme Court also held in these cases that the holders of a royalty interest, i. e., a right to receive a specified percentage of all oil and gas produced during the term of the lease, are deemed to have an economic interest in the oil and gas subject to depletion and therefore are entitled to a depletion allowance under the Federal Income Tax Laws. On the other hand, recipients of rents are not entitled to any such depletion allowance.

An examination of the legislative history of the Federal Revenue Act of 1934 indicates quite strongly that Congress intended to include within the definition of holding company income all royalties except "overriding royalties" received by an operating company. As originally introduced in the House of Representatives the clause defining personal holding company contained the word "rent" in addition to "royalties, dividends, interest, annuities." But in the Senate the word "rent" was stricken from the enumeration of items of personal holding company income, the reason being, as expressed in the report of the Senate Finance Committee, "A great part of real estate business is done by small family corporations. These partake more of the nature of operating companies than mere holding companies. Your committee is of the opinion that it is unwise to include such companies within the category of personal holding companies." It appears also that at hearings before the Senate Finance Committee an attempt was made to have the definition of personal holding companies changed so as to specifically exclude from the operation of these provisions companies dealing in mineral royalties, but the proposed change was not adopted, indicating that Congress did not intend to exclude oil and gas royalties other than royalties received by an operating company.

[5] We are convinced that Congress in enacting the Federal Revenue Act of 1934, and our legislature in enacting Section 2(*o*) of the Personal Income Tax Act of 1935, understood fully the distinction between rents and royalties, particularly as applied to oil leases, and that they did not intend to exclude from the term "royalties" payments of a share of the product under oil leases which by common usage are known and referred to as "royalties".

Appellants cite several California cases which they assert hold that payments made to a lessor under an oil lease are not the purchase price of the oil in place but are compensation for the use of the land and are essentially rents. These cases are Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Elsinore Oil Co. v. Signal Oil & Gas Co., 3 Cal.App.2d 570, 40 P.2d 523; Barnard v. Jamison, 78 Cal.App.2d 136, 177 P.2d 341. However, these cases did not deal with tax matters or the statute here involved and are of little assistance in determining the issue here involved. While it may be true, as stated in Callahan v.

Martin, supra, "The royalty return which the lessee renders to his lessor for this estate in the land is rent, or so closely analogous to rent as to partake of the incidents thereof", we are satisfied the Congress intended to use the term "royalties" in the act here involved in its generally understood and ordinary everyday meaning.

In the case of Logan Coal & Timber Ass'n v. Commissioner, the U. S. Board of Tax Appeals was called upon to decide if payments received by the Logan Coal Co. which were based on the quantity of coal extracted from the land were royalties within the meaning of the Federal Revenue Acts of 1934 and 1936, as well as under the 1937 amendment to the personal holding company provisions of the Revenue Laws. The Board held 42 B.T.A. 529, that under the provisions of the Revenue Acts of 1934 and 1936 payments based on mineral production were royalties and not rents. The Board pointed out that Kiseau Petroleum Corp. v. Commissioner, 42 B.T.A. 69, specifically held that since the word "royalties" was used in its ordinary everyday sense meaning in the Revenue Act of 1934, it would include payments based on volume of mineral production. This decision was approved and affirmed by the Circuit Court of Appeals, 3 Cir., in 122 F.2d 848.

[6] Appellants state that "While there is no question but that the language of the lease itself and by common usage payments under oil leases are referred to as 'royalties', nevertheless, it should be noted that the lease uses the term synonymously with the term 'rent'." The fact that the lease may use the term "royalties" synonymously with the term "rent" did not, of course, change the nature of the payments, nor could it have any effect upon the undoubted intention of Congress and the Legislature in the acts here involved to make such payments a part of the income of a personal holding company.

No other points raised require discussion.

In view of the foregoing we conclude that the payments received by the Monarch Investment Co. under the oil and gas lease were "royalties" as that term was used in Section 2(*o*) of the California Personal Income Tax Act of 1935 and that Monarch was a personal holding company.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

112 Cal.App.2d 286

PEOPLE v. DAVIS.

Cr. 4659.

District Court of Appeal, Second District, Division 2, California.

July 18, 1952.

Hearing Denied Aug. 14, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, John J. Ford, J., of grand theft by false pretenses on 23 counts, and he appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that the evidence supported the conviction.

Affirmed.

1. Criminal Law ⇨1159(2)

Substantial proof having been adduced in support of information charging fraud, the Court of Appeal would not interfere with judgment of conviction by weighing evidence but would decide only whether upon face of evidence it could be held that sufficient facts could not have been found by jury to warrant inference of guilt.

2. Embezzlement ⇨1

False Pretenses ⇨1

Larceny ⇨1

The crime of grand theft is committed when a person obtains money or property of another by taking it from the possession of its owner without his consent, by obtaining it by deceit and false pretenses, or by embezzling it after it has been entrusted to the thief.

3. False Pretenses ⇨49(1)

Evidence supported conviction for grand theft by false pretenses.

4. False Pretenses 🔑8

Where purported manufacturer of three wheeled automobile, in obtaining money by selling dealer's franchises, falsely stated, among other things, that he had invested a large sum and that engineering plans were complete, he did so while conscious of the falsity of such statements, or in reckless disregard of their truth, and such statements constituted "actionable fraud".

See publication Words and Phrases, for other judicial constructions and definitions of "Actionable Fraud".

5. False Pretenses 🔑7(5)

Where purported manufacturer of three wheeled automobile, in obtaining money by selling dealer's franchises, promised that certain product schedule would be followed, and such promises were made without intention of performing them, they were "fraudulent".

See publication Words and Phrases, for other judicial constructions and definitions of "Fraudulent".

6. False Pretenses 🔑7(4)

Where a party offers to sell an interest in a business which has not been established and paints a rosy picture of its future based upon false statements which prospective purchaser believes to be true, such party is guilty of "fraud".

See publication Words and Phrases, for other judicial constructions and definitions of "Fraud".

7. False Pretenses 🔑7(5)

Fraud can be perpetrated by a promise to do an act if at the time of making it the promisor intends not to perform.

8. Criminal Law 🔑447

In prosecution for criminal fraud, jury may consider acts and utterances as well as writings of accused.

9. Criminal Law 🔑447

In action taken for crime committed in relation to a contract, the state is not a party to, and is not bound by, the contract, but may prove the true nature of the transaction.

10. Criminal Law 🔑447

Where fraud is shown, parol evidence does not contradict the writing involved, but merely shows that no binding contract was legally made or did not express the actual agreement.

11. Criminal Law 🔑777

In prosecution of purported manufacturer of three wheeled automobile for grand theft by false pretenses in obtaining money by selling dealer's franchises under written contract, it was not error to instruct jury to consider evidence other than the contract. U.S.C.A.Const. Amend. 14.

12. False Pretenses 🔑9

Where any false and fraudulent representation or pretense has been made, the law considers it as continuing so as to cover any money or property received as a result thereof.

13. False Pretenses 🔑52

In prosecution of purported manufacturer of three wheeled automobile for grand theft by false pretenses in obtaining money by selling dealer's franchises, instruction, relating to continuing representation to effect that time elapsing between fraudulent representation or false pretense and obtaining of property was not itself controlling, but that the question was whether the effect of the false pretense continued and was relied upon at the time the property in question was given over, was proper.

14. Criminal Law 🔑785(3)

In prosecution of purported manufacturer of three wheeled automobile for grand theft by false pretenses in obtaining money by selling dealer's franchises under written contract, instruction to effect that if jury should find that any victim had been shown any document prior to time he paid money and there were provisions in such document which were contrary to or inconsistent with representations which victim claimed to have heard, jury, for purpose of determining credibility of such victim, could take into consideration question whether reasonable person would have believed and relied on any such oral statements, was proper.

15. Criminal Law 🔑823(4)

In prosecution for grand theft by false pretenses based upon 23 transactions, instruction to effect that jury to convict must all agree upon at least one specific false and fraudulent representation or pretense as having been made by defendant, was proper, in view of further instruction to effect that the false representation must have been a material element in inducing victim to part with his money.

◆

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Mark Brandler, Deputy Dist. Atty., Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant was convicted on 23 counts of grand theft. He now demands a reversal of the judgments on the grounds of insufficiency of the evidence to support the verdicts, and errors in giving and in refusing certain instructions.

Sufficiency of the Evidence.

In April, 1947, appellant was a salesman of used cars. He met certain engineers of an aircraft company and requested them to redesign a three-wheel automobile which he called the "Californian." He was without funds to employ the engineers and had not at that time made any investment whatsoever in his prospective enterprise. Prior to August, 1947, the engineers dismantled the "Californian" for the purpose of assembling engineering data. During the last named month, appellant organized the Davis Motor Car Company and established its headquarters in a building on Woodley Avenue in Van Nuys. The company had no equipment, was without capital, without manufacturing experience and without a definite design for the building of the three-wheel automobile. However, appellant caused lines to be painted on the floor of the building to simulate assembly lines which might inflame the imagination of prospects who would come to purchase territorial franchises for the sale of the car. The selling campaign commenced August 6, 1947. Sales were made to the several parties named in the indictment. In each instance of the 23 verdicts included in the judgments here on appeal, the sales were induced by appellant's false statements, promises and representations which were relied upon by the purchasers.

Appellant stated to Messrs. Ragan and Wiley (Count 1) that the engineering on the car was complete; that he was ready to commence building the three-wheel car; that he had a contract with Hercules Motor Company for motors; war contractors would build the parts and appellant would assemble them; that about the first of 1948 Ragan would have a car to show on his floor and soon thereafter cars would be "running out of his ears." Relying upon such statements, Ragan and Wiley paid appellant part of the purchase price for a franchise for the three cities of Glendale, Montrose and Burbank. Thereupon Ragan leased a building for the operation of his business for two years at a monthly rental of $300.

Having read an advertisement in a San Francisco paper about the three-wheel automobile, the witnesses Straub and Gregory visited the plant of the Davis Motor Car Company in September, 1947, where appellant told Straub that he had put $150,000 of his own money into the business; that he was drawing nothing from it; that no one would receive a cent until the car was produced; that the plant would be producing cars at the rate of 50 a day in from 30 to 90 days; that he had contracts for Hercules motors and contracts with airplane companies for aluminum panels. In reliance upon such statements of appellant on three separate occasions they paid him $500, $1,000 and $1,500 (Counts 2, 3, and 4) as payment for a franchise for Petaluma, Sonoma and Napa counties.

In order to induce the witness Paige to purchase a franchise, appellant made substantially the same statements he had made to Gregory, Straub and Ragan, and stated that the car would be built by having the various subcontractors ship the parts to the plant at Van Nuys where they would be assembled; that they would make 10 models before January, 1948; that thereafter the company would get into production at the rate of 50 cars per day; that Paige would have cars for sale by the first of the year; that moneys paid for franchises would be used to produce the car. While relying upon such statements of appellant, Paige paid him $1,500 in September on a franchise for Marin County and thereupon leased a showroom for two years as a salesroom for the three-wheel automobile. In February, Paige paid appellant the first installment of the price of a franchise on Alameda County. Thereafter while still relying upon the same statements which appellant had made to him, he made the final payment of $1,800 on March 3. (Counts 5, 6, 7.)

In September, 1947, the witness Decker accompanied by his friend Looschen (Counts 8 and 9) visited the plant of the Davis Motor Car Company where they engaged appellant in conversation with respect to the out-look for the three-wheel automobile, the method of financing and expenditures of the money. At that time appellant stated that the franchise money was to be used for the production of the "Californian"; that Hercules Motor Company would supply the motors at the rate of 50 per day; that the company would commence with the production of 200 cars a month; and thereafter increase to one thousand monthly; that if Decker and Looschen would purchase a franchise, they would receive their first shipment of the automobiles within sixty days. Thereupon the two investors together, believing in and relying upon appellant's statements paid him $500 as part payment on a franchise for the Santa Monica area. The second payment of $1,000 was made in November.

In September, 1947, Harold Libby (Count 10), a minor and a student at Fresno State College, read of the three-wheel car and visited the Davis plant. In August, 1947, appellant told Libby that he had commenced work on the automobile prior to 1942; that within from 30 to 90 days the company would be producing at the rate of 50 cars per day; that to make possible such production, appellant stated that 150 subcontractors in the Los Angeles area were making parts which would be assembled at the plant in Van Nuys; that the engineering was practically completed and plans were ready for production; that it had received approximately 150,000 miles of testing and had stood up under all conditions. In reliance upon such statements, Libby paid appellant on behalf of himself and his wife, $1500 as part of the $5,000 purchase price for a Fresno franchise.

In October the witness O'Hara (Counts 12 and 13) visited with appellant at his office in Van Nuys. The latter told him that the engineering on the automobile had been completed; that he had a contract with the Hercules Motor Company to supply him with 250 engines to start with; that he had contracts duly executed with various companies to manufacture the parts; that he would produce 50 cars daily beginning January, 1948, by assembling the parts at the plant; that production would be increased to one thousand a week when the crew became experienced; that he had a machine on the way to make body panels; that every penny was being put into a fund for the production of the car; that if he purchased a franchise, O'Hara would get cars in January, 1948. While relying upon such statements of appellant, O'Hara paid him $2,500 in October as part payment on a franchise for Santa Ana and on January 16 paid him $2,250 to complete the purchase.

The witnesses Evans and Zeravica (Counts 14, 15, 16) visited appellant at his plant in October, 1947. Evans was a haybailer and Zeravica was a rancher. Appellant told Evans that if they purchased franchises, they would have a car by January, 1948; that thereafter the car would be in production at the rate of 50 a day, increasing to an output of 200 daily; that he had invested between $100,000 and $200,000 in the production of the automobile. Relying upon the statements of appellant, Evans and Zeravica paid the Davis Motor Car Company $500 in October and $500 in November on account of the purchase of a franchise for the city of Lancaster and in December they paid him the balance of $1,000 on the purchase price for such franchise.

In November, 1947, the witness Browne (Count 17) was told by appellant at the Van Nuys plant that a great deal of time had been spent in the development of the three-wheel car; that it had been perfected mechanically and was ready to go into production of 200 daily within 30 days; that in six months they would be producing 1,000 cars a day; that the parts would be fabricated at various aircraft companies including Douglas and Lockheed. When Browne told appellant of another car manufacturer who was having trouble with franchise holders because of misapplication of the funds paid for franchises, appellant said, "there is nothing to worry about because all moneys which are paid into the company by franchise holders will be held in trust to be used for the purpose of development and manufacture of the Davis car"; that he had contracted for a thousand engines per day with the Hercules Motor Company and Browne would get his first cars in the very near future. Relying upon appellant's statements, Browne paid $5,000 for a franchise covering North Hollywood and Compton areas. Notwithstanding the sale of the Compton franchise to Browne, appellant made a sale thereof to Messrs. Scoville and Lea for $6,500.

In October, 1947, appellant told the witness Coppetti (Count 18) that he would be in production within 60 to 90 days; that if Coppetti purchased a franchise he would receive a demonstrator within that period; that he had contracts for Hercules motors and other parts of the automobile. While relying upon such statements, Coppetti borrowed $2,500 with which to purchase a franchise for the city of Oakdale.

In July, 1948, the witnesses Heydon and Allec (Counts 22 and 24), furniture salesman and drive-in market operator respectively, visited the Davis plant in Van Nuys to discuss the advertisement they had read about the three-wheel car. Neither had had previous experience in the automobile business. Appellant told them that the engineering and tooling on the car had been completed; that it would be in production within 60 to 90 days at the rate of 50 cars per day; that there would be no material shortages because they had three or more contracts for each of the essential materials for the car; that he had contracts with Hercules and Continental for motors; that the franchise moneys would be used for the sole purpose of producing the automobile and that no money had been used for anything else. In reliance upon such statements, Heydon and Allec purchased a franchise for El Monte. They paid $500 on July 20 and $3,000 on July 23.

The statements of appellant with respect to the readiness of the plans and specifications for the Davis car, the time within which it would be finished, the time within which exhibition cars and those for sale to the public would be available were not true. Three engineers employed by appellant established that the engineering was never completed on the three-wheel car; that nothing had been planned by the engineers concerning the differential, transmission or other component parts. While one prototype car was completed in November, 1947, it was not made ready for commercial production. It had a Ford transmission, Ford rear end, a Plymouth steering gear and Ford wheels. Appellant requested his engineers to repaint the first car a different color at various intervals in order that it might appear that there were many Davis cars on the road, instead of just one. Appellant told his men that if he could get 10 cars he would create the illusion that 100 cars had been produced. The first creation of the Davis Company was painted twelve times and was given at least two sets of upholstery. The shop engineer informed appellant in October, 1948, that they were not ready to produce 50 cars a day nor would such condition occur during that year, but appellant had a shipment of cobblers' sewing machines moved into the factory and stated that any machinery he could have about would be a good front. When the engineers asked appellant for instructions as to what they should tell the franchise holders who made inquiry, appellant replied, "tell them nothing. We have got their money. Let them go to hell."

The company's tool designer, Mr. Woodin, testified that there were some jigs at the plant, but that they were such as could not be used for mass production. And he established that the engineering on the three-wheel car was not completed in February, 1949. The same testimony was given by the witness Bricker, production engineer. There was no production machinery to produce any number of cars. During the two years of engineer Bricker's association with appellant, a total of 14 three-wheel automobiles were completed, but they were built by hand. Not one was made for sale to the public. The company was without tools to engage in manufacture, none for the assembly of car doors; it was not even possible to obtain tools from a tool manufacturer since they had no designs for such tools. Whenever engineer Charipar requested appellant to purchase machinery and equipment for the factory, his reply was, "there is not enough capital available and such purchases can be made at a later time." Mass production cannot be commenced unless a factory is completely equipped with tools. No testing of a completed car was ever made except the run of a prototype car from Detroit to Chicago. The witness Kelly, sales engineer for the Hercules Motor Corporation, established that appellant never had a contract for Hercules motors. While appellant purchased one motor in 1947 and subsequently nine others, the Hercules company refused to open a purchasing account with appellant for the reason that he had not established any credit. Notwithstanding appellant's promise that a large machine was on its way from the east to be used in forming large body panels, it never arrived. No production car was ever manufactured or engineered with complete tooling. The witness Yates had been employed by appellant to prepare brochures as advertising material. When he advised appellant that the franchise purchasers were requesting them, appellant told Yates not to spend any more time on such franchise owners as he already had their money. When in early January, 1948, a number of franchise holders called to inspect the plant, appellant stated "to hell with them. Lock up the plant and don't let them see it." When on another occasion a franchise owner requested an automobile for demonstration purposes, he said, "to heck with him. We have got his dough." When an agent in Washington, D. C., opened an office for the purpose of selling franchises on the Davis car, appellant commenced his letter by saying, "this will serve to authorize you to let you deposit the loot."

Appellant's Personal Gain.

Prior to the "beginning" of the sales of franchises, appellant resided in a garage apartment for which he paid a monthly rental of $44.50. He had mortgaged his household furniture and pawned his ring. In the summer of that year he borrowed money to buy groceries. He had borrowed a 1941 Plymouth for his transportation. On the day he sold his first two franchises for a total of $3,250, he gave the nurse for his children $100 with the statement that he had sold his first franchise. He made a payment of $150 on his chattel mortgage and redeemed his ring. In the same week, he and his wife left for a weekend in Ojai Valley. For the sojourn at the inn he paid $78.49. Prior to his receipt of $15,000 from sales of franchises, he had no bank account and kept all money in his pocket; had no bookkeeper prior to December, 1947. In January, 1948, appellant leased a home on Benedict Canyon Drive at a rental of $400 a month and paid one year in advance. He had a check written payable to cash which he applied to the payment of his lease for one year and instructed his employee to charge it to sales expense. Six months later he purchased the house for $25,000 cash and charged that sum to the "plant expansion fund" of the Davis Motor Car Company. When the company's bookkeeper transferred the $25,000 to appellant's personal drawing account he was told by appellant that it was none of his business what the $25,000 was for; that it was his money and that he would do as he pleased; that he did not want it reflected on the books of the company and thereupon the bookkeeper deleted it.

[1] The fact that appellant denied the accusatory and damning testimony presented against him can avail nothing now in effecting a reversal. Substantial proof having been adduced in support of the information, this court is powerless to infere with the judgment by weighing the evidence "but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt." People v. Newland, 15 Cal.2d

678, 681, 104 P.2d 778, 779. Paraphrasing the cited decision no showing has been made that upon no hypothesis whatever is there sufficient evidential support for the verdict. Because an adverse verdict might have been reached by another jury or by this court or because in our opinion the evidence might be reconciled with innocence, a reversal is not authorized. (Ibid.)

Appellant had not enjoyed a liberal education. His studies had been confined almost exclusively to mechanical engineering, but no high degree of efficiency appears to have been achieved by him. He had ultimately engaged in dealing in used cars with a minimum of success. From his testimony he had expended no great amount of genius on the three-wheel design. He obtained one which had been constructed by one Joel Thorne. After appellant had rebuilt it and abandoned it "at the Woodley Avenue plant, finally someone came out there and claimed it * * * the car was completely wrecked." At that time he undertook to finance the manufacture of the model by negotiations with the Bank of America, the Jewel Tea Company, Swift and Company, Consolidated Vultee, Lehman Bros., and a group on Wall Street, but without success. He was advised by brokers of the difficulty of getting "venture capital."

When he began the campaign to raise moneys by the sale of franchises he prepared a form of contract for his investors to sign. It contained clause 21 which provided that "the consideration paid for this franchise is not refundable and Davis shall have no obligation to make any refund. No representation is made as to time of delivery of automobiles or parts. In the event that through no fault of Davis, motor cars are not produced, Dealer waives all claims against Davis arising from this agreement." After some dealers had purchased franchises, appellant consulted a lawyer who revised clause 21 to read that "the consideration paid for this franchise is in no way to be interpreted as a trust fund for the benefit of Dealer and that said consideration is the sole property of Davis."

From the language used in both quoted clauses it would be difficult for any unprejudiced jury to derive any conclusion of appellant's innocent purpose. Although he was penniless, he frames a contract for his victims to sign designed to transfer to his ownership such funds as he by his conversation may cause his patrons to invest. By his spoken words he was pursuing a course to obtain moneys with which he would invent, construct, and manufacture in large lots an automobile of a fanciful design but by his writing he relieved himself of delivering cars or parts forever and pocketed the dealer's waiver of "all claims arising from this agreement." And while he was obtaining funds in exchange for a specified territory in which the dealer might make sales of the "Californian," he was falsely telling his victims that he had contracts with makers of "parts" to supply him, had a contract for Continental and Hercules motors, had sufficient machinery for mass production; telling his employees he did not care about his investors because he had their money, was not interested in low income groups; telling his Washington agent to deposit "the loot." During the early stages of his enterprise he took the very money he had induced his franchise purchasers to pay to him for manufacturing the three-wheel automobile and leased an extravagant home, then purchased it for $25,000, practically one year from the time he was borrowing money with which to buy groceries and insisted to his bookkeeper that the withdrawal of the $25,000 should not appear on the books of the company.

Despite such proof of his felonious purpose, appellant mournfully asserts: he always intended to produce the cars in mass in accordance with his agreement; made no misrepresentation; had no intent to defraud; the dealers got what they bought; the money was used as represented; *frustration of purpose or impossibility of performance is a complete defense!*

Grand Theft.

[2] The crime of grand theft is committed when a person obtains the money or property of another by taking it from the possession of its owner without his consent, by obtaining it by deceit and false pretenses, or by embezzling it after it has been entrusted to the thief.

[3] Appellant is guilty of grand theft under the doctrine of *false pretenses.* He had nothing of value. The three-wheel vehicle was the cast-off toy and gift of a sportsman who had evidently built it for his own amusement. Appellant told his prospective engineers that he had paid $10,000 for the car. He rented a building to be used as a pretense of a factory, painted lines on its floor to pretend that the toilers to be employed would there construct his "dream" into a reality. He had no useful tools for two years during which he was garnering the wealth of his "dealers" by his statements, opinions and promises, selling to unsuspecting, trusting men "franchises" to sell in prescribed areas the phantom machine. The naked declaration of his purpose: a penniless man to sell dealers the privilege of selling an automobile which had not been invented and to promise to use their money with which to design it, to erect a factory and to produce the car in mass—such a plan in its very essence was dishonest.

Despite his contrary statements to his coveted "dealers" appellant had not worked on the three-wheel before the war. His purpose in making such declaration was to create in the mind of a victim that his promises of a successful machine and of early production were the result of seasoned reflection, long study and careful experimentation. The fact is that he had no knowledge of the three-wheel prior to his ill-fated gift from Mr. Thorne. When he commenced his franchise sales, he did not work on the invention to try to build a practical product but engaged mechanical engineers on contingent compensation.

His statement that he had worked on the three-wheel before the war served another purpose. It gave factual support to his promise that mass production would begin within 90 days. When he told his "dealers" that the engineering data was complete and that a "production car" would be ready by November, 1947, he intended to convince them that the plans were the fruitage of years of study. He knew at the time that the engineering had not been completed for either the car as a whole or for any essential part. He had neither blue prints nor production machinery. Such condition continued during the two years of his sales of franchises. While he built 14 three-wheel cars in that time, they were made by hand. When his engineers urged him to obtain necessary machinery with which to turn out quantities for the public, appellant replied that he did not have sufficient capital.

Appellant's assurances that (1) in 1947 the plant would be producing 50 cars within 90 days after August; (2) in 1948 50 cars daily would be produced and (3) within six months after November, 1947, the company would produce 1,000 cars a day were false and deceitful promises and opinions accompanied by his false statements as to the completion of the engineering plans and his implied declaration that he had sufficient capital on hand. Such promises were as false and as illy-conceived as his statements that he had a contract with the Hercules Motor Company for the motors to be used. Such statement and those with respect to the availability of other parts were material. Their pronouncement came with special force during the post-war-period when the procurement of such items in mass was doubtful and their steady flow was indispensable to the production promised by appellant. The fact that appellant had no contract with the Hercules company did not dampen his ardor or mollify his enthusiasm in telling as a fact that he had such agreement.

His statements that subcontractors were building parts for the three-wheel had not the slightest foundation in fact. He had no standardized plans. His statements that a prototype car had been tested for durability and mechanical efficiency by being driven 150,000 miles, and that the cars would have the benefit of extensive experimentation were made for the purpose of convincing the investors that the production car would be a perfect unit of mechanical art. In truth, the prototype had journeyed only from Detroit to Chicago.

That he had invested $150,000 of his own money in the three-wheel enterprise was a material misstatement. Showing his faith in the plans he was exploiting by putting a small fortune into it must have inspired the "dealers" with appellant's gallant leadership, they being ignorant of the fact that appellant had never possessed one-tenth so much money.

Finally, appellant's lure with which to entrap the more thoughtful investor was his promise to impound the moneys received for the franchises in a special fund to be used solely for developing the design and for producing the car. Appellant had no intention of performing such a promise. On most of the occasions when he made it, he had already used $25,000 for the purchase of a home, had paid old bills and redeemed his pawned and mortgaged movables. If he would so treat the fund in the early stages of its existence, could appellant ever have intended to fulfill his promise? But he knew that the confidence of the investors had to be gained and the only available instrumentality he had for such purpose was words—his own false words!

[4, 5] The foregoing statements of fact by appellant were made while he was (1) conscious of their falsity or (2) in a reckless disregard of their truth. In either event they constituted actionable fraud. People v. Cummings, 123 Cal. 269, 271–272, 55 P. 898; People v. Daener, 96 Cal.App.2d 827, 831–832, 216 P.2d 511. His promises and opinions are equally vicious. The promises were made without intention of performing them and are therefore fraudulent. His opinions were given concomitantly with his statements of fact which gave material support to his opinions expressed to men who were ignorant of the true facts, and were therefore actionable fraud. People v. Arberry, 13 Cal.App. 749, 757, 114 P. 411; People v. Walker, 69 Cal.App. 475, 480, 231 P. 572; People v. Ryan, 103 Cal.App.2d 904, 908, 230 P.2d 359; People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353; People v. Mason, 86 Cal.App.2d 445, 449, 195 P.2d 60.

But he did not rely on words alone. He caused the handbuilt "Californian" to appear on the streets in paints of different colors to make it appear that he had many three-wheeled vehicles. He said to his associates that if he had 10 automobiles he could create the illusion of 100. In order to create a showing of activity in his "plant," he moved in a number of sewing machines "to have a good front." He was not interested in his "dealers" anymore after he had their "dough." "To hell with them; lock up the plant; don't let them see it."

His letter to his Washington agent in respect of "depositing the loot"; his second sale of the Compton franchise; his spending the franchise moneys in payment of old debts; his keeping $15,000 in his pocket instead of depositing it in the "fund" and his purchase of the expensive home with money entrusted to him—these and other expenditures, diversions of a trust fund at a time when the moneys could have been used in manufacturing or inventing the three-wheel, were sufficient to convince the jury that appellant had no intention of producing a car for the market, but that he obtained a contract with clause 21 and made his plans for acquiring money without work.

Not Puffing.

[6] The statements and promises of appellant were not "puffing" as he contends. He uttered untruths concerning material facts and made false promises. "Puffing" is a term applied to a salesman's description of a product which is wholly within the view of the prospective buyer. It does not consist of such statements as those used by appellant in selling the right to distribute a machine not yet invented within a specific territory. He was forced to describe a thing yet to be created and after that to be produced in mass. The purchasers had nothing to buy but the picture painted in the words of appellant. Where a party offers to sell an interest in a business which has not been established and paints a rosy picture of its future based upon false statements which the prospective purchaser believes to be true, the fraud is complete. People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353.

Promises.

[7] Neither may appellant be freed from liability by reason of the fact that some of his representations were promises. Fraud can be perpetrated by a promise to do an act if at the time of making it he intends not to perform. People v. Mason, 86 Cal.

App.2d 445, 449–453, 195 P.2d 60. From the nature of appellant's representations and the circumstances under which they were made it is obvious that his promises were made in bad faith. He knew that his entire scheme was an imaginary Pandora's box that would open surely as a consequence of his receipt of his victims' money and that many of his promises were recklessly made without regard to their falsity. He did not care. That the dealers believed what he said pleased and encouraged him and because they relied upon his utterances, the jury correctly and readily determined that he had committed grand theft. People v. Chait, 69 Cal.App.2d 503, 514, 159 P.2d 445; People v. Steffner, 67 Cal.App. 1, 13, 227 P. 690.

Frustration.

Appellant argues that his failure to complete the design and manufacture of the three-wheel was due to hindrances he had not caused and could not obviate and that by virtue of the doctrine of frustration his failure to succeed in materializing his promises is excused "whenever a fortuitous event supervenes to cause a failure of the consideration or practically total destruction of the expected value of the performance." Appellant's concept of "frustration" is a vagary, a hallucination, evidently conceived for the purpose of forestalling demands for the moneys paid him when he should ultimately be faced with the tragic emptiness of his folly. He says it is impossible to perform and that his obligation is suspended by reason of such impossibility with reference to which they had agreed. His contract does not negative a criminal intent. It was one item of evidence which was considered by the jury who determined that appellant took the money in each of the 23 counts.

Rulings on Admissibility.

[8–11] Assignment is made of the court's ruling in allowing the dealers to vary the terms of the written contract by parol evidence of appellant's contemporaneous oral statements. The argument is made that such ruling violates the due process doctrine of the 14th amendment as well as the best evidence rule. The answer is that the statements of appellant did not vary the terms of his writing. His oral affirmations and his written declarations were all his representations in the trial of a fraud action. He is not the agency to decide first that one or the other is free from fraudulent vice and thereafter to make his choice. In a prosecution for a criminal fraud, the jury may consider the acts and utterances as well as the writings of the accused. People v. Sidwell, 27 Cal.2d 121, 126, 162 P.2d 913; People v. Pierce, 110 Cal.App.2d 598, 243 P.2d 585. In an action taken for a crime committed in relation to a contract, the state is not a party to, and is not bound by, the contract. It may prove the true nature of the transaction. People v. Chait, supra, 69 Cal.App.2d at page 519, 159 P.2d 445. The prosecution of appellant is based upon his acts which are forbidden by law. The proof of his guilt may obtain in both his writings and his oral declarations. Why should either be excluded? The purpose of a trial is to derive the truth. Where fraud is shown, parol evidence does not contradict the writing involved. It merely shows that no binding contract was legally made or did not express the actual agreement. Barham v. Barham, 33 Cal.2d 416, 422–423, 202 P.2d 289; Lynn v. Herman, 72 Cal.App.2d 614, 617, 165 P.2d 54. For the reasons herein stated, it was not prejudicial to instruct the jury to consider evidence other than the contract.

No Error in the Instructions.

[12, 13] Appellant contends it was prejudicial error to give the instruction[1] with reference to whether a false pretense upon the mind of the representee continued and was relied upon when the latter parted with

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[1] "When it is shown that there was some space of time between the making of a fraudulent representation or the use of a false pretense and the time when the person who, by employing such false means, obtained the property of another, the length of time between the two events is not of itself controlling, the question being whether the effect of the false pretense upon the mind to which it was directed continued, operated, and was relied upon at the time the property in question was given over.

"When any false and fraudulent reprehis property for the reason that there is no authority which recognizes continuing representations. Appellant concedes however, that a representation is actionable if it "be shown that it was still in the mind of the person to whom the representation was made at the time that he acted, and that he acted thereon." Such was the gist of the instruction as given. No error appears. See People v. Rabe, 202 Cal. 409, 413, 261 P. 303; People v. Howes, 99 Cal.App.2d 808, 818, 222 P.2d 969.

[14] Appellant aso urges error in the giving of an instruction[2] that in considering the evidence the jury should take into consideration whether a reasonable person would have believed and relied upon such representations. It is contended that such instruction ignores the written contract, and makes the accused liable for obtaining the money if the jury believe incredible statements. Such is not the effect of the instruction. The jury were told to consider both the oral representations and the contract. If the jury believed the accused made grossly incredible representations and believed that a reasonable person would have believed in and relied on them, their "incredibility" will not avail him on a trial for his fraud. Since the representations of appellant were such, if true, as promised a successful business venture the jury correctly determined that since they were false the damage was attributable to appellant's fraud. People v. Pearson, 69 Cal.App 524, 531, 231 P. 612.

[15] Finally, the court instructed on the necessity of the jury's unanimity with respect to "at least one specific, false representation."[3] Appellant contends that essential factors were omitted from that instruction; that the one fraudulent representation made "must have been agreed by the jury" to have been the one relied upon by the complainant in parting with his money; that "the jury must have been unanimous that it was the particular reliance by the complainant upon which he acted, and not some other representation."

Appellant's criticisms of the last quoted instruction are all answered by the court's general charges. Caljic 226 was given in its entirety. It requires some false pretense to have been used by defendant to perpetrate the fraud and it must have been a material element; also, the fraud must have been thereby effected. Moreover, the jury were told that for a false representation to be material the owner must have relied and acted upon it; "you must all agree upon at least one specific false * * * representation as having been made * * * If you find that any false representations were made to a particular * * * witness * * * at least one of such representations must have been a material element in inducing that * * * witness to part with his money before the defendant may be found guilty of the crime of theft" etc; "you are not to single out any certain sentence * * * in the instructions and ignore the others, but you are to consider all instructions as a whole."

But aside from the foregoing, Caljic's 239[4] was given. It is a complete answer to appellant's point as to unanimity on one

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sentation or pretense has been made, the law considers it as continuing so as to cover any money or property received as a result thereof."

[2] "If you should find that any person named in a particular count of the information was shown any writing or document prior to the time that he paid any money in connection with the transaction involved and there were provisions in such document which were contrary to or inconsistent with representations which such person, so seeing the document, claims to have heard, then, for the purpose of determining the credibility of the testimony of such witness, you may take into consideration the question whether a reasonable person would have believed and relied on any such oral statements."

[3] "Before you may return a verdict of guilty of theft by obtaining property by false pretense under a particular count, you must all agree upon at least one specific false and fraudulent representation or pretense as having been made by the defendant, if you find that he made any, which representation or pretense must be of the kind and have the effect as defined for you in these instructions."

[4] "When, as in this case, a defendant is charged with having obtained property by false pretense, and it is alleged in the

false representation. And the stock instruction on reasonable doubt was tantamount to a caution not to convict unless convinced to a moral certainty and beyond a reasonable doubt. They were thereby empowered to acquit appellant if they could not unanimously find that they had believed and relied upon at least one false pretense in each of the 23 transactions involved in the twenty-three judgments.

The judgments are affirmed.

McCOMB and FOX, JJ., concur.

112 Cal.App.2d 234

TICE v. LEMOS.

Civ. 8081.

Sac. 6220.

District Court of Appeal, Third District, California.

July 15, 1952.

Action by Albert G. Tice, buyer, against Lawrence Lemos, seller, predicated upon defendant's alleged failure to deliver cattle, as agreed in oral contract, upon plaintiff's tender of purchase price. The Superior Court, Siskiyou County, James M. Allen, J., granted defendant's motion for nonsuit at the close of plaintiff's evidence, and plaintiff appealed. The District Court of Appeal, Adams, P. J., held that the evidence failed to establish, as a matter of law, that plaintiff's business was that of a dealer and thus preclude his recovery in absence of compliance with the licensing requirement of the Agricultural Code.

Reversed and remanded for new trial.

1. Appeal and Error 🔑927(3)

Upon appeal from judgment granting nonsuit, it is duty of appellate court to consider evidence, and such inferences as may reasonably be drawn therefrom, in light most favorable to plaintiff.

2. Trial 🔑165

Nonsuit may not be granted if, disregarding all unfavorable evidence, there is any substantial evidence which would support findings for plaintiff.

3. Licenses 🔑39.45

In buyer's action predicated upon oral contract for sale of cattle, evidence failed to establish as a matter of law that plaintiff was a "dealer", within purview of the agricultural code licensing requirements, and thus preclude his recovery in absence of such license. Agricultural Code, §§ 1261 and subd. (f), 1262(f), 1263.

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Tebbe & Correia, Yreka, for appellant.

Floyd Merrill, Yreka, for respondent.

ADAMS, Presiding Justice.

Plaintiff in an amended and supplemental complaint alleged that he had entered into an oral contract with defendant to purchase from him about 200 head of cattle for an agreed price of $20,000, of which $100 had been paid; that subsequently he tendered to defendant $19,900 and demanded the delivery of the cattle, which defendant refused. Plaintiff also set forth a memorandum written by plaintiff but signed by defendant which acknowledged the receipt of $100 as a deposit for defendant's entire herd consisting of about 200 head of cattle at a price of $20,000. In a second count plaintiff claimed damages for the failure of defendant to perform.

Defendant answered, alleging that there had been no oral contract but only the writ-

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information that the defendant used two or more different false pretenses as means of obtaining the property of another, it is not necessary to justify a verdict of "guilty" that the jury find that all the alleged false pretenses were used. Proof that there was one instance of defendant's using a false pretense which was a material inducement, in reliance on which the complaining witness parted with his property, and proof that the other requisite elements of the alleged crime were present, are sufficient to sustain a conviction if that proof meets the standard of convincingness required by the law."

ing set forth by plaintiff, denied refusal on his part to perform in compliance therewith, denied any liability for damages claimed by plaintiff, alleged that he had tendered to plaintiff all the cattle referred to in the written memorandum, but that plaintiff had refused to pay the balance due, to wit: $19,900, or to accept delivery of the cattle.

The case was tried by the court without a jury, and, at the conclusion of plaintiff's evidence, a motion for a nonsuit, interposed by defendant, was granted. No findings were filed, the court merely stating that it was its view that plaintiff was "required to have a license" as a "dealer".

From the order granting the nonsuit plaintiff has appealed; and the question presented by him is whether, under the facts as shown by his evidence, his contract with defendant, who, it had been stipulated, was a "producer" within the provisions of section 1261 of the Agricultural Code, was for the purchase of the cattle for "his own use," under subdivision (f) of section 1262 of said code, so as to exempt him from the license requirements of said code.

Section 1261 of the Agricultural Code defines a producer as any person engaged in the business of growing or producing any farm product, including livestock. Subdivision (f) of said section defines a "dealer" as "any person other than a commission merchant or cash buyer who solicits, contracts for or obtains from the producer thereof title, possession or control of any farm product, or who buys or agrees to buy any farm product from the producer thereof."

Section 1262, subdivision (f) exempts from the provisions of the chapter "Any person buying farm products for his own use or consumption." Section 1263 provides that "No person shall act as a commission merchant, dealer, broker, cash buyer, or agent without having obtained a license as provided in this chapter."

Appellant concedes that he was not purchasing the cattle for which he contracted for his own consumption, but urges that he was purchasing them for "his own use".

Plaintiff testified that he was a cattle and grain rancher; that he had been in the cattle business for over twenty years, and had never had a license; that he owned a ranch at Willows, California, and also rented pasturage in the Fort Klamath area for range where he fattened cattle which he had bought; that during the year 1950 he bought about 266 head from stockmen and some from auction yards, and that during said year he sold about 150 head; that cattle which he contracted to buy from defendant consisted of approximately 100 cows, including dairy cows, 25 to 30 three year olds, and the balance marked calves anywhere from "weaners" up to "yearlings"; also three bulls; that he intended to keep some of the cows for "stockers", and to fatten the rest and then sell them.

[1, 2] The rule regarding the granting or denying of motions for nonsuits has been passed upon by this Court in numerous cases holding that upon appeal from a judgment granting a nonsuit it is the duty of an appellate court to consider the evidence and such inferences as may reasonably be drawn therefrom, in the light most favorable to a plaintiff; and that a nonsuit may not be granted if, disregarding all unfavorable evidence, there is any substantial evidence which will support a finding for plaintiff. See Connors v. Southern Pac. Co., 91 Cal.App.2d 872, 877, 206 P.2d 31; Milani v. Southern Pac. Co., 93 Cal.App.2d 527, 528, 209 P.2d 413; Copeland v. Rabing, 110 Cal.App.2d 631, 243 P.2d 119; Kroupa v. Oak Park Theatre Co., 111 Cal.App.2d 514, 244 P.2d 985.

[3] It cannot be determined from plaintiff's testimony that, as matter of law, his business was that of a dealer, rather than that of a producer. The record shows that the cattle which plaintiff sought to purchase from defendant did not consist of beef cattle alone, but constituted a miscellaneous herd including "calves" and "slicks". There is no testimony that plaintiff intended to sell this herd as a whole, and his intention as stated was to keep some of the cattle purchased, to use some of the cows as "stockers" and to fatten some on his ranges to be sold subsequently; and, obviously, the "slickers" would have to be nurtured further. This testimony indicates that what plaintiff was doing more properly classifies

him as a producer rather than as a dealer. See People v. Stevens, 10 Cal.App.Supp.2d 763, 51 P.2d 1179, and People v. Terkanian, 27 Cal.App.2d 460, 463, 81 P.2d 251. Considering plaintiff's testimony in the light most favorable to him we think it was error to grant defendant's motion for a nonsuit, and that the cause should have been heard on its merits and findings made.

The judgment is reversed and the case is remanded for a new trial.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

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112 Cal.App.2d Supp. 895

PEOPLE v. PALLARES.

Appeal No. 4.

Appellate Department, Superior Court,
Fresno County, California.
June 30, 1952.

An accused was charged with unlawfully annoying a child under the age of 18 years in a theater and he demurred to the complaint. The Municipal Court of the Fresno Judicial District of the County of Fresno, State of California, entered an order sustaining the demurrer and the people of the State of California appealed. The Superior Court, Appellate Department, Conley, J., held that statute declaring a person who annoys or molests a child under age of 18 to be a vagrant, and prescribing punishment for committing such annoyance or molestation, is sufficiently clear and definite to state a public offense.

Decision reversed and cause remanded with directions.

1. Statutes 🔑181(1)

Object of construction of code sections or statutes is to ascertain and give effect to intention of legislature.

2. Statutes 🔑190

If words of legislative enactment given their ordinary and popular signification are reasonably free from ambiguity and uncertainty, courts will look no further to ascertain its meaning.

3. Statutes 🔑205

A statute should be read and considered as a whole to determine legislative intent.

4. Statutes 🔑188

Words used in a statute should receive a sensible construction in accordance with their commonly understood meaning.

5. Statutes 🔑184, 217.1, 223.1

History of legislation, previous state of legislation on subject involved, other statutes in pari materia, and object sought to be attained by legislation, may be weighed in proper case in construing such legislation.

6. Vagrancy 🔑1

Object of enactment of statute declaring a person who annoys or molests a child under age of 18 to be a vagrant, and prescribing punishment for committing such annoyance or molestation, was protection of children from interference by sexual offenders, and apprehension, segregation and punishment of latter. Pen.Code, § 647a (1).

7. Criminal Law 🔑304(2)

In the year 1952 it was common knowledge that subject of sex offenders, and particularly protection of the young from improper advances, had in recent years engaged close attention of legislature and of general body of citizens of state.

8. Statutes 🔑203

In construction of statutes if intention of legislature be clearly ascertainable, a word omitted inadvertently may be supplied in process of construction to effectuate legislative intent.

9. Vagrancy 🔑1

The words "under the age of 18" as used in statute declaring a person who annoys or molests a child under age of 18 to be a vagrant, and prescribing punishment for committing such annoyance or molestation, mean under the age of 18 years, and such words do not refer only to children under the age of 18 months, 18 weeks or

18 days, rather than to all children under age of 18 years. Pen.Code, § 647a(1).

See publication Words and Phrases, for other judicial constructions and definitions of "Under the Age of 18".

10. Criminal Law ⚷13

The words "to annoy or molest" as used in statute declaring a person who annoys or molests a child under age of 18 to be a vagrant, and prescribing punishment for committing such annoyance or molestation, is sufficiently definite and certain to advise public generally what acts and conduct are prohibited. Pen.Code, § 647a(1).

11. Vagrancy ⚷1

The acts forbidden by statute declaring a person who annoys or molests a child under age of 18 to be a vagrant, and prescribing punishment for committing such annoyance or molestation are those motivated by unnatural or abnormal sexual interests or intent with respect to children. Pen. Code, § 647a(1).

12. Criminal Law ⚷13

The statute declaring a person who annoys or molests a child under age of 18 to be a vagrant, and prescribing punishment for committing such annoyance or molestation, is sufficiently clear and definite to state a public offense. Pen.Code, § 647a(1).

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E. Clarke Savory, Dist. Atty., Fresno, Marvin E. Helon, Fresno, Deputy Dist. Atty., for the People.

Harry Sarkisian, Fresno, for defendant and respondent.

CONLEY, Judge.

The District Attorney of the County of Fresno filed an appeal from an order of the Municipal Court of the Fresno Judicial District sustaining defendant's demurrer to a complaint charging a misdemeanor, to wit: Violation of Section 647a(1) of the Penal Code. The order sustaining the demurrer was duly entered on the docket. Although no formal dismissal of the action was thereafter ordered, the People had a clear right of appeal. Sec. 1466(1) (b), Penal Code; People v. Draper, 134 Cal.App.Supp. 787, 793, 22 P.2d 604; People v. Dobbs, 70 Cal.App.2d 261, 161 P.2d 46.

The complaint charges that the offense was committed as follows:

> "The said defendant, on or about the 27th day of April, 1952, at and in the said County of Fresno, State of California, wilfully and unlawfully annoyed and molested Lupe Torres, age four years, in the Azteca Theater."

The ground of the demurrer was that "the facts therein stated do not constitute a public offense."

In pleading the alleged crime the District Attorney observed generally the requirement of Section 952 of the Penal Code by following "the words of the enactment". The validity of the ruling in the Court below, therefore, depends on the question whether the wording of the statute itself is sufficient to state a public offense.

Section 647a of the Penal Code reads as follows:

> "(1) Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable upon first conviction by a fine of not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction or upon the first conviction after a previous conviction under Section 288 of this code by imprisonment in the state prison not exceeding five years.
>
> "(2) Every person who loiters about any school or public place at or near which school children attend, or who loiters in or about public toilets in public parks, is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment."

Two major arguments are made by the defendant against the sufficiency of the enactment: First, that the words "any child under the *age of 18*" are so uncertain that they have no fair and well-understood meaning; and, second, that the words "annoys or molests" do not advise the public in understandable form of the acts which are forbidden.

On the first point raised, defendant contends that in using the words "any child under the *age of 18*" the legislature might have intended them to apply to children under the age of 18 years, or only to children under the age of 18 months, 18 weeks or 18 days.

[1, 2] The object of all construction of code sections or statutes is to ascertain and give effect to the intention of the legislature. County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639, 122 P.2d 526. "If the words of an enactment given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the Courts will look no further to ascertain its meaning." (23 Cal.Jur., Pages 730–731).

[3] "A statute should be read and considered as a whole to determine the legislative intent." People v. Trieber, 28 Cal.2d 657, 663, 171 P.2d 1, 4.

"Words and phrases will, when possible, be given a reasonable construction, 'according to the context and the approved usage of the language' and in furtherance of what appears from a consideration of the whole enactment to be its true purpose and object." 23 Cal.Jur., Page 745.

[4] Words used in a statute should receive a sensible construction in accordance with their commonly understood meaning. Universal Pictures Corporation v. Superior Court, 9 Cal.App.2d 490, 493, 50 P.2d 500; Section 13, Civil Code.

[5] The history of the legislation, the previous state of legislation on the subject, other statutes *in pari materia,* and the object sought to be attained by the legislation may be weighed in a proper case. People v. Earl, 19 Cal.App. 69, 71, 124 P. 887.

Has the phrase "under the age of 18" a common and well-understood meaning as "under the age of 18" years? The legislature of this State has previously so used the phrase with such meaning. Thus, Section 33 of the Civil Code reads in part:

> "A minor cannot give a delegation of power, nor, *under the age of eighteen,* make a contract relating to real property * * *."

And Section 35 of the Civil Code relates to "the contract of a minor, if made whilst he is under the *age of eighteen* * * *".

The Courts of this state have never had any difficulty in construing the phrase used in these sections of the Civil Code as meaning *"under the age of eighteen years".* See Annotations to Deering's Civil Code of California under Sections 33 and 35.

In numerous opinions, the Supreme and Appellate Courts of this state have used the phrase with the clear meaning of *"18 years of age".* For example, see: Magee v. Welsh, 18 Cal. 155, 159; Hakes Investment Co. v. Lyons, 16 Cal. 557, 560, 561, 137 P. 911; Maier v. Harbor Central Land Co., 41 Cal.App. 79, 80, 182 P. 345; Burnard v. Irigoyen, 30 Cal.2d 861, 865, 866, 867, 186 P.2d 417.

Another illustration of the common and well-understood use of the phrase *"age of eighteen"* (or other similar phrases using the numerals alone) as referring to years, is furnished by the article on "Infants" in 14 Cal.Jur.:

> "As has been seen, minors are *males under twenty-one and females under eighteen."* (Page 113);
>
> "If the contract which the infant would disaffirm was made by him when he was *over eighteen,* he must, as a condition of disaffirmance, restore the consideration or its equivalent." (Page 127);
>
> "A minor *under eighteen* may disaffirm a contract without restoring or offering to restore the consideration." (Page 127)
>
> "Though the general rule, in the absence of statute, is that the deed of an infant is voidable merely, in California, under Section 33 of the Civil Code, the deed of one *under eighteen* is absolutely void from the beginning, and conveys no title to, or interest in, the land. So a deed of trust on real estate,

executed by a minor *under eighteen,* is absolutely void." (Page 131);

"A minor may disaffirm a conveyance made by him while *under eighteen,* without being under any legal duty, as a condition of disaffirmance, to restore the consideration received." (Page 132);

"All persons are capable of committing crimes, except, among others, children *under the age of fourteen,* in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness. This means that minors *under fourteen* are incapable of crime, in the absence of the proof required." (Page 135);

"Persons *under eighteen,* committing murder, are relieved from the death penalty. The fact that one is a minor *under the age of twenty-one,* and acts under the direction of a parent, is no defense to a prosecution for crime." (Page 136). (Emphasis is ours.)

These examples of the common use of the phrase *"age of eighteen"* as meaning *"age of eighteen years"* could be multiplied easily, not only by quotations from the reported cases and legal texts, but from daily newspapers, periodicals and books on nonlegal subjects.

[6, 7] The subject matter of the entire Section read as a whole further reenforces our conclusion as to the legislative intent. The object of the enactment of the code section was the protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter. It is common knowledge that the subject of sex offenders, and particularly the protection of the young from improper advances, has in recent years engaged the close attention of the legislature and of the general body of the citizens of this State. The purpose of the legislation is indicated clearly by reference in the section to Section 288 of the Penal Code, by the increase of penalties for second offenders, and by the prohibition in the second subparagraph of the section of loitering near schools or public places where school children attend. Prior to the amendment of the section in 1951, Section 647a of the Penal Code applied to the annoyance or molestation of any child; the amendment restricted the application of the law to children *"under the age of 18"*. To contend that the latter phrase refers only to children under the age of 18 months, 18 weeks or 18 days, rather than to all children under the age of 18 years, would be to ascribe an intent to the legislature completely at variance with the patent purpose of the legislation considered as a whole.

[8] It should be observed in passing that in the construction of statutes if the intention of the legislature be clearly ascertainable, a word omitted inadvertently may even be supplied in the process of construction to effectuate the legislative intent. Crawford v. Payne, 12 Cal.App.2d 485, 488, 55 P.2d 1240; In re Sekuguchi, 123 Cal.App. 537, 11 P.2d 655; People v. Heron, 34 Cal.App.2d Supp. 755, 758, 90 P.2d 154.

[9] As we conclude that the meaning of the words "under the age of 18" were used by the legislature, and are to be understood, in their usual, natural, ordinary and popular sense as "under the age of 18 years", the first point raised on the demurrer must be resolved against the defendant.

[10] It seems equally clear that the meaning of the words "to annoy or molest", as employed in the Code section, are sufficiently definite and certain to advise the public generally what acts and conduct are prohibited. Annoy means to disturb or irritate, especially by continued or repeated acts; 3 C.J.S., P. 1370; Territory v. Long Bell Lumber Co., 22 Okl. 890, 99 P. 911 "to weary or trouble, to irk; to offend; to disturb or irritate, esp. by continued or repeated acts; to vex; to molest; * * * harm; injure". (Webster's New International Dictionary, Second Edition.)

The same dictionary defines "molest" as, "to interfere with or meddle with unwarrantably so as to injure or disturb". Molest is, in general, a synonym for annoy. The term "molestation" always conveys the idea of some injustice or injury. Molest is also defined as meaning to trouble, disturb, annoy, or vex. People v. Reid, 180 Misc. 289, 40 N.Y.S.2d 793, 795. To molest means to interfere with so as to injure or disturb; molestation is a wilful injury inflicted upon another by interference with the user of rights as to person or property. Gulf Refining Co. v. Fetschan, 6 Cir., 130 F.2d 129, 133. Annoyance or molestation signifies something that works hurt, inconvenience or damage. Prior v. White, 132 Fla. 1, 180 So. 347, 116 A.L.R. 1176.

[11] When the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this State indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children. It should be noted further that the section must be construed reasonably as setting up an objective test for annoyance or molestation; a childish and wholly unreasonable subjective annoyance, arising, for example, from a child's dislike for proper correction by a teacher, is not covered by the section. The annoyance or molestation which is forbidden is in no sense a purely subjective state on the part of the child. The objectionable acts of a defendant constitute the annoyance or molestation contemplated by the statute. See State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754.

In two instances the upper courts of this State have upheld Section 647a of the Penal Code; although the exact points which were raised herein were not directly ruled upon, the observations of the Appellate Court in approving the Section in its earlier form should be noted. People v. Smoot, 97 Cal.App.2d 306, 217 P.2d 732; Phillips v. Municipal Court, 24 Cal.App.2d 453, 75 P.2d 548.

[12] It is the view of this Court that Section 647a as amended is sufficiently clear and definite to state a public offense, and that the demurrer was, therefore, improperly sustained.

It Is Ordered, Adjudged and Decreed that the decision of the Municipal Court of the Fresno Judicial District be, and it hereby is, reversed and the cause remanded with directions to overrule the demurrer to the complaint and to proceed with the arraignment and trial of the defendant.

SHEPARD, P. J., and DE WOLF, J., concur.

39 Cal.2d 309

In re ADAMS' ESTATE.

KUCHEL v. HARKNESS.

L. A. 21872.

Supreme Court of California, in Bank.
July 15, 1952.

Proceeding in the matter of the estate of Lillian T. Adams, deceased, by Thomas C. Kuchel, petitioner, against Edgar G. Harkness, as executor of the last will and testament of Lillian T. Adams, deceased, to fix inheritance tax on inter vivos transfer of property by decedent on ground that transfer was made in contemplation of death. The Superior Court, Los Angeles County, Roy L. Herndon, J., found that the transfer was made in contemplation of death within meaning of the inheritance tax statute, and executor appealed. The Supreme Court, Schauer, J., held that evidence sustained the finding.

Order affirmed.

Prior opinion, Cal.App., 236 P.2d 418.

1. Taxation ⚷893

In probate proceeding to fix inheritance tax due, evidence sustained trial court's finding that the transfer in trust, made by decedent ten years prior to her death, was made in contemplation of death within inheritance tax statute. Revenue and Taxation Code, §§ 13301, 13641, 13642, 13644, 13647, 14502–14504, 14506, 14510–14513, 15101 et seq.; Probate Code, § 1240.

2. Taxation ⚷879(1)

The phrase in "contemplation of death" as used in inheritance tax statute is not limited to an expectation that death is imminent or likely to occur within a few years. Revenue and Taxation Code, § 13642.

See publication Words and Phrases, for other judicial constructions and definitions of "Contemplation of Death".

3. Taxation ⚷879(1)

Solution of question whether gift is made in contemplation of death within inheritance tax statute may depend upon an impelling and inductive motive or motives, but it does not always depend upon any single motive which controls to the exclusion of all others. Revenue and Taxation Code, § 13642.

4. Taxation ⚷895(3)

Presumption in inheritance tax statute, for purpose of the hearing, that inheritance tax appraiser's report is correct will not support findings which the evidence does not support. Revenue and Taxation Code, § 14512.

◆

Fleming, Robbins & Tinsman, Los Angeles, for appellant.

James W. Hickey, Sacramento, Morton L. Barker and Walter H. Miller, Los Angeles, for respondent.

SCHAUER, Justice.

This is an appeal by the executor of the last will and testament of Lillian T. Adams, deceased, from an order of the probate court fixing the inheritance tax due to the State of California. After the appeal was noticed, the executor, Morgan Adams, died, and Edgar G. Harkness thereafter became the duly appointed and qualified executor and has been substituted as appellant in this proceeding.

[1] The issue to be decided is whether the evidence is sufficient to support the finding of the trial court that a transfer in trust made by the decedent ten years before her death was made in "contemplation of death" within the meaning of that phrase as used in section 13642 of the Revenue and Taxation Code, prior to the 1951 amendment of that section. We have concluded that the evidence does warrant such finding, and that the order appealed from must be affirmed.

Section 13642,[1] at the time of Mrs. Adams' death in 1946, provided that "A transfer conforming to Section 13641 [i. e., "without a valuable and adequate consideration"] and made in contemplation of the death of the transferor is a transfer subject to this part.[2]

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[1] Unless otherwise stated, all section numbers herein mentioned refer to sections of the Revenue and Taxation Code.

[2] That is, the "Part" of the Revenue and Taxation Code known as the "Inheritance Tax Law." (Section 13301, Rev. & Tax. Code.)

"'Contemplation of death' includes that expectancy of death which actuates the mind of a person on the execution of his will. The term is not restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis."

After a hearing before the inheritance tax appraiser (see §§ 14502–14504), the appraiser filed his written report with the superior court (see § 14506) in which he listed as taxable the assets of the trust and also included a statement that "The above Trust constitutes a transfer made in contemplation of death, with life estate retained and as an advancement and is taxable under Div. 2, Part 8, Chap. 4, Art. 3 of the Revenue and Taxation Code." (This Article 3 includes § 13642, quoted hereinabove.) The executor filed objections to the appraiser's report (see § 14510), and after a hearing in the superior court (see § 14511) that court made its findings of fact and conclusions of law to the effect that the "trust constitutes a transfer made in contemplation of death," and is therefore taxable. The court's order was entered fixing the tax accordingly (see § 14513) and this appeal by the executor followed (see § 1240, Probate Code).

The evidence, contended by appellant to be insufficient to support the finding of the trial court that the transfer was made in contemplation of death, may be summarized as follows:

In November, 1935, decedent Mrs. Adams two weeks before her eightieth birthday transferred to an irrevocable trust certain property worth some $300,000. The trustee was Mrs. Adams' only child, her son Morgan Adams, who later became executor and appellant herein. The declaration of trust provided that the income from the trust estate should be paid to Morgan Adams during his life, and thereafter to his two sons (i. e., Mrs. Adams' grandsons) until such times as the two sons reached, respectively, the age of thirty-five years, when each of such sons would receive distribution of his proportionate one-half share of the trust corpus free of the trust. The trustee was given the further power to distribute the corpus or any portion thereof to his sons at any earlier time he deemed advisable. At the time the trust was created the two grandsons were aged eighteen and twenty, respectively. Some ten years thereafter (in 1945) the trustee exercised his power to distribute the trust estate to the two grandsons and to terminate the trust. Mrs. Adams died in January, 1946, at the age of ninety years.

The property transferred to the trust constituted about three-fourths of Mrs. Adams' fortune, which she had received at the death of her husband in 1922. Mr. Edgar G. Harkness, substituted as appellant herein, is the attorney who drew the declaration of trust for Mrs. Adams. He testified that he had been legal counsel to Mrs. Adams' husband for many years prior to the latter's death, and since that time had been closely associated with and had acted as legal counsel for Mrs. Adams and for her son and two grandsons; that he did not suggest the trust to Mrs. Adams; that "I believe she came into my office and brought up the subject about the boys. The boys was the only thing she had in her mind"; that over a period of two or three weeks prior to preparing the trust declaration he and Mrs. Adams had several discussions concerning the matter, and "I pointed out to her that she was giving away all interest in that property if it was executed. She didn't care anything about that. She was a very intelligent woman, but she was also quite set in her ideas, and she was very much interested in these grandchildren. Naturally, she was afraid that some woman would get ahold of these boys before they were mature enough to know what they were doing, and that they might lose whatever they had. So, we discussed that considerably about their youth and inexperience, and how so many people were anxious to separate rich men's sons from any money that they might receive. And I pointed out also, of course, the legal effect of that trust, and that she would have to pay a [federal] gift tax, because she was giving away whatever she had. * * * [S]he wanted to put the property in such a way that she would feel their father could supervise and protect them until they got to a point where they were safe to handle it. This was the one thing she was after. She wanted them established in business safely, and that is about all she told me about the deal. I told her very little except the effect of it, that it was gone as far as she was concerned, that she was going to have to pay a gift tax to do it. * * * [S]he wanted Mr. Morgan Adams named as trustee, I believe she wanted him to have the income of the trust. * * * Oh, she did say that in regard to Morgan, that on account of the Mortgage Guarantee Company and the large amount of stock that he had in it, that if he should be liable there in stockholders' liabilities, he wouldn't have anything. * * * [S]he desired the income paid to her son until such time as it was safe to distribute the corpus of the estate to the grandchildren, and for the further reason that her son might need the income due to the uncertainties caused by the depression then inflicting the nation. * * * Q. Did she say to you, either in that discussion or any other discussion, that she was making this gift to avoid inheritance taxes? A. There was no discussion of taxes whatever, except my statement to her that she would have to pay a [federal [3]] gift tax if she made it." The attorney further testified that Mrs. Adams did not explain to him "why she waited until so late in her life to decide to make this trust," or "how it happened to occur to her right at the time that she created that trust," and that he did not suggest to her that she could herself take care of the grandsons' needs later on when they were ready to enter business; that in his conferences with the accounting firm which handled the Adams family tax matters there was no discussion as to whether or not creation of the trust would save inheritance taxes, that the thought "never even entered my head"; that a federal gift tax return was made and a gift tax paid when the trust was created.

Morgan Adams, Jr., one of the two grandsons, testified that at the time the trust was created the decedent, Mrs. Adams, told him and his brother that "she wanted to give this money to us so that we would more or less be free to set up our own lives and not be tied down by lack of capital or cash. On the other hand, she thought we were a little young, and didn't want to have us lose our shirt * * *, so she wanted to have my father supervise it for awhile"; that at that time both the witness and his brother were in college and were being supported by their father; that the father had been managing Mrs. Adams' "sales of stocks and * * * Taking care of her main assets * * * for many years prior to" the time the trust was created.

At the hearing before the inheritance tax appraiser Mrs. Adams' son, Morgan Adams, in answer to the question, "What was her motive in creating that trust?," stated "Well, even at that time she was well along. She was in good health, but I had taken care of her affairs pretty much ever since my father's death and she thought it was a good scheme to make a bequest—I guess that is what it was—at that time on the basis that I would continue to look out for that amount of money, which, of course, I did." When asked whether he needed the income from the trust the witness stated, "It so turned out that I did not, but in 1933 until about 1941 my own affairs were in rather chaotic condition. It might well have been that I would have needed it * * *." At the hearing before the probate court the witness further stated, by affidavit, that from his childhood his mother had been a woman of "unusually good health and unusual mental activity * * *, she had no serious illness during her lifetime until very shortly before her death in 1946. * * * While she was guided and assisted by her husband in her over-all financial affairs until his death in 1922, and by affiant after that time, as far as her personal expenditures,—the running of her home, the employment and payment of her servants, and her other diverse civic and social activities,—were concerned, these matters were handled entirely by her. * * * During the years 1934, 1935, and 1936,—being immediately prior to and subsequent to the date of the Declaration of Trust, * * * she was far more energetic and industrious in many lines than a much younger woman * * *"; that Mrs. Adams traveled to Japan in 1934 and to Panama and Mexico in 1936; that in 1933 she joined a club at the University of Southern California, which focused "on the education of young people and on scholarships and building programs on the campus," and until 1944 took an active part in the organization, attending a business meeting each month; that Mrs. Adams was also active in various other civic, educational, and charitable organizations; that prior to creation of the trust she discussed the matter with the witness and her "thought" as then expressed "was that she desired that both grandsons receive the corpus of the Trust Estate at such time as in the discretion of affiant they were able to properly manage the same,—to the end that moneys which they might need to start in business would be available to put them in a financially safe position to start off their business careers," and she suggested that the witness receive the trust income while he continued to support the grandsons and as long thereafter as he felt it wise; that prior to distributing the trust corpus to the grandsons in 1945 he discussed the matter with Mrs. Adams and she approved.

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[3] The California Gift Tax Law, § 15101 et seq., had not yet been adopted when this trust was created.

Other evidence was also introduced to the effect that until a few months prior to Mrs. Adams' death in January, 1946, she was active in social, business, and civic affairs, attended directors' meetings of the company in which she and her son had an interest and when she told him "what she wanted done, it was done"; that she made extended trips both in and out of this country, was in good health and of an alert and cheerful frame of mind, and was planning and contemplating life rather than death. Also introduced were three wills executed by Mrs. Adams. The first, executed in 1922, left all of her estate, except for a $5,000 bequest to a friend, to her son, Morgan Adams. The second will, executed in 1937, left her entire estate to her son. Her final will, admitted to probate herein, was executed in 1941, and left her entire estate in trust to her son, with the income to be by him either paid to his two sons or at his discretion accumulated for their benefit, and with the power in him to distribute the corpus to his two sons and terminate the trust at any time he chose.

Respondent state controller does not suggest (and the court did not find) that the statements of the appraiser in the latter's written report to the superior court that Mrs. Adams retained a life estate in the trust corpus and that the trust constituted an advancement are correct, but he does contend that the evidence and permissible inferences to be drawn therefrom are sufficient to support the finding that the trust constitutes a transfer made in contemplation of death. With this contention, bound as we are by the rules governing appellate courts in considering facts on appeal, we cannot disagree, even though it may seem to us, or to some of us, that upon an original weighing of the evidence we might reach a contrary finding.

[2] In Estate of Newman (1942), 52 Cal.App.2d 126, 125 P.2d 908, the District Court of Appeal, speaking through Mr. Presiding Justice Barnard, thoroughly elucidates the principles to be followed in determining whether such a finding should be upheld. The court there states: "[52 Cal.App.2d at page 130, 125 P.2d 910] It rather clearly appears from the wording of our statute * * * that the words 'contemplation of death' refer to that expectancy of death which actuates the mind of a person in the execution of his will rather than to that general expectation of death which all men have. It is well settled in this state, however, that the phrase in question is not limited to an expectation that death is imminent or that it is likely to occur within a few years. The controlling rules and principles have been sufficiently established in this state and it is unnecessary to consider or analyze the varying viewpoints in the many decisions which have been cited from other states and from federal courts. It may also be observed that in several particulars views expressed in some of the earlier decisions in this state have been somewhat modified or changed, in effect, by later decisions. * *

"[At page 131 of 52 Cal.App.2d, at page 910 of 125 P.2d] In Spreckels v. State [1916], 30 Cal.App. 363, 158 P.2d 549, * * the court said, 'each case arising under the statute in question * * * must rest upon its own peculiar facts, and the adjudicated cases can, as a rule, do little, if any, more than to illustrate the application of the law to the particular facts of particular cases.' In McDougald v. Wulzen [1917], 34 Cal. App. 21 [166 P. 1033], an order refusing to tax a transfer was affirmed. The grantor was 83 years old and in reasonably good health. There was evidence that he transferred the property to his wife because it annoyed him to take care of it. The court held the evidence sufficient to sustain the findings although contrary findings, if made, would have had to be sustained. * * *

"[At page 132 of 52 Cal.App.2d, at page 911 of 125 P.2d] In Estate of Pauson [1921], 186 Cal. 358 [199 P. 331], an order fixing a tax was affirmed. The donor, who was 78 years old and in vigorous health, transferred some $600,000 to a corporation practically all of the stock of which he gave to his children. He was voted a salary of $20,000 a year to cover his expenses and died in less than a year from a sudden illness. The court stated that the question of whether or not a gift is made in contemplation of death is a question of fact and that if the evidence justifies an inference that the transfer was or was not made in contemplation of death the finding cannot be disturbed on appeal even though the appellate court might draw a contrary inference from the same evidence. * * * The court * * * said:

" '* * * the taxing of transfers was purely ancillary to and in aid of taxes imposed upon the right of succession, the purpose of such ancillary legislation being to tax transfers which were made in lieu of succession or testamentary disposition. That the object of such imposition of taxes upon transfers made in contemplation of death is to prevent the evasion of laws imposing a tax upon the right to succeed to an estate at death is conceded in all the cases. It is obvious that this purpose is not achieved when the phrase "transfers made in contemplation of death" is limited, as in New York, to gifts *causa mortis.* This court, in the Estate of Reynolds, supra [169 Cal. 600, 147 P. 268], declined to follow this narrow view. It is equally obvious that the legislative intent will be frustrated if the transfer in order to be taxable must be made with a sense of impending death, for under this view no tax can be collected where a donor in expectation of death and for the purpose of vesting title in his heirs makes a transfer *inter vivos* with no contemplation of death other than that involved in arranging his affairs so that when the contemplated event occurs the property will be distributed or vested in accordance with his wishes in that event. * * *' * * *

"[At page 133 of 52 Cal.App.2d, at page 912 of 125 P.2d] In Estate of Snyder [1925], 71 Cal.App. 324, [235 P. 54], an order fixing a tax upon a building transferred by a mother to her son was affirmed. The son contended that the impelling motive for the transfer was his mother's desire to have him manage her affairs in accordance with a contract between them, and not her contemplation of death. The court there said:

" 'But it is not necessary that the decedent should have made a direct statement of her motives. If the circumstances shown are such as in the mind of a reasonable man might justify the inference that in coming to an agreement with her son, as well as in making said deed, she was actuated by the contemplation of death, that will be sufficient to sustain the court's finding to that effect.'

"After observing that 'If it sufficiently appears that interests having relation to the ordinary affairs of life, rather than death, constituted the primary and controlling consideration for the making and ultimate consummation of an agreement to transfer property, the transfer will not be subject to tax', the court then held that the evidence in that case justified the inference that the probability of the mother's death in the near future 'was an important moving cause' of the transfer.

"In Chambers v. Larronde [1925], 196 Cal. 100, [235 P. 1024, 41 A.L.R. 980], an order fixing a tax on a large amount of property transferred by a woman 84 years old to her children was affirmed. * * * The court * * * said that the fact that there had been no discussion or mention of death in connection with making the transfers 'would not necessarily be opposed to a conclusion that decedent acted under an undisclosed intent * * *.'

"In Estate of Boole [1929], 98 Cal.App. 714, [277 P. 759], an order fixing a tax was affirmed. The donor died at the age of 63 and five years after making the transfer in question. While his health had been seriously impaired over a period of five years there was evidence that he had no fear or expectation of immediate death. After stating that the latter fact did not negative the existence of that contemplation of death which is defined in the statute, the court said:

" 'The state's burden of proof is to show the motive or motives of the decedent which actuated the transfers. From the very nature of this burden, a case capable of direct proof of the issue will seldom arise. The motive will usually have to be inferred from other facts such as the acts of the decedent, the surrounding circumstances and the nature of the transfer. For these reasons the question is one which is peculiarly within the province of the trial court.'

[3] "The question whether or not a gift is one made in contemplation of death is essentially a question as to whether such gift was one in the nature of a distribution of the donor's property or was one which was intended merely as a lifetime favor to the donee. While the solution may depend upon an impelling and inducing motive or motives it does not always depend upon any single motive which controls to the exclusion of all others. Where a contemplation of death is one of the motives, an important moving cause of the transfer, and one without which the transfer would not be made, the transfer is taxable even though other substantial motives may have contributed to the result. If one purpose of the transfer is a distribution of the donor's property as a substitute for testamentary or similar disposition, with the effect of merely hastening or anticipating the effects of what would otherwise be a testamentary or similar disposition, the transfer is taxable. A desire to see a donee have a present use of the property and to have the donee established with a separate competency are not necessarily inconsistent with a transfer of the property in contemplation of death within the meaning of the statute. Such desires and motives may well accompany an intention to make an advanced delivery to a donee of property which the donor intends shall ultimately go to him, that is to say, an intention to make a present distribution of property in lieu of a testamentary or similar distribution. Where the exclusive motive for the transfer is one associated with the continued life of the donor rather than with his death the transfer is not taxable under this statute. But where such a motive, although present, is not exclusive the transfer may be taxable."

In the cited case (Estate of Newman (1942), supra, 52 Cal.App.2d 126, 125 P.2d 908), the decedent during the period he was aged 63 to 65 transferred to his wife, who was some sixteen years younger than he, about 73 per cent of his property. He died three years later. Prior to the transfers he had made a will leaving all of his property to his wife with the exception of small bequests to two nieces and two nephews. About a month after the last transfer he made a new will leaving everything to his wife. Other evidence was to the effect that he was generous, of cheerful disposition, in good health at the time of the transfers, and had made the transfers to enable his wife to be financially independent. The court held that in view of the applicable principles the evidence was sufficient to sustain the finding of the superior court that all of the transfers were made in contemplation of death and that the contrary evidence was (52 Cal.App.2d at page 135, 125 P.2d 126) "not sufficient to compel a finding contrary to that made by the court. The existence of the motives thus indicated and relied upon by the appellant does not establish, as a matter of law, the absence of the other motive, 'contemplation of death,' which is essential here. And there is other evidence which justifies an inference that a contemplation of death at some time in the future was an important moving cause of each of these transfers. The decedent transferred to the appellant over $57,000 worth of property, constituting about 73 per cent of all he had. As the court said in In re Schweinler's Estate, 117 N.J.Eq. 67 [175 A. 71]:

"'As a matter of common knowledge, most men do not divest themselves of their whole estates or a large proportion thereof except as the result of that contemplation of death already discussed. When such a gift is made, therefore, it is more probable than not that it was made as the result of such contemplation.'

"The transfer included all of the property owned by the decedent except his interest in the partnership through which he was engaged in business, which was valued at about $21,000. The transfers were made to his wife, who was 16 years younger than he was. She was not only the natural object of his bounty but she was given the bulk of his estate in his first will and all of it in the second will. The first of these wills was executed before any of the transfers were made and the other within a month after the last transfer. The fact that the deceased devised and bequeathed practically all of his property to the appellant, then transferred about three-fourths of it to her outright and then, within a month, made a new will giving her all of his estate, is significant and indicates that throughout all of these transactions he had in mind that expectancy of death at sometime in the future which actuates the mind of a person in the execution of his will, and that one of his motives in making the transfer was to make in advance a partial distribution of his property without waiting for the time when his will should take effect. The question was one of fact for the trial court and, assuming that a contrary finding would have been supported by the evidence, it cannot be held as a matter of law that the evidence and the reasonable inferences that may be drawn therefrom are not sufficient to support the finding made."

The evidence in the instant case is so similar to that in Estate of Newman as to make it apparent that inferences may reasonably be drawn therefrom which would support the finding of the superior court that the trust created by Mrs. Adams constituted a transfer made in contemplation of death within the meaning of the statute.

Estate of Minor (1919), 180 Cal. 291, 180 P. 813, 4 A.L.R. 456, and Estate of Darby (1949), 93 Cal.App.2d 96, 208 P.2d 689, relied upon by appellant, have to do with whether the transfers there involved were for a consideration, and are not persuasive here.

It is urged on behalf of respondent controller that there is further support for the court's finding in the direct testimony of the son, Morgan Adams, given at a time when he was the executor herein, that when the trust was created Mrs. Adams "thought it was a good scheme to make a bequest—I guess that is what it was—at that time on the basis that I would continue to look out for that amount of money, which, of course, I did." If this were the only evidence tending to support the trial court's finding we might well agree with appellant. As urged by the latter such testimony appears to be "but a legal conclusion of a layman," does not appear to be based on any fact statement made by Mrs. Adams, and is not shown to be more than an "erroneous hearsay statement." But disregarding such statement entirely leads to no other conclusion than that which has been previously indicated.

[4] The controller has also argued that the presumption provided by section 14512[4] is sufficient, standing alone, to sustain the court's finding. Regardless of the effect of such presumption otherwise where the record of the evidence before the appraiser is not before the court, it obviously does not support findings which the evidence does not support. A contrary view would result in giving to the appraiser's report a far greater sanctity than is lent to a court's findings of fact, which of course must find support in the evidence if they are to be upheld on appeal. Moreover, the controller does not even suggest that the presumption should apply in support of the statements in the appraiser's report that Mrs. Adams retained a life estate in the trust corpus and that the trust constituted an advancement

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[4] Section 14512: "For the purpose of the hearing the report of the inheritance tax appraiser is presumed to be correct, and at the hearing it is the duty of the objector to proceed in support of his objection."

(in either of which events the transfer would be taxable, §§ 13644, 13647).

For the reasons which have been pointed out the order appealed from is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

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39 Cal.2d 253

CHAN et al. v. TITLE INS. & TRUST CO. et al.

L. A. 22228.

Supreme Court of California, in Bank.
July 11, 1952.

Rehearing Denied Aug. 7, 1952.

Action for forfeiture of escrow money, by Chin Ott Wong and Quan Shee Wong against Title Insurance and Trust Company, Melvin E. Vaughan, Sr., and Rozelle Rainey Vaughan and another. The Vaughans cross-complained for recovery of escrow money. Chin Ott Wong died and Taul C. Chan, as special administrator of his estate was substituted as party plaintiff. The Superior Court, Los Angeles County, Arthur Coats, J., rendered judgment against plaintiffs on the complaint and in favor of the Vaughans on their cross-complaint, and plaintiffs appealed. The Supreme Court, Spence, J., held that under the circumstances the purchasers were entitled to restitution of the escrow money but were not entitled to interest thereon.

Affirmed as modified.

Schauer, J., dissented.

Prior opinion, Cal.App., 237 P.2d 53.

1. Appeal and Error 🔑994(3)

Questions as to credibility of witnesses and weight to be given their testimony are for trier of facts, who may disbelieve a portion of a witness's testimony and yet believe other portions thereof.

2. Appeal and Error 🔑1011(1)

Trial court's findings on conflicting evidence are conclusive.

3. Vendor and Purchaser 🔑104

In vendors' action against purchasers for forfeiture of escrow money deposited by purchasers cross-complaining for restitution thereof, evidence was sufficient to show that the transaction was pending with vendors' approval after the time limit set in escrow instructions and that thereafter no notice to perform by a specific date was given to purchasers by vendors.

4. Vendor and Purchaser 🔑335

Where transaction was pending with vendors' approval after the time limit set in escrow instructions containing "time is of the essence" clause and thereafter no notice to perform by a specific date was given to purchasers by vendors, vendors could not enforce right to forfeiture of purchasers' escrow deposit and purchasers were entitled to restitution of escrow deposit.

5. Interest 🔑39(1)

Where purchasers in their cross-complaint only sought a refund of amount of their escrow payments without any claim of interest and case was tried on theory that escrow holder as custodian of the escrow money was only obligated to pay it to prevailing party on disposition of purchasers' and vendors' conflicting claims thereto by a "final judgment," judgment returning money to purchasers should not have provided for payment of interest prior to time that the principal sum became due.

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Harry M. Irwin and V. P. Lucas, Los Angeles, for plaintiffs and appellants.

Lawrence L. Otis, Gilbert E. Harris, James F. Healy, Jr., and Harold Arman, Los Angeles, for defendant and appellant.

J. Q. Gilchrist, Los Angeles, for respondents.

SPENCE, Justice.

Melvin E. Vaughan, Sr., and Rozelle Rainey Vaughan agreed to purchase real property from Chin Ott Wong and Quan Shee Wong. The Vaughans deposited certain money in escrow with the Title Insurance and Trust Company (hereinafter called the Title Company). The Wongs, claiming that "time was of the essence" of the agreement and that the Vaughans had defaulted in their payments, brought this action seeking a forfeiture of the escrow money. The action originally was commenced only against the Title Company as the escrow holder. Upon the latter's motion, the Vaughans were substituted as defendants and the Title Company was discharged from further liability except that it was ordered to retain the escrow money for disbursement as "ordered and adjudged by a final judgment." Trial of the action resulted in a judgment for the Wongs, which judgment was reversed on the ground that the "time is of the essence" provision had been waived, and no notice fixing a new date for performance had been given by them. Chin Ott Wong v. Title Ins. & Trust Co., 89 Cal.App.2d 183, 200 P.2d 541. Thereafter Chin Ott Wong died and Taul C. Chan as special administrator of his estate was substituted as party plaintiff. The second trial resulted in a judgment for the Vaughans based upon their cross-complaint for return of the escrow deposit. The judgment ran against plaintiffs and the Title Company for payment of the full escrow deposit plus interest calculated from the day the trial court found the Title Company, after entry of the first judgment, had paid such deposit to the Wongs. From such judgment, plaintiffs and the Title Company appeal.

Plaintiffs contend that the evidence does not support the findings, and that the issue of damages was improperly considered a factor in determination of the rights of the parties. The Title Company, as custodian of the escrow deposit, attacks the propriety of the award only insofar as it allows interest prior to the date of final judgment. Plaintiffs also make this same objection. An examination of the record discloses that the findings and judgment are not vulnerable to attack except as to the interest provision. Accordingly, we conclude that such provision should be deleted from the judgment and as so modified, the judgment should be affirmed.

In April and May, 1946, the Wongs agreed to sell and the Vaughans agreed to buy certain real property for the total price of $176,254.15. An escrow was opened with the Title Company wherein the Vaughans were to deposit by May 29, 1946, the sum of $35,000 and a trust deed and promissory note for the balance, $141,254.15, payable at the rate of $30,000 per year. Prior to this date the Vaughans paid $5,000 into the escrow, plus an agreed tax payment of $77.45, and deposited the trust deed and note duly executed; and the Wongs deposited their grant deed conveying to the Vaughans the property involved. The escrow instructions contained a "time is of the essence" clause and provided that in the event the escrow was not in "condition to close by May 29, 1946, any party who then shall have fully complied with his instructions may, in writing, demand the return of his money and/or property." (The accompanying agreement between the parties contemplated the erection of a substantial building on the property by the Vaughans.)

The escrow was not in condition to be closed by May 29, but on June 18 the Title Company notified the Vaughans that on receipt of the unpaid balance of $30,000, it was ready to issue its policy of title insurance. On July 1, the Vaughans paid an additional $5,000 into escrow. On July 15 they executed and delivered to the Title Company with the Wongs' approval, amended instructions directing the company to endorse interest paid on the note to June 18, 1946, in lieu of the previous instructions to endorse interest paid thereon to date of the close of escrow.

No more money was paid into escrow, and this action was filed on August 27, 1946, by the Wongs to declare a forfeiture of the escrow money. They prevailed on the trial, but the judgment was reversed in Chin Ott Wong v. Title Ins. & Trust Co., supra, 89 Cal.App.2d 183, at page 188, 200 P.2d 541, at page 544, with the court stating that their "complaint affirmatively shows that the transaction was still pending with plaintiff's approval on July 15th which is long after May 29th the date originally agreed upon by the parties within which the agreement was to have been performed. The complaint contains no allegation that a later and different date was agreed upon by the parties to which the 'Time is of the essence' condition was to apply. * * * It is well settled that 'Where time is made of the essence of the contract for the payment of * * * of money, and this covenant has been waived by the acceptance of * * * moneys after [the same is] due, and with knowledge of the facts, such conduct will be regarded as creating "such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it."'"

Thereafter the Wongs amended one paragraph of their complaint to allege that on August 1, 5, and 9, 1946, they demanded of Vaughan, Sr., payment of the total sum due in the escrow; and that on August 9, 1946, they notified him that "thereafter they intended to and would require strict compliance by [him] with the conditions of his agreement in said escrow instructions and that in the event that he * * * failed to pay said total sum of $35,077.45 on or prior to August 26, 1946, [they] intended to and would thereupon strictly enforce their rights under said escrow instructions and would thereupon file an action in court for the enforcement thereof." The Vaughans filed an answer to the amended complaint and a cross-complaint for money had and received. The case was tried and submitted. Thereafter the court, upon its own motion, vacated the order of submission and set a date to take "further evidence upon the issue of the damage suffered by plaintiff[s] and the price for which the property was sold, and to consider the amending of the pleadings to conform to the proof." When the matter came on for hearing, plaintiffs objected upon the ground that the court had no jurisdiction to reopen the cause after submission and that the introduction of any further evidence on the matter of damages would be beyond the issues as framed by the pleadings. The objection was overruled. Plaintiffs declined to submit additional evidence on the damage question or to amend their pleadings. The Vaughans, however, introduced evidence showing that the property involved had been sold for more than the contract price with the Wongs. Thereupon the court found that plaintiffs had sustained no damage by reason of the Vaughans' failure to complete the escrow transaction in question. Accordingly, judgment was entered against plaintiffs on their complaint and in favor of defendants Vaughan on their cross-complaint as above indicated.

[1-3] Plaintiffs first challenge the sufficiency of the evidence to support the finding that while plaintiffs' agent Irwin and Vaughan, Sr., had various telephone conversations between May 29 and August 28, 1946, regarding proposed modifications of the escrow instructions and the payment of the sum due thereon, "at no time did the Wongs, or their agent Irwin, inform Vaughan, Sr., that they would insist upon a strict performance of the provision in the Escrow Instructions making time the essence thereof," nor "did they give to Vaughan, Sr., a definite notice whereby another date for the performance of the contract was fixed."

Plaintiffs' agent Irwin testified that according to the notations in his office datebook, he had telephone conversations with Vaughan, Sr., regarding completion of the escrow on July 8, July 30, and August 5; and that on August 9 Vaughan telephoned and Irwin told him that Mr. Wong would not wait any longer for performance of the contract, that if Vaughan did not pay "the balance in full in escrow by Monday, August 26," Mr. Wong would "file suit * * * immediately thereafter to enforce whatever rights he may have under the purchase contract" and would "demand strict compliance."

Vaughan, Sr., testified that prior to the commencement of this action he had never talked personally or by telephone to Irwin or the Wongs. He further testified that Irwin at no time had informed him that he would be required to comply with the terms of the escrow instructions by August 26; that he, Vaughan, left Los Angeles for Catalina on July 31, 1946, and remained there until August 16, 1946, on a job of installing certain electrical equipment; and that during that period in Catalina he had not talked to Irwin or anyone else by telephone. Vaughan, Jr., as a witness on behalf of defendants, testified that he was associated in the electrical business with his father; that he had no interest in the property transaction in question; that his father was in Catalina for the length of time mentioned, and that during that period when Irwin telephoned for his father, he told Irwin that his father was out of town but did not say where he had gone because that was not his business practice. Defendants Vaughan introduced into evidence certain time cards showing work done in Catalina by Vaughan, Sr., between August 1 and 16, 1946, and a steamship freight bill showing the shipment of Vaughan's tools from Catalina to Los Angeles on August 16, 1946.

Questions as to the credibility of the witnesses and the weight to be given their testimony are for the trier of the facts, who may disbelieve a portion of a witness' testimony and yet believe other portions thereof. Robinson v. Robinson, 159 Cal. 203, 204, 113 P. 155; Pedrow v. Federoff, 77 Cal.App. 164, 172–173, 247 P. 212; also Turner v. Whittel, 2 Cal.App.2d 585, 588, 38 P.2d 835. While the court here apparently believed Irwin's testimony that from time to time between May 29 and August 28, 1946, he had telephone conversations with Vaughan, Sr., the court was not bound thereby to accredit also the substance of those conversations as declared by Irwin. The only conversation claimed to constitute specific notice and to fix a definite time for performance of the contract was that of August 9. Vaughan, Sr., not only denied that he had ever been given notice to perform by another certain date, but stated that on said August 9, the day Irwin claimed to have given the required notice, he, Vaughan, was in Catalina and was not in communication with any one in Los Angeles by telephone. Confronted with this conflict in the evidence, it was for the trial court to determine whether or not Vaughan, Sr., had ever been given definite notice to perform the contract by another specific date. The trial court found that no such notice had been given. Such finding is sustained by the evidence and is binding upon this court. Rolland v. Porterfield, 183 Cal. 466, 470, 191 P. 913.

[4] Most of the remaining contentions of plaintiff need not be considered in view of our conclusion that the evidence sustains the finding that no notice to perform the contract by a specific date was given. The complaint and the evidence clearly show that the transaction between the parties was still pending on July 15, 1946, with plaintiff's approval. This was long after the time limit set in the escrow instructions, and the "time is of the essence" clause contained therein must therefore be deemed to have been waived. Any right of forfeiture which may have existed was thus suspended until definite notice to perform the contract by a specific date was given. Chin Ott Wong v. Title Insurance & Trust Co., supra, 89 Cal.App.2d 183, 188, 200 P.2d 541, and cases there cited. In the absence of such notice plaintiff cannot, therefore, enforce a right of forfeiture, and the trial court properly determined that the Vaughans were entitled to prevail on their cross-complaint for restitution of the escrow payments.

[5] However, plaintiffs and the Title Company properly maintain that it was error to allow interest on the escrow payments. The judgment provides for the payment of interest from October 14, 1947, purportedly the date when the Title Company paid the escrow money to the Wongs. The record does not show any specified date when the Title Company in fact made such payment, but only that it was made after entry of the judgment in favor of the Wongs on the first trial. In refuting the Vaughans' claim that such payment by the Title Company constituted a conversion of the money, with interest chargeable from the date thereof (Civ.Code, § 3336), plaintiffs in their brief state that after reversal of the first judgment, they "returned said money to the Title Company who now retains it as custodian" pending final judgment in this case. These considerations, however, have no material significance. The court's order substituting the Vaughans as defendants in the action expressly discharged the Title Company from all liability to the parties except that all money and documents involved therein were to be retained by it and "paid, disbursed, delivered and disposed of * * * as may be ordered and adjudged by a final judgment." In their cross-complaint the Vaughans only sought a refund of the amount of their escrow

payments, $10,077.45, without any claim of interest, and the case was tried on the theory that the Title Company, as custodian of such principal sum, was only obligated to pay it to the prevailing party on disposition of the conflicting claims thereto by a "final judgment." Under the circumstances, the court erred in providing for the payment of interest prior to the time that the principal sum became due, Upton v. Gould, 64 Cal.App.2d 814, 817, 149 P.2d 731, and cases cited, and to that extent the judgment in favor of the Vaughans is excessive.

The judgment is therefore modified by striking therefrom the provision for interest on the sum of $10,077.45, and as so modified, the judgment is affirmed. Defendants and cross-complainants Vaughan will recover their costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice (dissenting).

Upon the grounds stated by the District Court of Appeal in an opinion authored by the late Justice Wilson and concurred in by Presiding Justice Moore and Justice McComb (Chan v. Title Ins. & Trust Co., Cal.App., 237 P.2d 53) I would reverse the judgment.

Rehearing denied; SCHAUER, J., dissenting.

39 Cal.2d 242

PEOPLE v. EVANS.

Cr. 5308.

Supreme Court of California, in Bank.

July 9, 1952.

Rehearing Denied Aug. 7, 1952.

Conviction in the Superior Court, Alameda County, Charles Wade Snook, J., of violation of statute prohibiting lewd or lascivious acts against children, and from an order denying a new trial defendant appealed. The Supreme Court, Carter, J., held that repetition by prosecution of improper questions and statements constituted prejudicial error in view of close question as to identity of assailant.

Order denying a new trial reversed.

Prior opinion 239 P.2d 666.

1. Criminal Law 🔑1037(1, 2)

In prosecution for lewd or lascivious acts against a child, repeatedly asking defendant and other witnesses leading questions, apparently for the sole purpose of placing uncorroborated testimony before the jury, constituted such misconduct as could not be purged of its harmful effect by an admonition, and hence it would be considered as a possible ground for reversal, though no objection was made or admonition requested on behalf of defendant. Pen.Code, § 288.

2. Indictment and Information 🔑122(2)

Where complaint against defendant charged only a violation of statute prohibiting lewd or lascivious acts against children, and he was bound over by committing magistrate only upon such charge, including in information additional count charging sex perversion was not error, in view of testimony of complaining witness showing that the two crimes were related to and connected with the transaction which was the basis for commitment order. Pen.Code, §§ 288, 288a.

3. Criminal Law 🔑823(15)

Giving awkwardly drawn instruction on reasonable doubt was not prejudicial, in view of other instructions.

4. Criminal Law 🔑957(5)

Affidavits of jurors that a map of city, which had not been received in evidence, was taken into jury room by another juror during jury's deliberations, were inadmissible to impeach jury's verdict. Pen.Code, § 1181, subd. 2.

5. Criminal Law 🔑957(5, 6)

Affidavits of jurors showing misconduct out of court or evidence received by jury from outside sources are inadmissible to impeach the verdict of jury.

6. Criminal Law 🔑706, 1171(1)

Repeated asking of questions relative to objectionable and prejudicial matter involving appeals to the passions and prejudices of jury constitutes reversible error.

7. Criminal Law ⚿719(1), 1171(3)

Statements by prosecution in its argument to jury as to facts not in evidence constitute prejudicial misconduct.

8. Criminal Law ⚿706

Where the crime charged is of itself sufficient to inflame the minds of the average person, such as in prosecution for lewd or lascivious acts against children, the rules as to admission of evidence and conduct of trial must be strictly observed, particularly where ability of complaining witness to describe her attacker so precisely is questionable. Pen.Code, § 288.

9. Criminal Law ⚿1159(4)

In prosecution for lewd or lascivious acts against a child, testimony of complaining witness, while not so inherently improbable as to be worthy of no belief, was open to attack on ground that it showed that she had been suggestively questioned and requestioned as to the crime by police. Pen.Code, § 288.

10. Criminal Law ⚿706, 1171(1)

Where the evidence in prosecution for lewd or lascivious acts against a child presented an extremely close question as to identity of defendant which was shown only by testimony of complaining witness, repeated questioning by prosecution presenting description of defendant precisely as he appeared in courtroom and details of offense in the form of questions put to defendant by police in effort to obtain an admission of guilt constituted prejudicial error.

◆

Popper & Burnstein, Fred B. Hart and Robert H. Kroninger, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant, John W. Evans, Jr., was convicted of a violation of Section 288 of the Penal Code, and also of a violation of Section 288a of the same code. The court granted a new trial on the 288a count, but denied defendant's motion for a new trial on the 288 violation. A third count, charging assault with a deadly weapon, was dismissed prior to trial. Judgment was suspended and defendant was placed on probation on the condition that he serve a nine months' sentence in the county jail. After hearing, it was determined that the defendant was not a sexual psychopath. The appeal is from the order denying a new trial on the conviction under Section 288 of the Penal Code.

The principal contentions raised on this appeal are the insufficiency of the evidence so far as the element of identification is concerned and prejudicial errors alleged to have occurred during the course of the trial.

It clearly appears from the record that the complaining witness, a female child of 10½ years, was accosted and molested in an Oakland public park about 6:00 p. m. on a Saturday evening (August 12, 1950) as she was leaving a swimming pool located there on her way home. According to her testimony, the man who accosted her pulled her behind a hill, disarranged her clothing and put his fingers in, and on, her private parts. She also complained that he exhibited his own sexual organs and attempted to force her to commit an unnatural act. She testified that he then drew a knife, telling her that she was to walk away and not look back or he would kill her. According to her story, the entire encounter took place in about five minutes. After leaving her assailant, the witness walked to a corner store where she first called the police who noted the time as 6:06 p. m. and then, a few minutes later, called her mother.

Identification of the Defendant:

Three days after the commission of the crime, the complaining witness was shown a picture of the defendant. This picture was on the top of a pile of pictures. She remembered having seen him some time prior to the day in question but was unable to remember where, or when, she had seen him. She admitted that she could have seen him almost any place.

An hour after having been shown the defendant's picture, she was taken to a room where the defendant was alone. She testified that at the time of the offense her assailant was wearing tan khaki pants with a zipper fly, a belt with the initial "W" on the buckle, and a yellow cable knit sweater with short sleeves. So far as the defendant's physical appearance was concerned, she testified that he was 5′ 11″ tall, weighed 187 pounds, and was 21 years of age. On cross-examination she said he could not have been 5–10″ tall, or 6′ 0″ tall, but was 5′ 11″. (The defendant is 5′ 11″ in height, 21 years of age, and, at the time of arrest, weighed 185 pounds.) The complaining witness testified that the man who accosted her had "goo on his hair, you know, slicked down." The record shows that the defendant owned khaki pants with a button fly, a yellow T shirt, a plain tan belt with no initial on the buckle; that he did not own, or have any reason to own, a buckle with the initial "W" thereon; that he did own a belt buckle with the initials "NMMI" (New Mexico Military Institute); that he wore no hair oil, nor did he own any. On the day in question, the defendant was wearing, together with khaki trousers and a yellow T shirt, the plain, uninitialed, web belt. He testified that the only time he wore the belt with the initials "NMMI" was when he was dressed up at school. The defendant testified that the khaki trousers and yellow T shirt was a common manner of dress in the neighborhood. This is corroborated by two witnesses who testified that they had each seen a boy, not the defendant, similarly dressed, at the time of the crime, in that neighborhood, walking rapidly away from the park. These other boys were seen at about 6:10 and 6:30 p. m.

Darlene Hatton, aged 15 years, testified that she had been swimming in the pool in the park in question, and that shortly before the time of the offense, the defendant had been outside the wire fence which enclosed the pool, a distance of approximately 16 feet, and had whistled at her. She testified that the man who whistled at her had slick, shiny hair "plastered" down, but she did not testify as to how he was dressed. She thought that it was either Thursday or Friday of the week following the offense (which had taken place on a Saturday) that the woman who owned a candy concession at the park had shown her the picture of the defendant and asked her if she had ever seen him before. A few hours after seeing the one picture—that of defendant—she was taken to a police line-up where she identified the defendant as the man whose picture she had seen and who had whistled at her the previous Saturday. She, too, testified that she had seen the defendant before the day in question "once or twice" at the Dimond Pool (the one here involved) but could not remember when she had seen him.

Defendant's brother testified that he and defense counsel, walking together, met the complaining witness and her mother in the courthouse just prior to the commencement of the trial and the attorney, pointing to defendant's brother, asked the child if she were still "sure that this is the man who did it", to which she replied that she was. At the trial the child denied having said so, but the mother admitted that the question had been asked and answered by the child, but said that the witness, Robert Evans, was not in her line of vision.

The complaining witness admitted having told the story to police officers and the prosecuting attorney about ten times. In describing the attack on her she used the term "private parts" and explained that the police officers had told her to use it; at the preliminary hearing, she had used the words "penis" and "vulva" and said at the trial that she had learned the words in a book her mother had given her but she didn't remember how long before her mother had given her the book.

Defendant's Alibi:

Defendant's story, which was corroborated by his grandmother and brother, showed that he had worked around his home, a distance of about nine or ten blocks from the park, until approximately 5:30 p. m. on that Saturday; that he then drove to the store for some groceries and there cashed a check; that he returned home at about 5:55 p. m. and was at dinner until 6:30 p. m. One of the employees of the grocery store corroborated the defendant's story that the check was cashed on the Saturday in question but did not know at what time it had been done. Defendant testified that he had been in school in New Mexico up until the first of June, 1950, and that he had remained at home from that time on. He testified that he had been in Dimond Park two or three times since his return from school; that he had not been there on the day in question; that he had been there within two or three weeks prior to August 12th.

Prejudicial Errors and Misconduct Occurring at the Trial:

Three days after the crime was committed, defendant, at the telephoned request of the police, went to the police station. He testified that at the time of the call he had been working on his radio with a small two-inch pocket knife which he put in his pocket when he left home; that when he arrived at the station, he remembered he had it with him and being afraid of having it found on his person since he did not know with what he was charged and having heard the officers mention a knife, he stuck it under the arch of his shoe with the open blade inserted in the heel. The knife was found there by the officers who searched him. It was later returned to him and was never put in evidence by the prosecution although a witness was called to testify to the incident and it was referred to as being of the same type and description as that carried by the man who attacked the complaining witness, although no evidence was offered either describing the knife carried by him or which would indicate that the one found on defendant's person was in any way connected with the attack. The knife was referred to in both the opening statement of the prosecution and in its closing argument as being the same type of knife carried by the girl's attacker. The girl herself was unable to describe the knife.

In addition to references to the knife, one of the witnesses, Dagneau, was questioned as follows: "Well now, at the time that the police officers received the information from you as to having seen this man at approximately 6:05, or thereabouts, they asked you whether or not he was about twenty years old, tall and very strong looking; brown hair, brown eyes, dark hair on his forearms, freckles on his face, brown shoes, sun tan pants and a yellow shirt, age about 20 or 21, height about five feet eleven, weight 185." This was the exact description of the defendant who was sitting in the courtroom. There had been no direct evidence as to the freckles, dark hair on the forearms, color of the eyes, etc. The witness was then asked if this was the description of the man the police were seeking to which he answered "Yes." The entire description was repeated a few questions later, and could only have had the effect of informing the jury that the police were looking for the defendant, and not for the girl's attacker, at the time they questioned the witness, Dagneau. The witness later testified that defendant was not the man he had seen running from the park although the man he had seen was wearing a yellow shirt of some type.

Several instances appear in the record where the prosecution asked leading questions apparently for the purpose of getting uncorroborated testimony before the jury. For example, the defendant, upon being questioned by the police, had refused to talk until after he had consulted with his father. Much stress is placed on defendant's refusal to talk until he had seen his father and one of the officers testified that when defendant was asked to confess the crime he had replied that "his father had always told him never to admit anything." On cross-examination, the prosecutor was permitted to ask defendant, over objection, "Do you remember that in that same conversation with Genevesino and Brown (police officers) Genevesino said, 'John, that little girl that pointed you out last night and said you were in Dimond Park last Saturday August the 12th around six p.m. and forced her head down and made her do something to you, had you seen her *prior to that Saturday*?' And at that time, you said, 'Yes, once before, I think.' Now, didn't he ask you that question and didn't you give that answer?" The defendant's answer was that he did not remember any such conversation. Another example of such questioning by the prosecution was one asked of the defendant, "* * * did you tell Officer Brown in response to his request that you would *tell him the truth about where it occurred* on August 12th in the Dimond Park? Did you say that you did not want to tell the truth of what happened until you had talked with your father because your father had told you never to admit anything?" Defendant denied having made any such statement and said that he had already told the officers the truth "about fifty other times too." Another question during defendant's cross-examination was, "Well, did they (the officers) mention the *fact* that the little girl *whom you had seen* had said *that you had a knife when you accosted her* in the Dimond Park", to which defendant replied that they "might have."

Endeavors were also made to elicit a statement from the defendant's brother that defense counsel had engaged him in an attempt to "trick" the complaining witness into identifying him as the defendant. When defense counsel objected, the court ruled it was proper cross-examination even though the witness twice answered that defense counsel had not so acted.

[1] In none of the instances above quoted did the prosecution make any attempt to prove the truth of the matters asserted in the questions. It seems apparent that the only purpose of the form of the questions was to get the statements before the jury. Although objections were not made to all of these questions, it would appear that the case was one in which an admonition would not have purged the harmful effect of the remarks. In cases where the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal where no objection was made or admonition requested on behalf of the accused, People v. Wynn, 44 Cal.App.2d 723, 112 P.2d 979; People v. Podwys, 6 Cal.App.2d 71, 44 P.2d 377; People v. Stafford, 108 Cal.App. 26, 290 P. 920; People v. George, 72 Cal.App. 124, 236 P. 934.

The Information:

[2] The complaint against defendant charged only a violation of Section 288 of the Penal Code, and he was bound over by the committing magistrate only upon that charge. The information, however, contained additional counts charging a violation of Section 288a of the Penal Code and assault with a deadly weapon. Defendant contends that the court was without jurisdiction to try him on the 288a count and that reading the information to the jury must have had a highly inflammatory effect and amounted to prejudicial error. He also contends that because of the inclusion of the violation of Section 288a in the information it is void. This matter was recently considered by this court in Parks v. Superior Court, 38 Cal.2d 609, 612, 241 P.2d 521, 522, wherein it was said: "In the decisions which outline the duties of the district attorney pursuant to the foregoing provisions of the law (Sec. 8, Art. I, California Constitution and sec. 739 of the Penal Code) there has been no departure from the proposition that the constitution protects a person from prosecution in the absence of a prior determination by either a magistrate or a grand jury that such action is justified. The legislative history and various claimed grounds of unconstitutionality of the provisions of former section 809 (now 739) were rather extensively treated in People v. Bird, 212 Cal. 632, 300 P. 23. The effect of the court's declarations of the constitutional operation of the section was to approve the filing of an information charging a different but related crime shown by the evidence taken before the magistrate bearing on the transaction involved in the commitment order. The court stated or plainly implied 212 Cal. at pp. 643–645, 300 P. 23, that an information would be contrary to the constitution if it designated a crime or crimes unrelated to or unconnected with the transaction which was the basis for the commitment order." The Parks case is controlling here inasmuch as the story told by the complaining

witness shows that the two crimes were related to and connected with the transaction which was the basis for the commitment order.

Instruction on "Reasonable Doubt":

[3] The defendant complains of the following instruction: "The defendant in a criminal case is not required to prove his innocence, but is presumed to be innocent until the contrary is proven, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, and if the evidence can reasonably be accounted for upon a theory which would admit of a defendant's innocence, he should not be convicted." There can be no question but that this instruction is inartistically and awkwardly drawn and, in the absence of any other instruction on the subject, it would be difficult to tell what its confusing or prejudicial effect would be. In the instant case, however, following the above quoted instruction, the court told the jury that: "The effect of a presumption of innocence is only to place upon the State the burden of proving a defendant guilty beyond a reasonable doubt." This was followed by the orthodox instruction on the meaning of "reasonable doubt."

Jurors' Affidavits:

Two jurors produced affidavits that one of the jury, other than themselves, had taken a map of the city of Oakland in the jury room during the discussion of the jury. This map had not been received in evidence during the trial. The defendant contends that it was error to deny his motion for a new trial based on this evidence. The court refused to admit the affidavits in evidence, but ordered them filed. Defendant maintains that the rule declaring affidavits of jurors incompetent does not apply where they are used to show that the jury has received evidence out of court (other than a view of the premises) and that this is mentioned as a separate ground for granting a new trial in Subdivision 2 of Section 1181 of the Penal Code.

[4, 5] There is no merit in this contention since the affidavits are introduced to impeach the verdict of the jury whether they show misconduct or evidence received out of court. In People v. Gidney, 10 Cal.2d 138, 146, 73 P.2d 1186, 1191, it was expressly held that affidavits of jurors showing misconduct out of court "or evidence received by them from outside sources" have been refused admission.

This case presents an extremely close question as to the identity of the defendant. The child's testimony describing her assailant with such exactitude raises a doubt as to whether or not she had been coached in her lines. When this "suspect" testimony is considered with the improper line of questioning on the part of the prosecution it may very well have led the jury to its conclusion that the defendant was guilty. Several times during the trial, the jury heard the prosecution describe the precise appearance of the defendant as he sat in the courtroom; it heard the words of police officers describing a particularly vile crime put in the form of questions to defendant in an attempt to gain from him an admission. The repetitious questions setting forth defendant's exact description could have had no other effect upon the jurors than to impress indelibly upon their minds the fact that the police had been looking for the defendant, not the unknown and unidentified man who molested the complaining witness. The statements made, in the guise of questions directed to defendant, in an effort to gain from him an admission could only have had one result, namely, that the jury would believe defendant had admitted the crime to the officers and was, on the trial, denying the truth of what he had previously said.

[6] The repeated asking of questions relative to objectionable and prejudicial matter which involved appeals to the passions and prejudices of the jury has been held to constitute reversible error. People v. Freitas, 34 Cal.App.2d 684, 94 P.2d 397; People v. Duvernay, 43 Cal.App.2d 823, 111 P.2d 659; People v. Wynn, 44 Cal.App.2d 723, 112 P.2d 979; People v. Lynch, 60 Cal.App.2d 133, 140 P.2d 418; People v. Williams, 104 Cal.App.2d 323, 231 P.2d 554.

[7] The same thing is true with respect to the references to the knife made by the prosecution. The knife found on defendant's person by the police was not in evidence and the complaining witness had been unable to describe the knife used by her assailant, yet the district attorney referred to defendant's knife as being the same type of knife carried by the girl's attacker. Statements of facts not in evidence by the prosecution in its argument to the jury has been held to constitute prejudicial misconduct. People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867; People v. Westcott, 86 Cal.App. 298, 260 P. 901; People v. Henderson, 4 Cal.2d 188, 48 P.2d 17; People v. Cook, 148 Cal. 334, 83 P. 43.

[8] In a case such as this where the crime charged is of itself sufficient to inflame the minds of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and conduct of the trial, People v. Adams, 14 Cal.2d 154, 167, 93 P.2d 146; People v. Putnam, 20 Cal.2d 885, 888, 129 P.2d 367; People v. Byrd, 88 Cal.App.2d 188, 190, 198 P.2d 561. It appears to us that even more care should be taken to protect the rights of the accused where the evidence as to the identity of the defendant leads one to conclude that a child of the age of the complaining witness, under the circumstances prevailing, would not have been able to describe her attacker so precisely. As was said in People v. Adams, [14 Cal.2d 154, 167, 93 P.2d 153], supra: "Errors committed either by the prosecution or by the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved."

[9] The only evidence presented as to the identity of the girl's assailant is the testimony of the complaining witness. While her testimony is not so inherently improbable as to be worthy of no belief, it is open to attack on the ground that it shows that she had been suggestively questioned and re-questioned as to the crime by the police. In connection therewith, it can hardly be said to be in accord with principles of justice and fair play to show a complaining witness the picture of one man and then take her into a room where that man is the only occupant.

[10] It must be concluded that where, as here, the case is one involving a crime of such an inflammatory character and the evidence on the issue of identity so closely balanced, the errors set forth could not have had any other effect upon the jury than to tip the scales against the accused.

The order denying a new trial is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

39 Cal.2d 374

ERICKSEN v. SOUTHERN PACIFIC CO.

S. F. 18478.

Supreme Court of California, in Bank.

July 31, 1952.

Rehearing Denied Aug. 28, 1952.

Action under Federal Employers' Liability Act by Ove E. Ericksen against the Southern Pacific Company for crushed heel bone which plaintiff suffered when he slipped on foreign object after he had inspected for defendant railroad ties which defendant knew to have been inconveniently placed by lumber company on lumber company dock. The Superior Court, San Francisco County, Lile T. Jacks, J., entered judgment on verdict for plaintiff, and defendant appealed. The Supreme Court, Shenk, J., held that fact that defendant was not in control of the premises in which the injury occurred did not absolve it from liability.

Judgment affirmed.

Edmonds, Schauer, and Spence, JJ., dissented.

Prior opinion, Cal.App., 234 P.2d 279.

1. Commerce ⇨27(5)

Under Federal Employers' Liability Act, an employee is deemed to have been employed by a carrier engaged in interstate commerce when the employee's duties are shown to have had the required effect on such commerce. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

2. Commerce ⇨27(5)

It is not necessary that an employee of a carrier be a "railroader" in order to recover for injuries under Federal Employers' Liability Act since Act is made applicable to any employees whose duties further interstate commerce or in any way directly or closely and substantially affect such commerce. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

3. Commerce ⇨27(8)

Railroad employee who traveled in several states inspecting, on premises of lumber companies, railroad ties which were then purchased by railroad and shipped across state lines for creosoting or to be placed in railroad tracks carrying interstate commerce, was doing work in furtherance of interstate commerce, within Federal Employers' Liability Act. Federal Employer's Liability Act, § 1, 45 U.S.C.A. § 51.

4. Master and Servant ⇨286(3)

In action under Federal Employers' Liability Act by railroad tie inspector for crushed heel suffered on lumber company dock when he slipped on foreign object as he attempted to regain balance after suspending himself off of dock to inspect ties stacked to edge of dock, whether premises were unsafe because of foreign object, the existence of which could not have been prevented by railroad by exercise of due care, or whether they were unsafe because ties were inconveniently placed at edge of dock and could have been made safe by railroad before plaintiff was required to work there, were questions for jury. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

5. Master and Servant ⇨217(1)

Under Federal Employers' Liability Act, employee's knowledge of unsafe nature of premises does not relieve employer of liability for injuries which occur as result of such unsafe premises. Federal Employers' Liability Act, § 4, 45 U.S.C.A. § 54.

6. Courts ⇨89

State court decisions in applying common law principles are not controlling in the presence of a clear and plain duty under the Federal Employers' Liability Act. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

7. Master and Servant ⇨106(1)

In cases of known dangerous premises belonging to a third party, the absence of direct control over the premises by a carrier does not absolve carrier from liability under Federal Employers' Liability Act for injuries sustained by employees as a result of dangerous premises. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

8. Master and Servant ⇨106(1)

Where railroad tie inspector, who had complained to railroad about inconvenience of inspecting ties which were piled to edge of particular lumber company's dock, crushed heel as result of ties being again so placed, fact that dock was under control of lumber company and not of railroad did not absolve railroad from liability for the injury, under Federal Employers' Liability Act. Federal Employers' Liability Act, § 4, 45 U.S.C.A. § 54.

9. Appeal and Error ⇨1004(1)

Where it was not established as a matter of law that injured railroad employee had been guilty of contributory negligence, amount of verdict could not be reappraised on appeal on basis of provision of Federal Employers' Liability Act which requires that awards must be diminished in proportion to contributory negligence of employee. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

10. Master and Servant ⇨289(17)

Whether railroad tie inspector, who made claim under Federal Employers' Liability Act for injury which occurred when he inspected ties piled to edge of dock by balancing himself on one foot with other foot in air and one hand braced against pile of ties, was contributorily negligent in the manner in which he attempted to inspect ties, was question for jury. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

11. Damages ⚷132(6)

Award of $18,000, $3000 of which was for wages lost, to 64 year old railroad tie inspector whose crushed heel bone had to be operated on twice and was eventually fused with other bones for purpose of relieving pain but with result of placing 25 per cent limitation on up and down motion of foot and 50 per cent limitation on the inward and outward turning of the foot, was not excessive.

12. Appeal and Error ⚷1004(3)

In suit under Federal Employers' Liability Act, amount of damages fixed by jury and thereafter approved by trial court would not be disturbed on appeal unless it was so disproportionate to any reasonable limit of compensation as to indicate passion, prejudice, or corruption of triers of facts. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

Dunne, Dunne & Phelps, R. Mitchell S. Boyd and A. B. Dunne, San Francisco, for appellant.

Leo Fried and William P. Callahan, San Francisco, for respondent.

SHENK, Justice.

The defendant Southern Pacific Company appeals from a judgment on a verdict awarding the plaintiff Ove E. Ericksen $18,000 damages for personal injuries in an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, for failure to provide the plaintiff with a safe place to work.

The plaintiff was employed by the defendant railroad company as a lumber inspector. It was his duty to inspect lumber on the premises of various lumber companies in Washington and Oregon and accept or reject it for shipment to the defendant. Railroad ties which he inspected would be shipped to various states. Some would be used for the building of new tracks and some for the repair of old. Some would be first sent to California for creosoting; others would be immediately used in an untreated state.

On June 17, 1947, the plaintiff was inspecting ties on the loading dock of an Oregon lumber company. The ties that he approved were being loaded in defendant's freight car standing alongside the dock. The ties being inspected were so piled that the ends of some were even with the edge of the dock while others extended beyond it. The plaintiff stood on the dock beside the pile. He then leaned over the edge in order to inspect the ends, standing on his right foot, holding his right hand against the pile, with his left foot in midair. He attempted to return to an upright position. While still off balance he set his left foot on the dock, touching some foreign object on the dock, possibly a pebble or piece of bark. His foot twisted and he fell, injuring his ankle.

The plaintiff testified that on other docks it was customary to keep the lumber away from the edge of the dock so that it could be readily checked. He further declared that he had almost fallen in making a previous inspection at this dock and had complained to his superior that not enough room was left at this particular location.

The applicability of the Federal Employers' Liability Act is brought into question. It provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set

> forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." 45 U.S.C.A. § 51.

[1] It is unnecessary to discuss the nature of the defendant employer's activities. When the employee's duties are shown to have had the required effect on interstate commerce he is "deemed" to have been employed by a carrier engaged in that commerce. The decision in Howard v. Illinois C. R. Co. (Brooks v. Southern Pac. Co.) 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297, casts no doubt on the constitutionality of such a rule. A similar statute was there held unconstitutional because it failed to require that the activities of either the employee or the employer affect interstate commerce. Such a requirement is clearly a part of the present statute as to the duties of the employee. This rule is designed, in part, to eliminate the necessity of determining whether an employee was engaged in interstate commerce at the moment of his injury. Southern Pac. Co. v. Industrial A. C., 19 Cal.2d 271, 120 P.2d 880. But there is no indication that this was intended to be its sole effect.

[2] The defendant contends that the Act does not apply to the plaintiff because he is not a "railroader" exposed to the risks peculiar to railroading. The Act furnishes a broader definition of those eligible to its benefits. It is made applicable to any employee whose duties further interstate commerce "or shall, in any way directly or closely and substantially" affect such commerce. 45 U.S.C.A. § 51.

No decision relied upon by the defendant which has excluded an employee from coverage under the Act in its present form deals with the question whether one performing the particular type of work done by the plaintiff falls within this definition. None suggests a test of any greater precision or ease of application to the present case than the words of the statute itself. In Holl v. Southern Pacific Company, D.C., 71 F.Supp. 21, 24, employees who have been held covered by the Act were distinguished from those not entitled to its protection on the ground that "* * * each was furthering, i. e., promoting or helping along, present or future interstate commerce." In Thomson v. Industrial Commission, 380 Ill. 386, 393, 44 N.E.2d 19, 23, the court similarly did no more than rephrase the words of the statute by saying that "* * * the test must be whether the activity in which the employee is engaged at the time of the accident, directly or closely and substantially affects interstate commerce." See also Lawrence v. Rutland Railroad Co., 112 Vt. 523, 526, 28 A.2d 488, 143 A.L.R. 476.

[3] It has been held that work on new tracks not yet in service is not covered by the Act, Moser v. Union Pacific R. R. Co., 65 Idaho 479, 147 P.2d 336, 153 A.L.R. 341. The ties inspected by the plaintiff were not destined solely for such a use. Some were immediately transported across state lines and placed in tracks carrying interstate commerce, others were placed in such tracks after being taken to another state for creosoting, and the plaintiff himself crossed state lines in the performance of his services. It is reasonable to conclude that his duties satisfy the statutory requirement that they be in furtherance of interstate commerce.

[4] It is argued on behalf of the defendant that negligence on its part was not established. It may be assumed that the jury could have concluded that the premises were unsafe only because of the presence of a foreign object on the dock and that the exercise of reasonable care did not require the defendant to prevent the existence of such a condition. That conclusion is not compelled as a matter of law. The question was one for the jury to determine.

Under the evidence the jury was entitled to conclude that the plaintiff was required to perform the duties of a tie inspector in a place where the defendant knew that there was danger of a fall because of the inconvenient location of the ties; that if the defendant had been exercising reasonable care to provide the plaintiff with a safe place to work it would not have required him to work there; that the inconvenient location of the ties was the cause of the plaintiff's injury since it forced him to assume an awkward, off-balance position likely to result in a fall; and that the defendant therefore breached his duty to the plaintiff to furnish a safe place in which to work.

[5] The plaintiff's knowledge of the unsafe nature of the premises does not relieve the defendant of liability. Since 1939 the defense of assumption of risk has been barred under the Act. 45 U.S.C.A. § 54.* No subsequent decision has been cited which as a matter of law relieves an employer from liability for injuries due to dangers known to the employer simply because those dangers were also known to the employee.

The defendant asserts that since it did not own the premises it had no control over them and is therefore not liable for the injury sustained. The case of Lang v. Lilley & Thurston Co., 20 Cal.App. 223, 230, 128 P. 1028, 1030, is relied on. There it was said that, "The principle underlying the decisions relating to the duty of the employer to furnish a safe place in which the employé is put to work is that the employer cannot be justly charged with negligence as to matters over which he has no control." See also Thompson v. Atchison, T. & S. F. Ry. Co., 96 Cal.App.2d 974, 977, 217 P.2d 45. It is argued that lack of direct control of the premises freed the defendant from responsibility no matter how unsafe it knows a particular location to be so long as its employees are aware of the danger.

The defendant's argument is answered by Terminal Railroad Association of St. Louis v. Fitzjohn, 8 Cir., 165 F.2d 473, 476–477, 1 A.L.R.2d 290. In that case the defendant employer had furnished a switching crew which was operating a third party's switch engine on that party's premises over tracks constructed, maintained, and owned by that party. The premises were unsafe because, as the plaintiff switching crew foreman knew, light standards attached to a cement ramp wall were so close to a track that there was insufficient clearance to permit a trainman to ride the side ladder of a freight car past that point. This lack of clearance resulted in injury to the plaintiff as he rode by while clinging to the side of a car. The court affirmed a judgment for the plaintiff and held that the absence of ownership or control of the premises by the employer did not absolve it from liability for their unsafe condition.

No distinction may be drawn between the present problem and the Terminal case on the ground that there the employer had taken over control of the third party's premises for the conduct of the employer's business or that the third party furnished the instrumentalities. In neither case did the employer by virtue of the task it required the employee to perform acquire control over that portion of the premises which made them an unsafe place in which to work. There is no indication that the Terminal Railroad Association had control over the location of the cement wall and light standards. The plaintiff here could not avoid the dangerous situation. He was required by the employer to work on or near the stock piles which constituted the dangerous condition.

[6–8] The question therefore is whether the defendant is liable under the act when it knowingly required the plaintiff to work on unsafe premises of a third party and the employee also knew of the danger. State court decisions in applying common law principles are not controlling in the presence of a clear and plain duty under the act. It may be assumed that the common law non-liability doctrine in the absence of direct control applies where the employer has no notice or knowledge of unsafety or danger. But a conclusion of non-liability under the act where the employer requires the employee to work on premises known by the employer to be unsafe would amount to disapproval of the authorities which have recognized liability in such cases. No exception is made when the employee also knows of the unsafe condition but has no alternative except to work in the place of danger. The benefits of the act are not to be withheld in contravention of the plain intent of the act and contrary to its application in other cases. To do so would be to permit employers, otherwise subject to the act, with impunity to require their employees to work in places of known danger, so long as the unsafe premises are not under the employer's direct control. In cases of known dangerous premises belonging to the third party, the absence of direct control does not absolve the defendant from liability under the act.

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* 45 U.S.C.A. § 54: "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[9, 10] It is contended that the verdict is excessive in the light of alleged contributory negligence and because of asserted passion and prejudice on the part of the jury. The Act provides that while contributory negligence is not a bar to recovery, awards must be diminished in proportion to the contributory negligence of the plaintiff. 45 U.S.C.A. § 53. Reappraisal of the amount of the verdict on the basis of this provision may not be made inasmuch as it was not established as a matter of law that the plaintiff was guilty of contributory negligence. It was for the jury to determine whether the plaintiff's manner of inspecting ties constituted negligence on his part.

[11] In other respects the facts do not indicate that the verdict was excessive. The plaintiff's loss of wages during the estimated period of disability was shown to be approximately $3,000. The defendant argues that the remaining $15,000 represents compensation for pain and suffering and that this is an unreasonable appraisal of a partial disability due to the limitation of the lateral motion in the ankle of a 64 year old man whose life expectancy was estimated to be approximately 14 years. The injury consisted of a crushing fracture of the heel bone. A closed reduction with pin traction was performed in June, 1947, a week after the accident. The plaintiff remained in bed in traction for over a month. He left the hospital for several weeks in August returning five times in the following six months and spending a total of twenty days in the hospital. On returning to work in March he experienced "throbbing pain night and day" and was forced to use a cane. In November, 1948, his ankle became so sore that he was unable to work for a month and he again received hospital treatment. In March, 1950, a triple arthrodesis was performed to relieve the pain from which he had been suffering for two years. The three joints beneath the astragalus were fused into a single joint by the operation, destroying the side motion of the foot. There is a 25% limitation on the up and down motion of the foot, and a 50% limitation in turning the foot inward and outward. It was estimated at the time of the trial that the plaintiff would be disabled for about six months after this operation. Although the operation may eliminate the pain, the evidence shows that the plaintiff will have difficulty in walking on uneven ground and will have to wear special shoes.

[12] The claim that the verdict was excessive was passed upon and rejected by the trial court on the motion for a new trial. The amount of damages fixed by the jury and thereafter approved by the trial court will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice, or corruption on the part of the triers of the facts. Drotleff v. Renshaw, 34 Cal.2d 176, 180, 208 P.2d 969. There is no such showing.

The judgment is affirmed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concur.

EDMONDS, Justice (dissenting).

The affirmance of the judgment in favor of Ericksen is based upon the assumption that he was injured upon unsafe premises provided by Southern Pacific Company. This conclusion can be reached only by misinterpreting evidence which is virtually without conflict. Moreover, the decision improperly expands the scope of the Federal Employers' Liability Act by imposing liability without fault when the employee is assigned to duties upon the premises of a third party. This construction of the statute is not justified by its terms and is directly contrary to all of the decisions of the federal courts.

The most favorable inference for Ericksen which can be drawn from the evidence is that Southern Pacific required him to go upon another's premises after it had notice that ties had been placed thereon in a dangerous manner in the past. The record does not show that the premises were dangerous, nor that the injury resulted from any defect in the loading dock. The evidence is undisputed that Cheney Lumber Company, not Southern Pacific, provided Ericksen with the place to work and exercised absolute control over its employees who placed the ties on the loading dock. The jury could have found from the evidence that Ericksen's injuries were caused by the negligent operation of the premises, but any wrongful conduct was that of the lumber company or its agents, not of Southern Pacific.

It is now said that the negligence of the lumber company, which Southern Pacific could do nothing to avoid, constitutes a breach of Southern Pacific's duty to Ericksen. But there is no holding that Southern Pacific was negligent and that its negligence was the cause of Ericksen's injury and the record would support no such conclusion. Under these circumstances, the only way in which the judgment could be affirmed is by applying the Act as if it were a compensation statute imposing liability without fault and making the employer the insurer of its employee's safety.

Under the rule stated by the majority, the railroad would be responsible in damages to its employee for an accident upon a public thoroughfare caused by a negligent automobile driver if the employee were engaged in his employer's business. This is said to be the "plain intent of the act" which imposes liability for injury "resulting in whole or in part from the *negligence* of any of the officers, agents, or employees *of such carrier,* or by reason of any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C.A. § 51, emphasis added.

In proceedings under the statute, "the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the federal courts." Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U.S. 44, 46–47, 52 S.Ct. 45, 46, 76 L.Ed. 157; Graham v. Atchison, T. & S. F. Ry. Co., 9 Cir., 176 F.2d 819, 824; Anderson v. Atchison T. & S. F. Ry. Co., 31 Cal.2d 117, 121–122, 187 P.2d 729. "What constitutes negligence for the statute's purposes is a federal question, * * * Federal decisional law formulating and applying the concept governs." Urie v. Thompson, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282; Chicago M. & St. P. Ry. v. Coogan, 271 U.S. 472, 474, 46 S.Ct. 564, 70 L.Ed. 1041.

The Act does not make the employer an absolute insurer against personal injuries suffered by its employees, but imposes liability only for negligence. Wilkerson v. McCarthy, 336 U.S. 53, 61, 69 S.Ct. 413, 93 L.Ed. 497; Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 7 Cir., 191 F.2d 302, 306; Blunk v. Atchison, T. & S. F. Ry. Co., 97 Cal.App.2d 229, 234, 217 P.2d 494. "The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools, and appliances, but only to the duty of exercising reasonable care to that end." Baltimore & O. S. W. R. Co. v. Carroll, 280 U.S. 491, 496, 50 S.Ct. 182, 183, 74 L.Ed. 566. Under the Act, the duty which rests upon the employer is the common law duty of exercising reasonable care having regard to the circumstances and fault or negligence may not be inferred from the mere fact that the employee was injured. Missouri P. R. Co. v. Aeby, 275 U.S. 426, 430, 48 S.Ct. 177, 72 L.Ed. 351; Thompson v. Atchison, T. & S. F. Ry. Co., 96 Cal.App.2d 974, 977, 217 P.2d 45. "The plaintiff cannot recover in the absence of negligence on the part of defendant." Toledo, St. L. & W. R. Co. v. Allen, 276 U.S. 165, 168–169, 48 S.Ct. 215, 216, 72 L. Ed. 513.

As the court said in McGivern v. Northern Pac. Ry. Co., 8 Cir., 132 F.2d 213, 217, "danger in a particular phase of an employment does not necessarily imply negligence. * * * 'no employment is free from danger'. The defect to form the basis for a cause of action must be one which implies negligence on the part of the employer, or those for whose acts he is answerable." The present decision completely disregards these well settled rules of the federal courts.

At common law, "[t]he master's duty as to working conditions does not extend to the condition of premises not in his control, nor to the conduct of third persons with whom the servants are to be brought into contact during the course of the work, except that he has a duty to disclose dangerous conditions of which he should know." Rest., Agency, § 504; Bosarge v. Gaines, 5 Cir., 93 F.2d 800, 801; Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 569–570, 74 P. 147; Lang v. Lilley & Thurston Co., 20 Cal.App. 223, 230, 128 P. 1028. The element of control required by the common law for the imposition of liability upon the employer for injuries to an employee occurring upon the premises of a third party has been carried into the Act. It provides liability only for negligence of the employer's "officers, agents, or employees" or for defects in "its" property and equipment due to "its negligence".

The Senate Judiciary Committee report upon the 1939 amendment to the Act which abolished the defense of assumption of risk under the statute stated: "In justice, the master ought to be held liable for *injuries attributable to conditions under his control* when they are not such as a reasonable man ought to maintain in the circumstances." (Report of Senate Committee on Judiciary, 76th Cong., 1st Sess., Rept. No. 661, p. 4, emphasis added.) The committee's interpretation of the Act has been adopted by the Supreme Court of the United States. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610. In Wilkerson v. McCarthy, supra, the court said [336 U.S. 53, 61, 69 S.Ct. 417]: "And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances', * * *." The language of section 54 of the Act, there being considered, is identical to that of section 51 in requiring that the negligence be that "of the officers, agents, or employees of such carrier".

Although speaking vaguely of "the authorities which have recognized liability in such cases", the majority of this court have cited no decision applying the Act which has abrogated the common law rules of negligence. No such case can be found. For the imposition of liability without fault reliance is placed upon Terminal R. Ass'n of St. Louis v. Fitzjohn, 8 Cir., 165 F.2d 473, 476–477, 1 A.L.R.2d 290, which, upon its facts, is clearly distinguishable from Ericksen's situation. There, the employer had taken over the instrumentalities of a third party to perform the railroad's functions. The control of the ordnance plant was in the government, but the facilities used in the switching procedure were under the control of the railroad. The injury to the employee occurred because a railroad car, under the control of the employer, was pulled past a place known to it to be dangerous while the employee was in a position where he might be injured. Although the employer did not construct the premises nor control the location of the wall and light standards, it controlled the use of the instrumentality which caused the injury. In the present case, however, the employer had no control over either the premises or the operation of the instrumentality causing the injury.

In the Terminal case the court said that "the fact that the premises where plaintiff was sent to work did not belong to and were not under the control of defendant did not absolve defendant from liability for their unsafe condition." Although this very broad language appears to support the decision in favor of Ericksen, it is directly contrary to the interpretation placed upon the Act by the Supreme Court of the United States, whose decisions upon this question are controlling. In addition, the statement was entirely unnecessary to the decision.

It has long been the rule that "where a railroad company permits an obstruction, of which it has actual or constructive knowledge to remain, on, over or near its tracks, and by reason of such obstruction its servant is injured, the company is liable, although the obstruction belongs to it, or is under the control of a third person." Sprickerhoff v. Baltimore & Ohio R. Co., 323 Ill.App. 340, 346, 55 N.E.2d 532, 535; Boston & M. R. R. v. Brown, 1 Cir., 218 F. 625, 627. Where obstructions exist on, over or near the tracks, it is the duty of the railroad toward its employees to give sufficient warning by means of telltales or other devices. See, generally, annotation in 79 A.L.R. 236. Even though the obstruction is owned and controlled by a third party, "[i]f the passage beneath it was not reasonably safe under all the circumstances, the railroad might still be negligent in continuing to permit the passage of trains beneath it while in such condition." Boston & M. R. R. v. Brown, supra; Humphfres v. Western Pac. Ry. Co., 173 Cal. 428, 433, 160 P. 415. The reason for the rule is obvious. Although the railroad may not control the obstruction, it controls the operation of its trains, which may be diverted to avoid the obstruction. The negligence does not consist of permitting the continuance of the obstruction, but lies in the operation of a train controlled by the railroad past a point which is unsafe because of the obstruction.

The rule is no different where the railroad is operating trains upon the tracks of another. In such case, the track and other instrumentalities which it is using are "its" for the purposes of the Act as much as if it were operating the road under lease. Campbell v. Canadian N. Ry. Co., 124 Minn. 245, 250, 144 N.W. 772. The sources of the employer's title to the instrumentalities in its control and use are of no concern to the employee and, "as between them, they are the tools of the master, and he is liable to the servant for their defects." Smith v. Memphis & L. R. R. Co., C.C., 18 F. 304, 310. Although the defect is not on property owned by the employer, if it is using the property in the conduct of its business and if, by exercising ordinary care, it could have remedied or repaired the condition, or warned the employee thereof, it is liable for failure to do so. Brum v. Wabash Ry. Co., 335 Mo. 876, 882–883, 74 S.W.2d 566. But in every case where liability has been imposed upon the employer for injury caused to the employee by a defect in the property or instrumentalities of another, the premises or tools have been under the control of the employer and in use by it in the conduct of its business. Such was the situation in the Terminal case. However, here the employer had no control of the premises or instrumentalities, which were used by Cheney Lumber Company exclusively in the conduct of its business.

The Terminal decision relies upon Albert Miller & Co. v. Wilkins, 7 Cir., 209 F. 582, American Machinery Co. v. Ferry, 141 Ky. 372, 132 S.W. 546, and Grand Trunk R. Co. v. Tennant, 1 Cir., 66 F. 922. In each of them, the defendant employer was in control of the instrumentalities being used in the performance of the work, although the work was being done upon the premises of a third party. In addition, the American Machinery and Grand Trunk cases also involved the duty of warning the employee of a danger upon the premises of the third party of which he did not know. The latter question is not here involved. The reliance of the Terminal case upon decisions stating the rule applicable when the employer controls the instrumentality being used, and its conformity with the general rule relating to obstructions near railroad tracks, clearly show that it is not authority in determining the rights of the parties where the employer has no control of the premises or instrumentalities.

For these reasons I would reverse the judgment and the order denying the motion for judgment notwithstanding the verdict and direct the trial court to enter its order granting said motion.

SCHAUER and SPENCE, JJ., concur.

Rehearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

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39 Cal.2d 327

CLIFFORD v. RUOCCO.

L. A. 22178.

Supreme Court of California

July 16, 1952.

Mary R. Clifford brought an action against R. T. Ruocco for injuries resulting when, as result of defendant's negligence, in automobile owned and driven by defendant collided with another automobile in intersection while defendant was driving plaintiff to work. The Superior Court, San Diego County, Joe L. Shell, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The Supreme Court, Gibson, C. J., held that $1500 damages awarded plaintiff was an inadequate award as a matter of law.

Judgment reversed.

Prior opinion, 235 P.2d 653.

1. Automobiles 🔑181(2)

Where driver of automobile receives a tangible benefit, monetary or otherwise, which is motivating influence for furnishing transportation to a rider, the rider is a "passenger" as distinguished from a guest, and driver is liable to passenger for injuries resulting from driver's ordinary negligence. Vehicle Code, § 403.

2. Damages 🔑130(4)

$1,500 damages awarded to automobile passenger who suffered scalp lacerations and bruises to side and leg, including a deep bruise of thigh, when automobile in which plaintiff was riding collided in intersection with another automobile, was an inadequate award as a matter of law where plaintiff incurred expenses for ambulance, hospital and medical service in amount of $1,159.42, and cost of necessary future surgical operation was estimated at $300, and plaintiff was confined to hospital for 24 days and suffered considerable pain and inconvenience for a year before action was brought, and there was evidence that plaintiff was likely to continue suffering for some time in future.

3. Appeal and Error 🔑1178(6)

Where evidence as to liability is overwhelming a retrial of action for injuries may be limited to issue of damages, but where evidence as to liability is in sharp and substantial conflict, and damages awarded are so grossly inadequate as to indicate a compromise on issues of liability and damages, case should be remanded for retrial of both issues.

4. Appeal and Error 🔑1178(6)

Where plaintiff in action for injuries resulting when, as result of defendant's negligence, automobile owned and driven by plaintiff's landlord collided with another automobile in intersection while defendant landlord was driving plaintiff to work, testified that plaintiff rented living accommodations from defendant only after defendant promised plaintiff that defendant would furnish transportation to and from plaintiff's place of employment, which, if true, would render defendant liable for ordinary negligence, and such evidence was corroborated, and defendant denied making such promise and stated he provided transportation gratuitously, and damages awarded were less than plaintiff's special damages and loss of earnings, case would be remanded on all issues rather than on issue of damages alone. Vehicle Code, § 403.

Edgar B. Hervey, San Diego, and Henry F. Walker, Los Angeles, for appellant.

McInnis & Hamilton and John W. McInnis, San Diego, for respondent.

GIBSON, Chief Justice.

Plaintiff was given judgment upon a jury verdict in an action for personal injuries arising out of an automobile collision. She takes this appeal, contending that the award of damages is inadequate and that the judgment is therefore unsupported by the evidence.

[1] Plaintiff rented living accommodations from defendant, and she testified that she did so with the understanding that he would provide her with transportation to and from her place of employment. While driving plaintiff to work one morning, defendant went through a stop light and collided with another car. As a result of the accident, plaintiff sustained injuries which required extensive medical treatment and hospital care. There is ample evidence that defendant's negligence was the proximate cause of the collision, but he claims that he did not agree to drive plaintiff to work and that she accepted the ride without giving compensation. The jury made a special finding that plaintiff was a passenger in defendant's car and not a guest,[1] and it returned a verdict in plaintiff's favor in the sum of $1,500. Plaintiff moved for a new trial on the ground that the amount of damages awarded was inadequate. The trial judge ruled that plaintiff's motion would be denied if, within ten days, defendant would file a consent to pay $2,000 in satisfaction of the judgment, but that the motion would be granted on all the issues if defendant failed to file a consent. Defendant filed a consent within the prescribed period, but plaintiff declined to take the increased amount in satisfaction of her claims. The court did not compel her to accept the additur, the motion for new trial was denied, and judgment was rendered on the verdict for $1,500. Cf. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604.

[2] The evidence establishes without contradiction that plaintiff suffered a scalp laceration and bruises to her side and leg, including a deep bruise of the thigh. A painful infection developed in her thigh, making it necessary for her doctor to incise the wound and drain the accumulated matter. Afterwards, adhesions formed between the skin tissue and the underlying muscles, causing plaintiff considerable discomfort and hindering her in the full use of her leg. An operation performed to remove the adhesions proved unsuccessful, and the area again became infected. She continued to suffer from pain and swelling in her leg up to the time of trial, and her doctor testified that there was a reasonable probability that another operation would be required in order to remedy this condition. Plaintiff incurred expenses for ambulance, hospital and medical service in the amount of $1,159.42, and the cost of the future operation was estimated at $300. In addition, her loss of earnings amounted to approximately $630. These items alone, which amounted to over $2,000, exceeded the $1,500 awarded by the jury. In addition, plaintiff sought recovery for pain and discomfort resulting from her injuries. She was confined to a hospital for 24 days, she experienced a considerable amount of pain and inconvenience for a year before the case came to trial, and there was evidence that she was likely to continue to suffer for some time in the future. Under these circumstances, it is clear that the award of damages was inadequate as a matter of law, and the judgment must be reversed.

[3] We must next determine whether the case should be remanded on all the issues or on the issue of damages alone. It has been held that on an appeal from a judgment where the evidence as to liability is "overwhelming" a retrial may be limited to the issue of damages. Taylor v. Pole, 16 Cal.2d 668, 675, 107 P.2d 614; cf. Crandall v. McGrath, 51 Cal.App.2d 438, 440–442, 124 P.2d 858. Where, however, the evidence as to liability is in sharp and substantial conflict, and the damages awarded are so grossly inadequate as to indicate a compromise on the issues of liability and damages, the case should be remanded for a retrial of both issues. Wilke v. Crofton, 34 Cal.2d 304, 310, 209 P.2d 790; Ben-

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[1] The designations "passenger" and "guest" have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 of the Vehicle Code from one carried gratuitously. Where the driver receives a tangible benefit, monetary or otherwise, which is the motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. Whitmore v. French, 37 Cal.2d 744, 746, 235 P.2d 3.

cich v. Market St. Ry. Co., 20 Cal.App.2d 518, 529–530, 67 P.2d 398; see also, Wallace v. Miller, 26 CalApp.2d 55, 58–59, 78 P.2d 745; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 10–11, 175 P. 26, 177 P. 845. A failure to allow for undisputed special damages and loss of earnings is one circumstance which the courts have considered as being some indication of a compromise verdict. See Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 529–530, 67 P.2d 398; see also, Woods v. Eitze, 94 Cal.App.2d 910, 915, 212 P.2d 12; Hughs v. Schwartz, 51 Cal.App.2d 362, 368–370, 124 P.2d 886.

[4] In the present case the evidence establishes that defendant's negligence was the proximate cause of plaintiff's injuries. It is not contended, however, that the evidence would support a finding that defendant was intoxicated or was guilty of wilful misconduct, and there is a sharp and substantial conflict in the evidence on the question of whether plaintiff paid compensation for the ride. See Vehicle Code, § 403. As we have seen, plaintiff testified that she rented living accommodations from defendant only after he assured her that he would furnish her with transportation to and from her place of employment, and there is other evidence which tends to corroborate her testimony. On the other hand, defendant denied having made such a promise and stated that he provided her with transportation merely as a gratuity.

In view of this conflict in the evidence, and considering that the damages awarded were less than plaintiff's undisputed special damages and loss of earnings, it would appear that the verdict was the result of a compromise on the issues of liability and damages, and substantial justice requires that the case be retried in its entirety.

The judgment is reversed.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of reversal but cannot agree with the reasoning of the majority on which it bases its conclusion that the action should be retried on all the issues. It is obvious that the majority has not analyzed the decisions which have given consideration to this problem.

From a study of the cases it is apparent that the function of the appellate court in determining whether or not a new trial should have been granted, and whether some or all of the issues should be retried, varies with what has happened in the trial court. This must be true if we are to follow the traditional rule relating to the function of the trial court in ruling on a motion for a new trial.

It must be remembered that in the case at bar the trial court denied plaintiff's motion for a new trial, after having stated that unless the defendant consented to an increase of $500 in the amount awarded to plaintiff, it would grant a new trial on all the issues. The defendant consented to this increase, but the plaintiff refused to accept the same, and the trial court thereupon denied plaintiff's motion for a new trial. The record before us, therefore, presents a question similar to that presented in Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398, cited in the majority opinion. There the trial court had denied plaintiff a new trial after a jury had returned a verdict in his favor for $5,000 on a second trial, when a verdict of $20,000 in favor of plaintiff had been awarded at a first trial, and a new trial granted. It is obvious that the appellate court there was confronted with the question as to whether or not the trial court had committed error in denying plaintiff's motion for a new trial which does not appear to have been limited to the issue of damages only, but the plaintiff asked the appellate court to reverse the judgment with directions that the case be retried on the issue of damages only. The opinion in the Bencich case was prepared by Mr. Justice Bray who was then sitting pro tem in the District Court of Appeal. It is a very able and scholarly opinion and correctly states the rule applicable to the questions presented in the case, and which are applicable to the case at bar. The difficulty with the reasoning of the majority in the case at bar is that it confuses the legal problems involved in a case such as this with the rule applicable to cases where the trial court has granted a motion for a new trial on the issue of damages only, as the majority opinion cites the cases of Hughes v. Schwartz, 51 Cal.App.2d 362, 124 P.2d 886, and Woods v. Eitze, 94 Cal.App.2d 910, 212 P.2d 12, as being governed by the same rule as the Bencich case. I will attempt to demonstrate the fallacy of such holding.

It must be conceded that the only statutory authority for a trial court to grant a new trial because of the inadequacy of the damages awarded is that such ground comes within the purview of insufficiency of the evidence to support the verdict or judgment set forth in subdivision 6 of section 657 of the Code of Civil Procedure. See 20 Cal.Jur. 104. It has been the traditional rule that if there is a conflict in the evidence, even though the evidence is overwhelmingly in favor of the party against whom the motion is granted, the order of the trial court granting a new trial on insufficiency of the evidence will not be disturbed on appeal, Brignoli v. Seaboard Transportation Co., 29 Cal.2d 782, 791, 178 P.2d 445; Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465; Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689. Such being the rule where a new trial is granted on the insufficiency of the evidence, and the same rule being applicable to a limited new trial, or a new trial on certain issues only, which is likewise authorized by section 657 of the Code of Civil Procedure, it should follow in the latter type of cases that if there is evidence which supports the conclusion of the trial court as to inadequacy of the damages awarded, its conclusion in such a case should likewise not be disturbed by an appellate court. This is the uniform rule which has been adopted and followed by the appellate courts of this state with very few exceptions, as will appear from the following citations. Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680; People ex rel. Department of Public Works v. McCullough, 100 Cal.App.2d 101, 223 P.2d 37; Ona v. Reachi, 105 Cal.App.2d 758, 233 P.2d 949; County of Los Angeles v. Bitter, 103 Cal.App.2d 385, 229 P.2d 466; Perry v. Fowler, 102 Cal.App.2d 808, 229 P.2d 46; Parks v. Dexter, 100 Cal.App.2d 521, 224 P.2d 121; Estate of Everts, 163 Cal. 449, 125 P. 1058; Julius Levin Co. v. Sherwood & Sherwood, 55 Cal.App. 308, 203 P. 404; Rigall v. Lewis, 1 Cal.App.2d 737, 37 P.2d 97; Spencer v. Nelson, 84 Cal.App.2d 61, 190 P.2d 40; Wold v. League of Cross, 107 Cal.App. 344, 290 P. 460; Amore v. Di Resta, 125 Cal.App. 410, 13 P.2d 986; Johnstone v. Johnson, 38 Cal.App.2d 700, 102 P.2d 374; Adams v. Hildebrand, 51 Cal.App.2d 117, 124 P.2d 80; Crandall v. McGrath, 51 Cal.App.2d 438, 124 P.2d 858; Bauman v. San Francisco, 42 Cal.App.2d 114, 108 P.2d 989; Tumelty v. Peerless Stages, 96 Cal.App. 530, 274 P. 430; Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 219 P.2d 506; Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 146 P.2d 34; Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858; Henslee v. Fox, 25 Cal.App.2d 286, 77 P.2d 307.

The only departure from the settled rule announced in the above-cited cases, that an order of a trial court granting a motion for a new trial on the issue of damages only will not be disturbed on appeal in the absence of a gross, manifest and unmistakable abuse of discretion, is the case of Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745, where the District Court of Appeal obviously misapplied the rule in the Bencich case, supra, and held that the trial court committed an abuse of discretion in granting a new trial on the issue of damages only where the jury awarded plaintiff the amount of his hospital bill of $120.25 when the undisputed evidence showed that the damage to his automobile from the accident amounted to $203.64 and he also suffered from the effects of the injury.

I think it is obvious that the District Court of Appeal in the Wallace case became confused and applied the rule applicable to a case such as the Bencich case where the trial court had denied plaintiff's motion for a new trial and the appellate court had before it the same question which is presented in the case at bar, namely, whether upon a reversal of the judgment it should direct a new trial upon the issue of damages only. Of course the appellate court in the Wallace case did not have the benefit of the numerous authorities cited above, all of which hold that the ruling of a trial court granting a new trial on the issue of damages only will not be disturbed unless there is a gross, manifest and unmistakable abuse of discretion.

The majority also cite the case of Wilke v. Crofton, 34 Cal.2d 304, 209 P.2d 790, 793, as supporting its holding in the case at bar. While it is true that the Wilke case cites Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858; Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745; Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398 and Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845, for the proposition that "where, as here, for evidence as to liability is sharply conflicting and the damages awarded are so grossly inadequate as to indicate a compromise on the issues of liability and damages, the entire case should be re-examined", it is obvious that these cases have no application to a case tried before a judge without a jury as was the situation in the Wilke case. Obviously the reason for the rule stated in the Wallace case could not be applicable to a case tried before a judge without a jury. In the Wallace case the court said, 26 Cal.App.2d at page 58, 78 P.2d at page 747: "'The verdict of the jury which found, in effect, that defendants were guilty of negligence and that plaintiff was free from contributory negligence and yet allowed damages which were grossly inadequate, furnishes convincing proof as said in the Donnatin Case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, [27] 177 P. 845, "that in order to reach an agreement, the verdict was the result of unwarranted concessions of convictions made by each of two opposing factions of the jury, one of which conscientiously believed that defendant should prevail in the action, and the other equally conscientious in the opinion that plaintiff should recover damages commensurate with the injuries sustained. It is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged" (or, in our case, the additional issue that plaintiff was guilty of contributory negligence), "nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made. * * * It would work a grave injustice upon defendant to force it to a new trial of the issue as to damages only, with the issue as to liability, upon which no verdict other than in name had been rendered, forever closed against any inquiry." Just how much the jury was influenced by the instructions upon imputed negligence it is impossible to say. It may well be that the jury did not believe there was any contributory negligence upon the part of the plaintiff, but some jurors might also have believed under the evidence that the driver of the apparatus was negligent and that his negligence as a matter of law should be imputed to plaintiff, and in this mistaken belief they might have surrendered their convictions as to the amount of damages they should award. On the other hand, it is possible under the evidence that some of the jurors believed that the driver was negligent and that plaintiff contributed proximately to the accident by, with knowledge of such negligence on the part of the driver and of the conditions constituting such negligence, failing to warn the driver or persuade him to stop or slow up, and such jurors surrendered their convictions in this behalf in exchange for a verdict for low damages. In view of this uncertainty and the fact that clearly something other than the evidence on the question of damages must have actuated the jury, or some of them in arriving at such a low verdict, substantial justice requires that (as said in the Donnatin Case, supra, 38 Cal. App. 8 at page 11, 175 P. 26 [at page 27], 177 P. 845), "* * * what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries."'" Certainly it cannot logically be said that a trial judge awarded inadequate damages because he entertained conflicting views on the issue of liability. It is therefore apparent that the Wilke case gives no support to the reasoning or conclusion of the majority in the case at bar.

It appears from the record before us both from the evidence and the statements of the trial judge that the damages suffered by plaintiff were far greater than the amount awarded by the verdict of the jury, and therefore the damages awarded are inadequate as a matter of law. In view of such state of the record, a reversal is mandatory. Since the trial court denied plaintiff's motion for a new trial and there was a conflict in the evidence on the issue of liability, it is not for this court to say that the case should be retried on the issue of damages only, as it is only in those cases where, as a matter of law, it may be said that the defendant's liability has been established, we may reverse with directions to retry the issue of damages only. Hence, I concur in the reversal of the judgment which sets the case at large in the trial court. The situation would be different had the trial court granted a new trial on the issue of damages only. In such situation the provisions of section 657 of the Code of Civil Procedure and the rule announced in the cases which I have cited hereinabove with respect to the discretion of the trial court, would be applicable, and an order granting such limited new trial should be affirmed if there is any substantial evidence to support the conclusion that the defendant was liable and the damages awarded were inadequate.

39 Cal.2d 260

FASCINATION, Inc. v. HOOVER et al.

L. A. 22232.

Supreme Court of California, in Bank.

July 11, 1952.

Action by Fascination, Incorporated, against Edward G. Hoover, and others, as municipal officials, to compel defendants to issue license to plaintiff to conduct amusement business consisting of game called "fascination". The Superior Court, Los Angeles County, Albert F. Ross, J., directed issuance of peremptory writ of mandate, and defendants appealed. The Supreme Court, Carter, J., held that when it appeared that municipal officials had examined and played game for determination whether it was game of skill or chance, and had concluded that it was game of chance, admission of evidence on question whether game was one of skill or chance was prejudicially erroneous, but court was confined to examination of matters considered and examined by officials in arriving at their decision.

Judgment reversed.

Prior opinion 237 P.2d 722.

1. Mandamus ⇨168(3), 187(9)

In mandamus action to compel city officials to issue license to plaintiff to conduct an amusement business for a game called "fascination", wherein it appeared that local officials had examined and played game and had concluded that it was a game of chance, admission of evidence on question whether game was one of skill or chance was prejudicial error in that trial court was limited to examination of matters considered by officials in arriving at their decision.

2. Mandamus ⇨172

Where plaintiff had applied for license to operate amusement business concerning certain game, and city officials had examined and played game and had concluded that it was a game of chance, and plaintiff brought mandamus to compel issuance of license, plaintiff was not entitled to trial de novo on question whether game was one of skill or chance, but court was limited to matters considered by city officials in arriving at their decision.

3. Appeal and Error ⇨931(5)

Where there has been a trial by the court without a jury it is ordinarily presumed that the court based its findings only upon admissible evidence.

4. Mandamus ⇨187(9)

In mandamus action to compel city officials to issue license to plaintiff to conduct an amusement business for a game called "fascination", wherein it appeared that city officials had examined and played game and had concluded that it was a game of chance, that court improperly admitted evidence on whether game was one of chance or skill, record established that court's judgment in mandamus was based to a considerable extent on such inadmissible evidence, and disclosed a prejudicial error.

5. Administrative Law and Procedure ⚷817

Where determinative powers are vested in a local administrative agency, and court finds its decision lacks evidentiary basis, or hearing was denied or it was otherwise erroneous, it is proper procedure to remand matter to agency for further and proper proceedings rather than for court to decide matter on merits.

6. Licenses ⚷22

Where city ordinance provided that when application for license to conduct business was made to tax collector it must refer same to officers in order that they might ascertain whether proposed business would comply with applicable laws and ordinances, and that collector should issue license upon written notice from officers that business would comply, license was required to be granted unless there was found cause for its denial, in which instance quasi judicial function was contemplated which required notice and hearing to applicant.

7. Administrative Law and Procedure ⚷470
Licenses ⚷22, 38

Where a statute contemplates a quasi judicial determination by an administrative agency that there be cause for refusal to grant license or revocation thereof, in absence of statute to contrary, license cannot be denied or revoked without hearing.

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Irving M. Smith, City Atty., Philip J. Brady and John R. Nimocks, Deputy City Attys., Long Beach, for appellants.

Fred N. Howser, Los Angeles, for respondent.

CARTER, Justice.

Defendants appeal from a judgment granting a writ of mandate commanding them to issue a license to plaintiff, a corporation, to conduct an amusement business consisting of a game called "fascination" in the city of Long Beach. Defendants are Hoover, the city tax collector, Dovey, chief of police, and Sutherland, city prosecutor.

There are certain ordinances of the City of Long Beach covering the issuance of licenses to operate amusement games and other businesses. It appears that before a person may engage in business in said city he must obtain a license therefor from the city tax collector and pay certain fees; if he operates the business without a license he is guilty of a misdemeanor. In order to obtain a license he must submit with his application "such information as the tax collector may reasonably require." Under section 6.100 of Ordinance C-2232 the collector "shall thereupon refer such application to the appropriate departments of the City government in order that it may be ascertained whether or not the business proposed to be conducted or the premises in which it is proposed to be conducted or the premises in which it is proposed to locate such business, will comply with applicable laws and ordinances. Upon receipt of written notice from such departments that such business and the location at which it is proposed to conduct the same will so comply, it shall be the duty of the tax collector to prepare and issue a license to the person making application therefor upon the payment of the proper fees. In the event that a particular department of the City government shall reject an application for the reason that such business or the location at which it is proposed to conduct the same will not so comply with applicable laws and ordinances, the tax collector shall not issue such license. If, at the time of making application therefor, any money has been paid in excess of that required for the expense of conducting an inspection by the City, the City Council shall, anything herein to the contrary notwithstanding, authorize the making of a refund to the applicant of such excess, upon receipt from the tax collector of information that such application has been rejected."

In compliance with the foregoing ordinance, plaintiff, on April 10, 1951, filed an application for a license to conduct an amusement business at a specified place and accompanied it with a description of the game to be operated. Each player is seated at a table and supplied with a ball which he endeavors to roll up a slope into holes in the table in front of him, with the aim of dropping balls in five holes in a row. The ball then returns to him. The player who first achieves that goal is the winner. He receives merchandise, replay coupons or merchandise certificates.

The chief of police, Dovey, and city prosecutor, Sutherland, were the appropriate officials to which the application should be submitted under section 6.100 to ascertain whether the business would violate any law and the tax collector submitted plaintiff's application to them. After an investigation by those officers (further discussed later herein) they found and recommended to the tax collector that the game would constitute a violation of "certain sections" of the state Penal Code. Accordingly, the tax collector denied plaintiff's application on May 29, 1951.

Thereafter, plaintiff commenced this action for a writ of mandate to compel the issuance of a license to operate the business charging that Fascination is a game of skill rather than of chance and violates no laws; and that Dovey and Sutherland "studied and considered" the game but acted arbitrarily and capriciously in denying the application. Defendants' answer denied the pertinent allegations of the complaint. The trial court found that the game was intended to be one of skill, not chance, and that defendants acted arbitrarily, making only a cursory examination of the game and without substantial evidence. Accordingly, judgment was entered directing the issuance of the writ and the appeal now considered was taken therefrom by defendants.

At the opening of the trial plaintiff took the position that evidence as to whether the game was one of chance or skill should be received. Defendants asserted that the only admissible evidence was the extent and nature of the investigation made by them to ascertain whether they had acted reasonably and on sufficient grounds in denying the application. The court agreed with plaintiff and evidence pro and con as to whether the game was one of skill or chance was admitted.

On the issue of the investigation by defendants, Dovey testified that plaintiff's secretary, Gibbs, wanted Dovey and Sutherland to examine the game on May 3, 1951. They, accompanied by Rope, an investigator from Sutherland's office, three police officers, and the city electrician, went to where the game was being erected. They were there about an hour and a half examining the game. Dovey and the others, except the electrician, played the game. Dovey rolled 30 balls, the others rolled many more. The equipment was inspected. The game was demonstrated by Gibbs and Dovey concluded it was a game of chance from "going it" himself and Gibbs' statement that he could not successfully operate it with the chevron out. (The chevron is a V shaped protuberance on the table immediately in front of the ball receiving holes and the ball must be rolled over it.) He tried to make the ball go into certain holes. His test as to whether the game could be characterized as one of skill or chance depended on which predominated. The chevron made it impossible to control the course of the ball. The police officers told him it was a game of chance. Sutherland testified substantially to the same effect and also that he submitted a game exactly similar to a university professor. Gibbs testified that at the May 3rd inspection he told them it was a game of skill; that the chevron made it more so; that by the exercise of skill the ball could be made to drop in a chosen hole; that the investigation took less than an hour; that Dovey and Sutherland rolled the ball seven or eight times; and that he was permitted to show them anything he wished about the game.

As before stated most of the record consists of evidence on the question of whether or not the game was one of skill or chance. Defendants contend that the admission of that evidence was error, their position being that the only evidence admissible was what was done and considered by Dovey and Sutherland in determining that question; that the finding that they acted arbitrarily is not supported by the evidence; and that in any event the matter should have been remanded to the officers to conduct a further and proper investigation if the one had was insufficient.

[1, 2] Putting aside for the moment the question of whether or not a notice and hearing in the traditional sense must be accorded the applicant for a license, it is clear that it was error to admit evidence in the trial court on the question of whether the game was one of skill or chance. Whether or not a notice and hearing is required, the applicant was not entitled to a trial de novo on the question inasmuch as we are dealing with a local administrative agency or officers. The authority to decide the question was vested in those officers. The trial court is limited to an examination of the matters considered and examined by the officers in arriving at their decision; to an ascertainment of whether such matters were sufficient to justify denying the license. Bank of America Nat. Trust & Savings Ass'n v. Mundo, 37 Cal.2d 1, 229 P.2d 345; Nishkian v. City of Long Beach, 103 Cal.App.2d 749, 230 P.2d 156; Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879; Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746; Los Angeles Gas & Elec. Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277; Hammond Lbr. Co. v. County of Los Angeles, 104 Cal.App. 235, 285 P. 896; La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 197 P.2d 218; see Southern Cal. Jockey Club v. California, etc., Racing Bd., 36 Cal.2d 167, 223 P.2d 1.

Plaintiff cites Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 237 P.2d 32, where the attack was on revocation of a zoning ordinance variance by a city council, and the court said that where there is pleading and proof that a local board acted arbitrarily, capriciously or fraudulently, the superior court will afford petitioner a trial de novo. If that means that such a trial may be granted where the question presented is the precise one the local agency had authority to decide and did decide, it is contrary to the foregoing authorities and must be disapproved. In Mitchell v. Morris, 94 Cal.App.2d 446, 210 P.2d 857, a permit to erect a residence on a lot was denied because of lack of access. The sole question there presented was the constitutionality of the ordinance, and the statement that the property owner must prove in court that his lot had adequate access in order to show the city agency's action was arbitrary, is dictum. What the court meant was, that plaintiff must show that the agency had no basis for the denial of the permit which embraced the conclusion that the access was adequate. The primary point involved in the Saks case was whether a hearing was accorded petitioner. But in a case where a hearing is required and none is had, the proper procedure, as will be discussed later herein, is to remand the case to the local agency with directions to afford petitioner a hearing, rather than a trial de novo. The true rule with respect to this problem was stated by this court in Bank of America v. Mundo, supra, 37 Cal.2d 1, 5, 229 P.2d 345, 347: "The question presented to the superior court in such an action is whether there was sufficient evidence of sufficient substantiality before the board to justify the finding * * * and in the absence of fraud or malicious or arbitrary use of its powers the board is the sole judge of questions of fact and of the values of property." That may mean in one sense that where there is no foundation for the agency's determination of the issue it is authorized to decide, its determination will be annulled because it is capricious and arbitrary; the court, however, is confined to the matters considered by the agency. In another sense it means that evidence may be introduced in court showing matters outside those before the agency when the record of the proceeding before the agency will not show such conduct on its part, such as fraud, or the denial of a proper hearing, if a hearing is required, etc. In those instances it must be contended that the agency acted arbitrarily, capriciously, fraudulently or maliciously. Even in those instances it may be necessary for the aggrieved person to present, if he can, such claims to the agency and make a record there, but we do not decide that question here. In the case at bar the precise issue, whether it be denominated law or fact or a mixture of the two, which the officers had the authority to determine, was whether plaintiff's proposed business would violate the law—whether it proposed to operate a game of chance. The evidence admitted at the trial was aimed at that same question, an issue upon which a trial de novo could not be had. Plaintiff and the trial court seemed to think that it could not be determined by the court whether the action by the officials was arbitrary or capricious unless the court took evidence on the issue decided by the officials. That view is wholly out of harmony with the principles heretofore enumerated. If it were accepted there could be a trial de novo in every case. It would be the same as if on a review of a record on appeal on the ground of insufficiency of the evidence to support the trial court's findings, the appellate court would receive evidence to ascertain whether the trial court acted arbitrarily, without sufficient evidence.

Defendants assert, however, that the error, if any, was not prejudicial. It clearly was. As seen from the foregoing discussion of the facts it is quite doubtful that the evidence is sufficient to support the court's finding that the officers had insufficient basis for their denial of the license, that the game was one of chance. In view of the result reached herein it is not necessary to pass upon that point.

At the outset of the trial and several times thereafter when a discussion arose between counsel and court as to the admissibility of evidence on whether the game was one of chance, the court expressed the view hereinabove stated to be erroneous, that is, that such evidence was admissible to ascertain if the officers acted arbitrarily. For illustration, when, at the beginning of the trial, the scope of the evidence was under discussion the trial court said: "There is not much question about the general principle of law but it seems to me in a case like this, you do have to take evidence about the merits, although you are not trying an issue. It is not a trial de novo, but trying the issues whether or not the officers of the board used their discretion arbitrarily. You almost have to see what the facts are about the issues they decided; not that you can substitute yours for them, if they made an honest determination. You may not agree with them but if you see that they could have reasonably come to the conclusion, then you had better let it stand, but it would be the same thing for instance on a license that should not be issued to anyone under twenty-one years of age, and the board refused on the ground that he was under twenty-one, that was their reason, and you come in here and they could show they made an investigation and following their investigation, they showed that he was under twenty-one, but if the other side wanted to produce evidence, they could show that he was over twenty-one. I think that evidence should be in, in answer to the other side, and whether they would have changed their idea or decision if it was known." Similar remarks were made on other occasions and finally in its "Memorandum of Decision" the court said: "The question as to whether the game is actually one of chance or skill, i. e. whether chance or skill predominates, is not a direct issue in this case. However I admitted evidence of the nature of the game, including that of the two experts who testified on opposing sides, as I feel that, in determining whether a sufficient hearing or investigation was had before the administrative decision was arrived at, not only the testimony of the expert relied on would be relevant, but also the testimony of other experts which might have been available to the investigators. Were handwriting an issue before an administrative agency and were it determined on the testimony of a bank teller who said it was that of a certain person, should not a reviewing court admit testimony of a Clark Sellers that the writing was not of that person in determining whether the evidence of the bank teller was substantial enough to support the decision of the administrative agency? It was for this limited purpose that the evidence of the experts was admitted herein. * * *

[3, 4] "For this reason I feel that the decision of the Chief of Police and the City Prosecutor was not at the time based on substantial evidence but, to that extent, was

arbitrary. Their determination that chance predominates in this game may be right, in which case the penal laws are effective regardless of city license, particularly 335a Penal Code, and this is true as to Lite-O-Line and the other games which are no less games of chance than Fascination. If one is such, all are. (This does not apply to target shooting, throwing balls at bottles, or darts at balloons, etc.)" While that memorandum cannot control the findings of the court (it did not find whether the game was one of chance but did find the officers acted without sufficient basis), and it is ordinarily presumed that in a trial by the court without a jury the court based its findings only upon admissible evidence, the record demonstrates that the court's judgment was based to a considerable extent, if not chiefly, on the inadmissible evidence. Hence, the error was prejudicial.

The judgment must, therefore, be reversed but to avoid the possibility of error in disposing of the case on retrial, more must be said. There are two important questions remaining: (1) Whether plaintiff was entitled to a formal notice and hearing of its application for a license before the officers, and (2) if it was, but such hearing was not afforded, or, if it was not, and it is found that the officers had no sound basis for their determination, should the judgment of the court be to remand the matter to the officers or an order for the issuance of the license?

[5] On the second question it is settled that where determinative powers are vested in a local administrative agency and the court finds its decision lacks evidentiary basis, a hearing was denied or it was otherwise erroneous, it is proper procedure to remand the matter to the agency for further and proper proceedings rather than for the court to decide the matter on the merits. See Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 231 P.2d 6; English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22, 18 A.L.R.2d 547; Steen v. City of Los Angeles, 31 Cal.2d 542, 190 P.2d 937; La Prade v. Department of Water & Power, supra, 27 Cal.2d 47, 162 P.2d 13; Martin v. Board of Supervisors, 135 Cal.App. 96, 26 P.2d 843. Plaintiff claims, however, that the officers were biased and prejudiced and it cannot obtain a fair and impartial decision from them. There is no finding to that effect, nor were they so charged in the complaint. Indeed the trial court in its opinion states its belief that they acted honestly and in good faith. It is not, therefore, a matter which will now be determined.

[6, 7] Under the circumstances presented a notice and hearing were required. It will be recalled that section 6.100 of the ordinance provides that when an application for a license is made to the tax collector he must refer it to designated officers in order that it may be "ascertained" whether or not the proposed business would "comply with applicable laws and ordinances." If such officers give written notice to the collector that it will comply he must issue the license. If the officers reject the application because the business would violate the law the collector shall not issue the license. In other words, the license must be granted unless there is found cause for its denial. Manifestly it is contemplated that a factual or mixed factual and legal determination shall be made by the officers which is characteristic in the exercise of a quasi judicial function. Martin v. Board of Supervisors, supra, 135 Cal.App. 96, 26 P.2d 843, is clearly analogous. There the county ordinance regulating the sale of beverages containing above a certain percentage of alcohol, designated the board of supervisors as the licensing board for the issuance of licenses to sell beverages. A person desiring a license should apply in writing to the board giving such information as the board prescribed. Upon receipt of the application the board shall "investigate" and deny such application if the applicant and the premises to be used for his business would not conform to specified conditions. Plaintiff filed an application for a license which was denied by the board without notice or hearing. On mandamus the court directed the board to afford plaintiff a hearing, stating, 135 Cal.App. at page 100, 26 P.2d at page 845: "When a board of supervisors is charged by law with the duty of issuing licenses upon specified terms and conditions, that tribunal becomes a quasi

judicial body for determining the facts and exercising sound and reasonable discretion in the performance of its duty. Since a board of supervisors is only a quasi judicial body in its investigation and determination of the merits of petitions for licenses in conformity with the provisions of an ordinance, its hearings may be somewhat informal and need not conform in all respects to the solemnity of a court proceeding. Nevertheless, the law does contemplate a fair and impartial hearing of an application for license with an opportunity for the petitioner to present competent evidence for the consideration of the board. Reed v. Collins, 5 Cal.App. 494, 90 P. 973; 33 C.J. 548, § 138–141. By the great weight of authority, as appears from the text in 33 C.J., at page 548: 'One who has made an application for license is entitled to a hearing by the licensing authority.' On page 549 of the same volume it is further said: 'Where the hearing on an application for a license is held before a court, or before a board which acts in a judicial capacity, the proceedings are in the nature of a civil action and are governed by the ordinary rules of judicial procedure applicable thereto.' * * * It is true that an individual has no vested right to engage in the business of selling intoxicating liquor. Ritz v. Lightston, 10 Cal.App. 685, 689, 103 P. 363. The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations. While it is contended the ordinance which is involved in this proceeding purports to license only nonintoxicating beverages, we are satisfied the interpretation of this act should be governed by the same rules which apply to the regulation of intoxicating drinks. A court may not take judicial notice of just what percentage of alcohol mingled with beer, ale, or wine will necessarily intoxicate a particular individual, or just what quantity of the beverage will have that effect. 33 C.J. 498, § 17. * * * In spite of the fact that a vested right to engage in the dispensing of these beverages may not exist, still the law contemplates a fair and impartial hearing of any application for a license which has been filed in strict conformity with the law. * * * It would be preposterous to concede that any judicial tribunal could be clothed with the arbitrary power of issuing licenses and regulating business subject only to its own caprice; that, with or without a hearing on the merits of the application, with or without reason, or upon ex parte statements or rumors, with no opportunity of refuting them, the board could grant or deny a petition for license. This is not the purpose or spirit with which regulatory statutes are enacted. Law contemplates justice whether it is granted as a privilege or recognized as a vested right. We therefore conclude that the right to engage in the sale of beverages under the ordinance of Lake county may not be arbitrarily denied by the board of supervisors without a hearing or an opportunity on the part of the petitioner to present the merits of her application to the licensing tribunal." See Reed v. Collins, 5 Cal.App. 494, 90 P. 973. The Martin case has been cited with approval in cases involving the revocation of a license. People v. Noggle, 7 Cal.App. 2d 14, 20, 45 P.2d 430; Carroll v. California Horse Racing Bd., 16 Cal.2d 164, 105 P.2d 110; Irvine v. State Board of Equalization, 40 Cal App.2d 280, 285, 104 P.2d 847; Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal.App.2d 776, 797, 194 P.2d 148. And it has been held that unless the statute expressly provides to the contrary a license cannot be revoked without a hearing where the statute contemplates a quasi judicial determination by the administrative agency that there be cause for the revocation; that because of reasons of justice and policy the statute will be interpreted to require a hearing. Ratliff v. Lampton, 32 Cal.2d 226, 195 P.2d 792, 10 A.L.R.2d 826; Carroll v. California Horse Racing Bd., supra, 16 Cal.2d 164, 105 P.2d 110; La Prade v. Department of Water & Power, supra, 27 Cal.2d 47, 162 P.2d 13; Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545; Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816; Bannerman v. Boyle, 160 Cal. 197, 116 P. 732; Welch v. Ware, 161 Cal. 641, 119 P. 1080; Knights of Ku Klux Klan v. Francis, 79 Cal.App. 383, 249 P. 539. Other cases are in line with such statutory construction. See also, Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U.S. 329, 336–367, 53 S.Ct. 167, 77 L.Ed. 341; Corcoran v. Board of Aldermen of Cambridge, 199 Mass. 5, 85 N.E. 155, 18 L.R.A., N.S., 187.

Reliance is placed on McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, where it was said that the Constitution does not require a hearing of an application for a permit to engage in the bail bond business. Here, however, we are dealing with the interpretation of an ordinance, not constitutional law. Moreover, in the McDonough case a hearing was afforded.

There is some indication from the record that the visit to plaintiff's prospective place of business and the events that transpired there constituted a hearing or that a full hearing was waived. These are issues that will have to be ascertained on retrial.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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39 Cal.2d 290

RODABAUGH et al. v. TEKUS.

L. A. 22246.

Supreme Court of California, in Bank.

July 14, 1952.

Rehearing Denied Aug. 7, 1952.

Dessie S. Rodabaugh, and others, brought an action against Paul Tekus, and others, for death of Andrew C. Rodabaugh, deceased, in an automobile collision at an intersection. The Superior Court, Orange County, Raymond Thompson, J., rendered a judgment for defendants notwithstanding verdict for plaintiffs and plaintiffs appealed. The Supreme Court, Spence, J., held that last clear chance doctrine was not applicable under evidence.

Judgment affirmed.

Carter, J., dissented.

For prior opinion see 238 P.2d 25.

1. Appeal and Error 🔑934(1)

On appeal from judgment for defendants notwithstanding verdict for plaintiffs in action for death resulting from an automobile collision at intersection, evidence would be veiwed in light most favorable to plaintiffs with every legitimate inference drawn in their favor.

2. Negligence 🔑135(6)

Mere fact that evidence in given case may be sufficient to sustain finding of negligence on part of a defendant does not justify conclusion that such evidence is sufficient to permit application of last clear chance doctrine, and in addition there must be substantial evidence to show that defendant had a last clear chance to avoid accident.

3. Negligence 🔑83.1, 83.5

Reliance on last clear chance doctrine presupposes negligence on part of both parties.

4. Automobiles 🔑171(13)

A motorist travelling on through highway was entitled to assume until contrary was apparent that motorist approaching intersection on intersecting road would obey law and would not drive automobile past stop sign directly into path of his automobile. Vehicle Code, §§ 552, 577.

5. Automobiles 🔑171(13)

A motorist travelling on through highway had right to assume that another motorist he saw approaching intersection on intersecting road possessed normal faculties and that he saw stop warnings which were directly within range of his vision. Vehicle Code, §§ 552, 577.

6. Automobiles 🔑227(3)

In action for damages resulting from intersectional collision between two rapidly moving automobiles approaching intersection at approximately same time and speed on intersecting road last clear chance doctrine is ordinarily inapplicable.

7. Automobiles 🔑244(59)

In action for death resulting from intersectional collision between rapidly moving automobiles approaching intersection at approximately same time and speed on intersecting road, brought against a defendant whose automobile collided with decedent's automobile which entered intersection without slowing down despite presence of stop warning, last clear chance doctrine was not applicable under evidence. Vehicle Code, §§ 552, 577.

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Elmer R. Guy, Fullerton, Hirson & Horn and Theodore A. Horn, Los Angeles, for appellants.

Robert A. Cushman, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiffs, the widow and adult sons of Andrew S. Rodabaugh, brought this action to recover damages for the latter's death as a result of an automobile collision. Following the denial of defendant's motion for a directed verdict, the jury returned a verdict in plaintiffs' favor for $2,500. Defendant then moved for judgment notwithstanding the verdict. The trial court granted this motion, and judgment was entered in defendant's favor. On this appeal, plaintiffs challenge the correctness of this ruling.

[1] Plaintiffs conceded in the trial court and now concede that the deceased was guilty of negligence in the operation of his own automobile, and that his negligence contributed to his death. However, the trial court instructed the jury on the doctrine of last clear chance. Defendant maintains that the evidence was insufficient to sustain plaintiffs' recovery on that theory, and that the trial court properly so determined in granting his motion for judgment notwithstanding the verdict. Viewing the evidence in the light most favorable to plaintiffs, with every legitimate inference drawn in their favor, Neel v. Mannings, Inc., 19 Cal.2d 647, 649–650, 122 P.2d 576; Champion v. Bennetts, 37 Cal.2d 815, 820, 236 P.2d 155; Shannon v. Thomas, 57 Cal. App.2d 187, 192–193, 134 P.2d 522, defendant's position must nevertheless be sustained.

There is no material conflict in the evidence. The only eye witnesses were defendant and his passenger. Plaintiffs called defendant under section 2055 of the Code of Civil Procedure, and they based their claims upon the testimony elicited from him. Defendant called his passenger as a defense witness, and his testimony substantially corroborated that of defendant.

The accident occurred in Orange County about 7:20 a.m. on August 24, 1948, at the intersection of Bolsa Street, an east and west state highway, and Golden West Avenue, a county road running north and south. Both roadways are approximately 20 feet wide and are paved, but with soft, sandy shoulders on both sides of the pavement. There are ditches on either side of Golden West Avenue. The view of the intersection is unobstructed from all sides, and at the time of the accident, there was a slight fog with visibility about 500 feet. Bolsa Street, on which defendant was traveling, is a through highway, and at the north and south approaches to it from Golden West Avenue there are regulation stop signs. (Veh. Code, § 471.) In addition, the word "stop" and a white stop line are painted across the northbound traffic lane of Golden West Avenue a few feet south of Bolsa Street. There also is a wavering white line crossing and recrossing the white center line of Golden West Avenue for approximately 300 feet south of the intersection.

Decedent was driving north on Golden West Avenue at 35 to 40 miles per hour, and defendant was driving west on Bolsa Street at approximately 40 miles per hour. When defendant first observed decedent, each of the automobiles was approximately 500 feet from the intersection. Decedent subsequently failed to heed the stop warnings, and continued into the intersection to the point of impact without slackening his speed.

Defendant testified that he continued to watch decedent's car; that when defendant was some 75 to 100 feet from the intersection and saw that decedent was not slowing down, he started to apply his brakes gently, thinking that decedent would probably stop; that as decedent approached, he appeared to be looking straight ahead and did not slacken his speed at any time before the impact occurred; that when decedent did not slow down, defendant applied his brakes harder at about 75 feet from the intersection, and at a distance of 35 feet he slammed them on, leaving skid marks on the pavement. Defendant further testified that traveling at 40 miles per hour, he could have stopped his car in approximately 60 feet. Defendant did not turn to the right or left before the impact, and his car struck decedent's car on the right side at the rear door and wheel. The collision occurred in the northeast quadrant of the intersection. When the vehicles came to rest, decedent's car was in a ditch near the northwest corner of the intersection, some 39 feet from the point of the impact, and defendant's car was some 25 feet west of said point facing east.

The parties are agreed on the necessary elements which must be present in order to warrant the application of the last clear chance doctrine. These elements were stated by this court in Girdner v. Union Oil Co., 126 Cal. 197, 202, 13 P.2d 915; and were recently reiterated in Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645, and Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977. The real dispute between the parties here involves the question of whether there is any substantial evidence to meet all the essential requirements for the application of that doctrine. Plaintiffs contend that there is such evidence in the record before us. Defendant concedes that the evidence is sufficient to establish that decedent through his own negligence placed himself in a position of danger, and that prior to the occurrence of the collision defendant had actual knowledge of that fact. Defendant contends, however, that there is no substantial evidence to show that *after* defendant acquired knowledge of decedent's perilous situation, he had a *clear* chance to avoid the collision by the exercise of ordinary care or that he failed to exercise such care.

[2, 3] In discussing the contentions of the parties, it is important to bear in mind that the mere fact that the evidence in a given case may be sufficient to sustain a finding of negligence on the part of a defendant does not justify the conclusion that such evidence is sufficient to permit the application of the last clear chance doctrine. Negligence is but one of the several elements involved in said doctrine, and reliance on the doctrine presupposes negligence on the part of both parties. In addition, however, there must be substantial evidence to show that defendant had a *last clear chance* to avoid the accident. Dalley v. Williams, 73 Cal.App.2d 427, 433, 166 P.2d 595; Berton v. Cochran, 81 Cal.App.2d 776, 779, 185 P.2d 349; DeVore v. Faris, 88 Cal. App.2d 576, 583, 199 P.2d 391.

[4, 5] We may assume without deciding that there is sufficient evidence to sustain a finding of some negligence on the part of defendant, despite the fact that he was traveling on a through highway and was entitled to assume, until the contrary was apparent, that decedent would obey the law and would not drive his car past the stop sign directly into the path of defendant's car. Veh.Code, §§ 552, 577; Dickinson v. Pacific Greyhound Lines, 55 Cal.App.2d 824, 827, 131 P.2d 401. However, the evidence is insufficient to support a finding that after defendant discovered decedent's peril, he had a last clear chance to avoid the collision. The fact that defendant saw that decedent was looking straight ahead while decedent was traveling approximately 500 feet in approaching the intersection does not establish that decedent was in a position of danger this entire distance. Decedent was not in a position of danger until he arrived at a point at which he could no longer stop or slow down in time to avoid a collision. Dalley v. Williams, supra, 73 Cal.App.2d 427, 435, 166 P.2d 595; also, Young v. Southern Pacific Co., 182 Cal. 369, 380–381, 190 P. 36. Defendant had the right to assume that decedent possessed normal faculties, and that he saw the stop warnings which were directly within the range of his vision. Folger v. Richfield Oil Corp., 80 Cal.App.2d 655, 660–661, 182 P.2d 337.

[6] Plaintiffs set forth the respective speeds and distances found in the testimony, and then argue by a series of mathematical calculations that such evidence is sufficient to support a finding that defendant had a last clear chance to avoid the accident. In our view this argument is without merit. Under any view of the testimony it is clear that both cars were approaching the intersection at approximately the same time and at approximately the same speed. Disregarding for the moment the fact that de-

fendant was traveling on the through highway and decedent was traveling on a road which was plainly marked with stop warnings, it is apparent that this case presents the picture of one of the usual types of intersection collisions between two rapidly moving vehicles. It has been frequently stated that the last clear chance doctrine is ordinarily inapplicable under such conditions. Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 232, 28 P.2d 932; also Johnson v. Sacramento Northern Ry., 54 Cal.App.2d 528, 532, 129 P.2d 503; Dalley v. Williams, supra, 73 Cal.App.2d 427, 436, 166 P.2d 595; Folger v. Richfield Oil Corp., supra, 80 Cal.App.2d 655, 660, 182 P.2d 337; Berton v. Cochran, supra, 81 Cal.App.2d 776, 781, 185 P.2d 349; Allin v. Snavely, 100 Cal.App.2d 411, 415, 224 P.2d 113.

As was said in Poncino v. Reid-Murdock & Co., supra, 136 Cal.App. at page 232, 28 P.2d at page 936: "Like many other cases involving collisions between moving vehicles, the accident may be said to have happened within the twinkling of an eye after the first indication of danger. While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences. To apply the doctrine to such cases would be equivalent to denying the existence of the general rule which makes contributory negligence a bar to recovery."

Certain phases of plaintiffs' argument should be mentioned. Plaintiffs rely heavily upon defendant's testimony to the effect that he could have stopped within a distance of 60 feet while traveling at 40 miles per hour. There is no other testimony in the record relating to the distance required to stop a car by the application of brakes. As plaintiffs accept this testimony, it appears therefrom that decedent did not reach a point of danger from which he could not extricate himself until he was within 60 feet of the path of defendant's car; and that defendant could assume that decedent would obey the stop sign until decedent had arrived at a point within such distance of 60 feet. A vehicle traveling at a speed of 40 miles per hour travels approximately 60 feet per second, and plaintiffs do not dispute the fact that defendant's total time for reaction and effective action after discovering decedent's perilous situation was necessarily somewhere between 1¼ and 1¾ seconds. Plaintiffs' calculations do not sustain their position. As was said in St. Louis S. W. Ry. Co. v. Simpson, 286 U.S. 346, at page 351, 52 S.Ct. 520 at page 522, 76 L.Ed. 1152: "Calculations so nice are unavailing to prove anything except the unity of the whole transaction. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent."

In Poncino v. Reid-Murdock & Co., supra, 136 Cal.App. 223, at page 227, 28 P.2d 932 at page 934, it was further said: "In other words, it is not enough to relieve a plaintiff of his own negligence that the defendant may have had *a chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear chance* to do so by the exercise of *ordinary* care. That he should have had the *last chance* implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a *clear chance* implies that he must have had more than a *bare possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party."

Plaintiffs also argue that defendant acted negligently in not turning to the right or left to avoid the collision. We have heretofore assumed, solely for the purpose of this discussion, that there was sufficient evidence to sustain a finding of some negligence on the part of defendant. As above indicated, this does not suffice to bring into operation the last clear chance doctrine. In passing it may be stated, however, that defendant was admittedly traveling on a narrow through road 20 feet in width with soft shoulders on either side; that he was approaching a narrow, intersecting road with ditches on either side thereof; and that decedent was admittedly negligent in not obeying the stop sign and in proceeding directly across defendant's path without diminishing his speed of 35 to 40 miles per hour. Plaintiffs fail to indicate in which direction they believe that defendant should have attempted to turn under these circumstances. As we view the evidence on which plaintiffs rely, it was sufficient to warrant the application of the imminent peril doctrine in favor of defendant, Petersen v. Devine, 68 Cal.App.2d 387, 392–393, 156 P.2d 936; Wilkerson v. Brown, 84 Cal.App.2d 401, 408, 190 P.2d 958, but was insufficient to warrant the application of the last clear chance doctrine in favor of plaintiffs.

Plaintiffs cite and rely upon certain decisions, in addition to those heretofore mentioned, in which the last clear chance doctrine has been applied. Bonebrake v. McCormick, 35 Cal.2d 16, 215 P.2d 728; Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918; Bragg v. Smith, 87 Cal.App.2d 11, 195 P.2d 546; Root v. Pacific Greyhound Lines, 84 Cal.App.2d 135, 190 P.2d 48; Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 136 P.2d 611; Yates v. Morotti, 120 Cal.App. 710, 8 P.2d 519. Many of these cases have presented close questions concerning the sufficiency of the evidence to warrant the application of the doctrine, but they are all distinguishable on their facts. In none of the cited authorities was a through highway involved nor was there such a relation between the time, distance and speed factors as is found in the present case. The language used in Bagwill v. Pacific Electric Railway Co., 90 Cal.App. 114, at page 121, 265 P. 517, at page 519, is singularly applicable here: "Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last *clear* chance, not possible chance."

[7] We therefore conclude that the record is devoid of substantial evidence to sustain the application of the last clear chance doctrine, and that it was error for the trial court to instruct the jury with respect thereto. Wallis v. Southern Pacific Co., 184 Cal. 662, 672, 195 P. 408, 15 A.L.R. 117; Palmer v. Tschudy, 191 Cal. 696, 700–701, 218 P. 36. The trial court therefore properly granted defendant's motion for judgment notwithstanding the verdict.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

SCHAUER, Justice (concurring).

In my view there appears no substantial and legally sound basis for distinguishing this case, in favor of a reversal here and an affirmance there, from Peterson v. Burkhalter (1951), 38 Cal.2d 107, 237 P.2d 977. In the interests of clarity of principle I think that the last cited case should either be followed or expressly overruled. Since I believe that the Peterson case is erroneous, as pointed out in my dissent (page 981 of 237 P.2d), I would overrule it. With such further statement of grounds I concur in the opinion and judgment.

CARTER, Justice.

I dissent.

The majority opinion in this case is contrary to the authorities, usurps the function of the jury and makes serious inroads into the last clear chance doctrine.

It is held that the doctrine is inapplicable because defendant did not, as a matter of law, have a chance to avoid the accident by acting as a person of ordinary prudence. In addition to his ability to stop, which is demonstrated by the evidence, he could have swerved to the left and averted the collision. The evidence shows that both cars were travelling at about 40 miles per hour; that defendant saw the deceased 500 feet from the intersection; that when the latter was 30 feet from it defendant was 75 feet and decedent was looking straight ahead and did not slow down at all, obviously indicating to defendant that he would not stop at the stop sign. Yet defendant applied his brakes only lightly, not forcefully enough to stop his car and avoid a collision. The accident occurred in the northeast part of the intersection and decedent's car was struck at the left rear wheel and door. The highway was 20 feet wide. No other cars were on the highway. Defendant made no effort to swerve to the left to avert the collision which he plainly could have done. Thus, he had ample opportunity to avoid the collision either by stopping or swerving. It was for the jury to say whether as a man of ordinary prudence he should have followed one course or the other.

The majority opinion weighs the evidence and concludes that there was no last clear chance by such statements as, that defendant was entitled to assume decedent would stop at the stop sign (the circumstances justified the jury in concluding that he was remiss if he made such assumption) and that defendant was entitled to the imminent peril rule with respect to swerving (whether there was such peril and he acted as a man of ordinary prudence was an issue for the jury).

It is not the rule, as asserted by the majority, that the last clear chance rule does not apply where two moving vehicles are involved; the conclusion reached is contrary to the authorities in this state.

We said in Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645, 647: "It was for the jury to determine whether in the space of time involved he could have avoided the collision."

In Bonebrake v. McCormick, 35 Cal.2d 16, 215 P.2d 728, this court reversed the trial court for refusal to instruct on the doctrine where two moving vehicles were involved, decedent on a bicycle and defendant in a car following him and the decedent turned to the left in the path of the car.

In Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, the vehicles were both moving toward an intersection and would arrive there at the same time. The plaintiff was not looking at defendant and a collision occurred. This court said 237 P.2d at page 979: "* * * [T]here is ample evidence from which the jury could determine that a reasonably prudent man, knowing the facts of which Burkhalter was aware, should have foreseen that Peterson *might* not turn or stop his motor scooter. Under such circumstances, it was negligent for Burkhalter to proceed toward the intersection acting upon a contrary assumption. * * * Considering the evidence in the Poncino case [relied upon by the majority], it does not stand for the proposition that, as a matter of law, a defendant with two seconds within which to avoid an accident had no chance to do so. In a proper case, an appellate court might say that the defendant did not have a chance which amounted to a 'clear' one. But the rule should not be applied when the only evidence is to the effect that the defendant could have avoided the accident within the existing time and distance limitations.

"Burkhalter saw Peterson when 50 feet from the intersection. He estimated that he could stop his automobile within 10 or 15 feet. He did stop within 28 to 30 feet after the impact, and testified that he could have done so sooner. All of the evidence indicates that Burkhalter might have halted his automobile at a much less distance than 50 feet.

"Moreover, Burkhalter's testimony reveals that he made no attempt to avoid the accident by turning his automobile or sounding his horn. *It cannot be said, as a matter of law, that he did not have sufficient time in which to do something,* and the jury properly might have found that sounding his horn to attract the attention of Peterson would have constituted the exercise of reasonable care on his part to avert the accident." (Emphasis added.) That case is indistinguishable from the one at bar.

In Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918, plaintiff, a pedestrian, was moving across the street not at a crosswalk and defendant was driving on the street when his car struck plaintiff. Plaintiff was not observing defendant's approach. It was held defendant had a last clear chance to avoid the accident by swerving, blowing his horn or stopping.

In Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, plaintiff drove across a main highway on a secondary cross road looking away from defendant's car approaching the intersection on the main highway. Defendant drove his car into plaintiff's. This court pointed out that the trial court found that the evidence 216 Cal. at page 200, 13 P.2d at page 917, "established the fact that when plaintiff approached and was proceeding across the path of the oil truck, and up to the time of the collision, he did not see and was totally oblivious of the approach of the truck, and the danger that confronted him; that defendant Elam first saw plaintiff's car some 40 or 50 feet away from the intersection; that he saw plaintiff looking straight ahead, in an opposite direction, and not slowing the speed of his automobile; that Elam was traveling at a speed of 20 miles an hour and could have stopped his truck almost immediately, and within a distance of a few feet; that he had ample time and sufficient distance, at least 25 to 35 feet, in which to stop and avoid coming in contact with plaintiff's car, but failed to do so", and concluded that defendant could have avoided the collision by stopping, swerving or blowing his horn.

Chappell v. San Diego, etc., Ry. Co., 201 Cal. 560, 258 P. 73, involved a collision between two moving vehicles at an intersection of a street railway and street. The one on the tracks was a gas motor railway car and the one on the street an automobile. It appeared that defendant (operator of the railway car) could have stopped when he first saw the car approaching when 55 feet to 60 feet from the crossing. It appeared that plaintiff was approaching slowly and attempting to stop. The court said 201 Cal. at page 565, 258 P. at page 75: "The verdict must be taken as a finding that the defendant's car failed to stop as soon as it was *possible* for it to have done so in the exercise of due care, and that the last act of negligence of the defendant was the proximate cause of the injury. *This it was the province of the jury to find under the instructions of the court relating to the doctrine of the last clear chance.*" (Emphasis added.)

Podeszwa v. White, 99 Cal.App.2d 777, 222 P.2d 683, while not involving the doctrine, is directly in point. Defendant approached an intersection at 40 miles per hour on a through highway and saw decedent's car approaching a stop sign at the intersection at 10 miles per hour and did not stop but continued across the highway. The court said 99 Cal.App.2d at page 779, 222 P.2d at page 684: "Manifestly by a very slight swerve of his truck he could have passed behind the coupe and avoided the accident. Furthermore, when he observed the coupe passing the boulevard stop sign and approaching the Orangethorpe pavement the application of his brakes would have slowed his truck sufficiently to allow the coupe to pass in front of him. The fact that the driver of the coupe did not make the boulevard stop as required by law, Vehicle Code, §§ 552, 577, did not justify defendant in failing to reduce his speed or change the direction of his car in an effort to avoid the accident."

The basic principle is that it is for the trier of the fact to determine whether defendant had a last clear chance to avoid the collision and that is true where the evidence is inconclusive or contradictory, or as stated: "It is not improper to instruct the jury on the doctrine of 'last clear chance' when *on any valid theory,* there is substantial evidence to support the application of that principle. Gardini v. Arakelian, 18 Cal.App.2d 424, 430, 64 P.2d 181. In the case entitled Wheeler v. Buerkle, 14 Cal.App.2d 368, 373, 58 P.2d 230, 232, it was said that 'if the facts of a case do not bring the doctrine into play, the court must so decide,' and if the facts be such that the doctrine *may be applied,* it is the duty of a trial judge to submit it to a jury by proper instructions, or to find upon it in the absence of a jury." Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 178, 93 P.2d 135, 140. Here there are three theories sustained by the evidence that defendant could have avoided the accident; he could have stopped, swerved or sounded his horn.

In making the statement that the doctrine does not apply to two moving vehicles approaching an intersection the majority cites Poncino v. Reid-Murdock & Co., 136 Cal. App. 223, 28 P.2d 932. No citation of authority is made for that statement in the Poncino case. A hearing in this court was denied. As pointed out by this court in Peterson v. Burkhalter, supra, 38 Cal.2d 107, 237 P.2d 977, that case was based upon the proposition that plaintiff was aware of the danger rather than that defendant did not have an opportunity to avoid it; that was the only basis for distinguishing it from Girdner v. Union Oil Co., supra, 216 Cal. 197, 13 P.2d 915, and otherwise the case was in effect overruled as being out of line with the Girdner case.

Johnson v. Sacramento Northern Ry., 54 Cal.App.2d 528, 129 P.2d 503, cited for the same proposition, cites in addition to the Poncino case, only cases dealing with *railroad crossing* collisions where the courts have been reluctant to apply the doctrine because of a feeling that a railroad company should not be expected to stop at crossings under any circumstances. Certainly that is not true of automobiles approaching intersections. The same is true of Folger v. Richfield Oil Corp., 80 Cal.App.2d 655, 182 P.2d 337; Dalley v. Williams, 73 Cal. App.2d 427, 166 P.2d 595; Berton v. Cochran, 81 Cal.App.2d 776, 185 P.2d 349, and Allin v. Snavely, 100 Cal.App.2d 411, 224 P.2d 113, which make no such statement. Moreover, as above seen, there are numerous decisions by this court applying the doctrine to moving vehicles.

There is no reason why it should not apply in such a situation considering the speed with which automobiles are now operated and the necessity for rapid reaction to avoid accidents. Here we have a person (defendant) approaching an intersection at 40 miles per hour. He sees another car approaching at the same speed on the cross road and the driver of the car (decedent) does not observe him. When the other car was at least 50 feet from the stop sign defendant was no longer justified in assuming it would stop at the stop sign. It is not reasonable to suppose that the driver of the other car would at that point apply his brakes with full force and come to a shrieking stop. Hence when the other car was at that point the defendant had adequate opportunity to stop his car or swerve from its path to avert the collision.

What was said by the District Court of Appeal in Bragg v. Smith, 87 Cal.App.2d 11, at page 15, 195 P.2d 546, at page 548, is pertinent here: "The defendant actually discovered the situation and realized the danger while it was still possible to avoid the collision by the use of ordinary care on his part. The opportunity was clearly open to him to avoid the accident by turning either to his right or to his left. While it may be true that he had to act quickly, it is not unusual for a motorist to be confronted with such a necessity and it cannot be said, as a matter of law, that a distance of approximately 100 feet was not sufficient to enable him to have a clear chance to slightly alter the course of his vehicle. Common experience is to the contrary, and the evidence here is sufficient to support the court's finding that a last clear chance to avoid the accident existed after the defendant actually knew that the plaintiff was in a position of danger from which he would be unable to escape by any action which he could then take. Cady v. Sanford, 57 Cal.App. 218, 207 P. 45."

It should be remembered that the trial court denied a motion on behalf of defendant for a directed verdict and submitted the case to the jury under appropriate instructions applying the last clear chance doctrine, and the jury returned a verdict in favor of plaintiffs from which it must be implied that they determined as a fact that defendant had a last clear chance to avoid the collision after perceiving that decedent was in a position of peril. The trial court then granted defendant's motion for judgment notwithstanding the verdict. Plaintiffs took an appeal from the judgment and the District Court of Appeal, Fourth Appellate District, by unanimous opinion prepared by Mr. Justice Mussell and concurred in by Mr. Presiding Justice Barnard and Mr. Justice Griffin reversed the judgment and remanded the case to the trial court with instructions to enter judgment in conformity with the verdict of the jury. Cal. App., 238 P.2d 25, 28. The opinion of the District Court of Appeal contains a correct statement of the facts, is well reasoned and is supported by abundant authority. The following statement is contained in the concluding paragraph of the opinion: "We conclude that there was substantial evidence to support the findings of the jury and that the trial court erred in rendering a judgment notwithstanding the verdict."

From the foregoing it clearly appears that the trial judge was of the opinion that the last clear chance doctrine was applicable when he submitted the case to the jury and that the jury found the facts necessary to support a verdict in favor of the plaintiffs. Although the trial judge changed his mind after the verdict was returned, it was the unanimous opinion of the District Court of Appeal that the evidence warranted the submission of the case to the jury and that the question of whether or not the defendant had a last clear chance to avoid the collision was one of fact and not of law, and reversed the trial court.

The very recent case of Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 at page 399, reannounced the well settled rule that " 'Where different conclusions may reasonably be drawn from the evidence by different minds the trial court's (jury's) findings are not to be disturbed on appeal.' " See also, Connor v. Owen, 28 Cal.App.2d 591, 592–593, 82 P.2d 1114.

I do not believe it can fairly and honestly be said that the record in this case presents a factual situation on which reasonable minds cannot differ. What has happened thus far demonstrates beyond question that reasonable minds have arrived at different conclusions on the record before us. Such being the case, under the well-settled doctrine, the issue is one of fact and not of law, and hence should be determined by the trier of fact—the jury in this case.

While the majority opinion in this case will create great confusion because it is in clear conflict with numerous other decisions of this court and the District Courts of Appeal which I have cited hereinabove, of graver and more far reaching concern is the problem that it is in direct violation of the constitutional provision that "the right of trial by jury shall be secured to all, and remain inviolate;" (Art. I, sec. 7, Constitution of California). It cannot be doubted that where a factual situation is presented in a case in which litigants are entitled to a jury trial as a matter of right, and the court takes the case from the jury and decides as a matter of law that there is no issue of fact to be determined, the litigants have been deprived of a jury trial, and the Constitution has been violated. Such is the situation in the case at bar. While this result may seem to be unimportant in this case, it has an insidious impact on our whole constitutional structure. If judges who have taken a solemn oath to support the Constitution can ruthlessly disregard its provisions, as the majority has done here, why demand loyalty oaths from those holding positions of lesser importance?

I would reverse the judgment and direct the trial court to enter judgment on the verdict of the jury.

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39 Cal.2d 282

HANDLER v. BOARD OF SUPERVISORS OF SAN MATEO COUNTY et al.

S. F. 1859.

Supreme Court of California.

July 11, 1952.

Action by Marvin Handler against Board of Supervisors of the County of San Mateo and others to compel the controller, Fred Beer, to draw a warrant for payment of plaintiff's claim which had been approved by Board of Supervisors as compensation for employment of plaintiff as specialist to oppose rate increase of public utility. The Superior Court, San Mateo County, Edmund Scott, J., rendered judgment adverse to petitioner, and petitioner appealed. The Supreme Court, Carter, J., held that county had authority to employ and expend funds for employment of specialist to oppose rate increase of railroad which traversed county.

Judgment reversed.

Prior opinion, 240 P.2d 409.

1. Mandamus 🔑187(9)

On appeal from sustaining of demurrer to petition for writ of mandamus and dismissal of alternative writ, allegations of petition would be accepted as true.

2. Counties 🔑63

Under provision of general law, made applicable to county by its charter, investing board of supervisors with power to employ any person for furnishing of special services and advice, and charter provision authorizing county manager to employ experts to advise when economically advantageous, board of supervisors had power to employ, by resolution, a legal specialist to oppose proposed increase in rates of public utility. Stats.1933, p. 2953, art. 3, § 1 et seq., as amended; Const. art. 11, § 7½.

3. Counties ⚷63

Persons performing specialized expert services for counties do so on temporary basis and are neither officers nor employees, but occupy status more akin to that of independent contractors, and consequently charter provisions requiring action of board of supervisors with regard to compensation and duties of officers and regular employees of county to be by ordinance, are inapplicable.

4. Counties ⚷63

Under county charter provision requiring board of supervisors to act by ordinance when dealing with compensation and duties of officers and regular employees of county, employment of specialist to oppose proposed rate increase of public utility need not have been by ordinance, but might have been by resolution, in that specialist was neither an officer nor regular employee of county.

5. Public Service Commissions ⚷13

Provision of public utility law that complaint may be made to the public utilities commission by any body politic or municipal corporation, as well as others, concerning rates charged by utility, is clear authorization to counties to appear in rate regulation proceedings before the public utilities commission. Stats.1933, p. 2953, art. 5, §§ 2(f), 3; Government Code, §§ 26100, 31001.

6. Counties ⚷158

County had authority to expend funds for employment of specialist to aid district attorney in opposing proposed rate increase of railroad traversing the county.

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Paul A. McCarthy and Howard Magee, San Francisco, for appellant.

Louis B. DeMatteis, Dist. Atty., Redwood City, Keith C. Sorensen and John A. Bruning, Asst. Dist. Attys., Redwood City, for respondents.

CARTER, Justice.

[1] Plaintiff petitioned for a writ of mandate to compel the controller of San Mateo County to draw a warrant for payment of his claim for $1,500, which had been approved by the Board of Supervisors. An alternate writ was issued and respondents, as their return thereto, demurred generally to the petition. The matter was argued on questions of law and submitted to the court which rendered judgment that petitioner take nothing and that the alternative writ be dismissed. Under these circumstances the allegations of the petition must be accepted as true. Merchants Service Co. v. Small Claims Court, 35 Cal.2d 109, 110, 216 P.2d 846; Kennedy v. Ross, 28 Cal.2d 569, 571, 170 P.2d 904; 16 Cal.Jur. 866 et seq.

According to the petition, plaintiff is an attorney admitted to practice in California and has been specializing for fifteen years in public utility rate regulation. The Southern Pacific Company operates passenger trains between San Francisco and San Jose and way points in San Mateo County. It applied to the Public Utilities Commission for an increase in passenger fares on such trains. Commuters in San Mateo County formed an association which employed plaintiff to represent them to resist the application before the Commission. Plaintiff arranged with Fred Chestnut, a traffic engineer, to assist him. The proceeding is now, and has been since 1949, pending before the Commission and plaintiff has been performing the services for which he was employed. On November 25, 1949, the Board of Supervisors of the county at a meeting "agreed to employ" plaintiff and Chestnut as "special assistants to the District Attorney" and to appropriate up to $2,000 toward their compensation for services in opposing the rate increases if proportionate amounts were appropriated by the municipalities and contributed by the commuters in the county. The funds from other sources were obtained and on June 20, 1950, the board adopted a resolution by a four to nothing vote (there was one vacancy), wherein it was declared that the fare increase would be detrimental to the general welfare of the county and it is to the best interest of the county to oppose the increase. Therefore, $1,500 is transferred from the unbudgeted reserves to the "Advertising Budget, Maintenance and Operation, Promotional Requests—Various and Sundries Appropriation" to be used to employ plaintiff and Chestnut as special assistants to the District Attorney to oppose the increase. On June 30, 1950, plaintiff presented a verified claim to the board for the $1,500. It was approved and ordered paid. Thereafter the county controller refused to approve the claim and the instant action followed.

The sole contention made by the controller is that the county has no authority to expend money for the employment of a person to oppose the increase in rates of a public utility. At the argument in the District Court of Appeal it was suggested that specialists could not be employed except by ordinance. In a letter to the District Court of Appeal thereafter in that connection, counsel for the controller stated that he did not question the power of the board to employ specialists by resolution; he contended only that the county funds could not be used to oppose an increase in utility rates. The District Court of Appeal nevertheless based its decision on both grounds and both will be discussed.

San Mateo has a charter adopted in 1933 pursuant to the Constitution, Cal. Const. Art. XI, sec. 7½, and approved by the Legislature, Stats.1933, p. 2953. It has been amended from time to time. Pertinent provisions relating to employment are that the Board of Supervisors has the power given to it by the Constitution, charter and "general laws, of the State". Charter, Art. III, sec. 1. In addition to other powers it has the power to appoint appointive officers whose appointments are not otherwise provided for in the charter; to confirm appointments of officers appointed by the county manager (formerly county executive, changed by Stats.1949, p. 2938); to provide by ordinance for the compensation of appointive officers; "To provide, by ordinance, and therein to fix and regulate, the appointment and number of assistants, deputies, clerks, attaches, and other persons to be employed, from time to time, in the several offices of the county, and therein to prescribe and regulate the powers, duties, qualifications and compensation of such persons, the times at which, and the terms for which, they shall be appointed, and the manner of their appointment and removal; provided, however, that the provisions of such ordinance or ordinances, so to be enacted by the Board of Supervisors, shall in all respects conform to and comply with all other provisions of this Charter with respect to the manner and method of appointment and removal of such assistants, deputies, clerks, attaches and other employees, their powers, duties, qualifications, compensation, the times of their appointment and the terms for which they shall be appointed." Stats.1943, p. 3147. To provide by ordinance for other officers recommended by the county manager; to provide for the creation of offices hereafter created by the Constitution or general law. Art. III, sec. 2.

The general law provides: "The board of supervisors may contract with and employ any person for the furnishing to the county, or for and on behalf of any district within the county for furnishing to the district, of special services and advice in financial, economic, accounting, engineering, legal, or administrative matters by any persons specially trained and experienced and who is competent to perform the special services required. The board may pay from any available funds such compensation to any such expert as it deems proper for the services rendered." Gov.Code, § 31000. There is also a provision, particularly directed to legal matters: "The board of supervisors of any county not having a charter which creates the office of county counsel may employ and contract with counsel to assist the district attorney in representing and advising it and all district officers in all matters and questions of law pertaining to their duties and to civil legal questions affecting the county or districts." Gov. Code, § 31001.

[2] The general law, supra, which, as seen, the charter expressly makes applicable, clearly gives authority to the board to contract with or employ plaintiff and Chestnut as the furnishers of special services. Moreover, in this connection, it should be observed that the charter authorizes the county manager to employ, with the approval of the board, "experts and consultants to perform work and advise, in connection with any of the functions of the county, when economically advantageous." Art. V, sec. 2[f]. See Kennedy v. Ross, supra, 28 Cal.2d 569, 170 P.2d 904. While it was not alleged that the employment and appropriation here was approved by the county manager, it is so stated in plaintiff's brief and not denied by defendants.

[3, 4] It is equally clear that the employment of such specialists for the performance of special services need not be by ordinance, as distinguished from a resolution. The charter provisions heretofore discussed, which refer to action by ordinance, deal with officers and regular employees, deputies and assistants and it is regulating their duties, compensation, etc., that the board acts by ordinance. Persons performing specialized expert services do so on a temporary basis and are neither officers nor employees, nor do they hold a position with the county. They are more akin to independent contractors. Similar services were considered by this court in Kennedy v. Ross, supra, 28 Cal.2d 569, 170 P.2d 904, where we were considering whether a contract to engage an architect for a special task required an exemption from civil service laws by the Civil Service Commission. We said, 28 Cal.2d at page 572, 170 P.2d at page 906: "Under the contract, the petitioner was not appointed to nor does he hold a position in any department or office of the city. The contract calls for his expert professional services on other than a permanent basis, but it does not follow that he is thereby employed in a position in any department of the city. The fact is otherwise. No position, temporary or permanent, in any department, was thereby created as contemplated by section 143 of the charter. The petitioner was engaged to do a specific expert professional task for a stated consideration. 'Positions' in 'departments and offices' of the city connote an employment to render services at a salary paid periodically and are governed by the salary standardization and related provisions of the charter, also invoked by the respondent." See City & County of San Francisco v. Boyd, 17 Cal. 2d 606, 110 P.2d 1036. It is true that plaintiff was referred to as a special assistant to the district attorney, but we do not think that took him out of the category considered in the Kennedy case.

[5, 6] To determine the legality of the expenditure for plaintiff's compensation for opposing the rate increases before the Commission it is necessary to apply pertinent principles. As we have above seen, the charter and general laws contemplate the employment of specialists for aiding the county in the performance of its functions. The charter also provides: "The county [manager] shall have plenary power, subject to the provisions of general laws, with respect to advertising or exploiting the resources of the county. He shall, ex officio, act as secretary of any county board of trade or county chamber of commerce created under the provisions of the general laws, and in event of the disestablishment of any such county board of trade or county chamber of commerce he shall perform the duties and functions customarily performed by the secretary of such county board of trade or chamber of commerce. He shall consult with the board of supervisors with respect to any appropriations made by the board of supervisors for advertising or exploiting such resources. Any appropriation made by said board of supervisors shall be upon the recommendation of the county [manager]." Art. V, sec. 3. He also has power "to employ, by and with the approval of the board of supervisors, experts and consultants to perform work and advise, in connection with any of the functions of the county, when economically advanta-

geous." Art. V, sec. 2[f]. The general law provides: "The board of supervisors may levy a * * * tax * * * for the purpose of inducing immigration to, and increasing the trade and commerce of, the county. The proceeds of the tax may be expended for any or all of the following uses: (a) Advertising, exploiting, and making known the resources of the county. (b) Exhibiting or advertising the agricultural, horticultural, viticultural, mineral, industrial, commercial, climatic, educational, recreational, artistic, musical, cultural, and other resources or advantages of the county. (c) Making plans and arrangements for a world's fair, trade fair, or other fair or exposition at which such resources may be exhibited. (d) Doing any of such work in cooperation with or jointly by contract with other agencies, associations, or corporations." Gov.Code, § 26100. Other laws have contemplated that the counties may have an interest in the rates of utilities operating therein. The public utility law provides that complaint may be made to the Public Utilities Commission by any "body politic" or "municipal corporation" as well as others concerning the rates charged by any public utility. Pub.Utilities Code, § 1702. This provision of the public utilities law clearly authorizes the county to appear in rate regulation proceedings before the Public Utilities Commission. See Interstate Water Co. v. City of Danville, 379 Ill. 41, 39 N.E.2d 356. The Public Utilities Act does not purport to restrict such complaints to patrons of the utility and the language of the above-cited section clearly indicates that a "body politic" may act on behalf of its inhabitants in the prosecution of such complaints. Certainly, the rates charged by the only railroad traversing a county has a bearing upon the trade and commerce affecting the county and whether people will choose to make it their home. Also, exploitation of the resources of the county can be made more effective depending upon the rates of the carriers operating therein. Apparently the board considered that such objects would be advanced. Where a substantial portion of the residents or prospective residents are affected, the county has a public interest in affording them protection. In speaking of public interest in the operation of a municipality in another connection it was said, quoting from Green v. Frazier, 253 U.S. 233, 40 S.Ct. 499, 501, 64 L.Ed. 878: "What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. Gray, Limitations of Taxing Power, § 176, 'Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to continue the existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.' Cooley, Justice, in People ex rel. Detroit & H. R. Co. v. [Township Board of] Salem, 20 Mich. 452, 4 Am.Rep. 400." City of Oakland v. Williams, 206 Cal. 315, 332, 274 P. 328. In City of Birmingham v. Wilkinson, 239 Ala. 199, 194 So. 548, the court held it to be a proper expenditure to employ counsel to appear before the public service commission to obtain better telephone rates as it was for the welfare of the city. Contra, City of Purcell v. Wadlington, 43 Okl. 728, 144 P. 380.

Taking into consideration all the foregoing provisions of the general law, charter and legal principles we believe it may be properly said that the county has the power to expend money for the purpose here present.

There being adequate authority for the employment of petitioner and the expenditure of public money for the purpose for which he was employed, the court should have ordered the issuance of the writ.

The judgment is reversed.

TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

112 Cal.App.2d 526

HODGES v. LEWIS.

Civ. 18791.

District Court of Appeal, Second District, Division 3, California.

Aug. 5, 1952.

Action by A. F. Hodges against Raymond Lewis for services rendered as real estate broker. Defendant had agreed in writing to give plaintiff, upon final consummation of the sale, an option to purchase certain lots, which defendant would have obtained upon consummation of the sale. Plaintiff obtained a purchaser ready, willing and able, but defendant sold the realty to another. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Wood, J. P., held that defendant did not owe plaintiff any compensation commission in absence of showing of defendant's bad faith.

Judgment affirmed.

1. Brokers ⚷40

Right of real estate broker to recover commission must be measured primarily by terms of his employment.

2. Brokers ⚷60

An owner and real estate broker may, if they wish, enter into a binding agreement that no commission shall be considered as earned until happening of a certain specified event.

3. Brokers ⚷48

Where owner agreed in writing to give real estate broker, upon consummation of sale, an option to purchase certain lots, which owner would have acquired in the sale, but owner sold the realty to another after broker had obtained purchaser who was ready, willing, and able, owner would have been bound to compensate broker only upon final consummation of the original sale and, therefore, did not owe broker any compensation in absence of showing of bad faith on part of owner.

Jerome T. Stewart, Los Angeles, for appellant.

Pearlson & Pearlson, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to recover $10,000 for services rendered as a real estate broker. Judgment was for defendant, and plaintiff appeals therefrom.

On October 28, 1949, the defendant and Safeway Stores, Incorporated, entered into a written agreement entitled "Sales Deposit Receipt," which recited that defendant had received $100 from Safeway Stores as a deposit on and part payment for certain real property (described therein), the purchase price of which was $170,000 cash and one lot and 50 feet of another lot. It recited further that an escrow would be opened and that the buyer (Safeway Stores), within 15 days after receipt of notice from the escrow holder that it was in a position to close escrow, would deposit "the balance of said purchase price in said escrow." Other recitals in the agreement were as follows:

> "6. Seller agrees to pay a real estate brokerage commission in the amount Agreed upon outside of escrow ($) Dollars to A. F. Hodges, Broker A–F–H. in connection with the completion of the sale escrow.
>
> "7. That this receipt form constitutes the full agreement between the parties hereto and shall be paramount to and supersede any variances, conflicts or omissions contained in any subsequent escrow instructions which may be prepared by an escrow officer and signed by the parties hereto.
>
> "8. The escrow herein provided for shall be completed on or before Thirty (30) days from date hereof, or on or before such extended period as the Buyer may grant."

On the same day, October 28th, the defendant signed escrow instructions and delivered them to an escrow holder. The escrow holder sent a copy of the instructions to Safeway Stores but Safeway Stores did not sign the instructions. (The escrow instructions were not offered or received in evidence.) The manager of the real estate department of Safeway Stores, who was called as a witness by plaintiff, testified that the instructions provided in part that "Before November 28, 1949, Safeway Stores, Incorporated, will hand you the sum of $169,000.00."

On October 31, 1949, plaintiff (broker) and defendant entered into a written agreement entitled "Commission Agreement," which was as follows:

> "In consideration of the efforts of A. F. Hodges to negotiate the sale of the property controlled by the undersigned, located at the Northeast corner of Vermont Avenue and Third Street, Los Angeles, California, containing approximately 87,955 sqft. of area, to Safeway Stores, Incorporated, a Maryland Corporation, I hereby agree to give to him *upon final consummation of said sale* an option to purchase Lot 428 and the Easterly 50 feet of Lot 430 of Ford's Temple Street Addition, in the City of Los Angeles [said lots being a part of the purchase price of the property involved here] * * * at a price of Five Thousand ($5,000.00) Dollars to and including Apr. 1st 1950. Price to be cash." (Italics added.)

In November, 1949, according to the testimony of plaintiff, the defendant told plaintiff that he was having difficulty in clearing his title. The escrow officer testified that there were several liens and encumbrances on the property; that on December 13, 1949, defendant delivered documents to him, or authorized use of funds to pay for documents, which were sufficient to clear the title, and at that time defendant told him that he wanted to cancel the escrow. Defendant cancelled the escrow on said December 13, 1949. Safeway was not notified by the escrow holder that it was in a position to close escrow. On said December 13th the escrow holder notified Safeway that the escrow had been cancelled. On December 16, 1949, Safeway "put up the money" and "deposited" it in the escrow. Prior to the time defendant cancelled the escrow he had been informed by another real estate broker that said broker had a buyer who wished to purchase the property here involved (the property at 3rd and Vermont). Defendant sold the property to that buyer about December 14, 1949.

Appellant contends that when a broker produces a buyer who is ready, able and willing to purchase property on the seller's terms, the broker has earned his commission and cannot be deprived of it by the seller's refusal to consummate the sale.

[1-3] The right of a broker to recover commission must be measured primarily by the terms of his employment. Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 894, 202 P.2d 365; Ford v. Palisades Corp., 101 Cal.App.2d 491, 498, 225 P.2d 545; see also Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 245 P.2d 650. As above shown, it was specifically provided in the commission agreement that, in consideration of plaintiff's efforts to negotiate the sale of the property to Safeway Stores, the defendant would give to plaintiff "upon final consummation of said sale" an option to purchase certain real property. It therefore appears that plaintiff's right to receive the option was contingent upon the happening of a certain event, namely, the final consummation of the sale. An owner and a broker "may, if they wish, enter into a binding agreement that no commission shall be considered as earned until the happening of a certain specified event." Edgecomb v. Callahan, 132 Cal.App. 248, 255, 22 P.2d 521, 524. In the case just cited, wherein the owner agreed to pay a commission "when the lease is signed," the court held that the commission was not earned since the lease was not signed. It was stated in Peterson v. Montgomery Holding Co., supra, 89 Cal.App.2d at page 894, 202 P.2d at page 367, that "When a condition precedent is adopted by contracting parties in their agreement, the court will exact a substantial if not a strict observance of the provisions of the agreement before ordering a judgment thereon." The agreement in the present case was not to secure a purchaser in the open market, but it was to negotiate a sale to a designated purchaser. In McGill v. Fleming, 32 Cal.App.2d 601, 90 P.2d 341, the defendant employed plaintiff's firm to secure leases on defendant's property from the Great Atlantic and Pacific Tea Company, and defendant agreed to pay the brokers a commission for "consummating" the

leases. The court therein held that the parties contemplated the payment of the brokers' commissions only upon the effective consummation of the leases, and it stated at page 604 of 32 Cal.App.2d, at page 343 of 90 P.2d: "We are not unmindful of the general rule that a broker earns his commission when he has secured an acceptable lessee for the lessor, one who is ready, able and willing to lease the property upon the terms on which the broker is authorized to negotiate the lease. The present case, however, is not the ordinary one in which a broker is employed to secure a lessee in the open market. In this case the prospective lessee was named in the form of lease which had been prepared and also in the agreement sued upon. In this agreement the lessor became bound to pay the commission 'for consummating' the transaction. The right of the broker to recover commissions must of course depend upon the terms of his employment. The word 'consummate' means to bring to completion." In the present case the sale was not consummated. As above shown, the agreement between Safeway and defendant recited that the escrow "shall be completed on or before" 30 days from the date of said agreement (October 28, 1949), or "on or before such extended time as the Buyer may grant." The time limited in that agreement was not extended by Safeway. Under the provisions of said agreement, the time for completing the escrow expired on November 28, 1949. Defendant did not agree to give the option to plaintiff, or to pay him a commission, if he (defendant) was unable to consummate the sale in 30 days. Of course, defendant could not give plaintiff an option to buy the lots until the defendant had acquired them upon consummation of the sale of defendant's property. Under the circumstances here, the defendant would have become bound to compensate plaintiff only upon "final consummation" of the sale, unless the failure to consummate the sale was due to the bad faith of defendant. See Ford v. Palisades Corp., supra, 101 Cal.App.2d at page 497, 225 P.2d 545; and Peterson v. Montgomery Holding Co., supra, 89 Cal.App.2d at page 894, 202 P.2d 365. There was no evidence that the failure to consummate the sale was due to bad faith on the part of defendant.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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112 Cal.App.2d 589

CARR et al. v. HOLTSLANDER et al.

Civ. 18875.

District Court of Appeal, Second District,
Division 3, California.

Aug. 7, 1952.

W. W. Carr and Thelma G. Carr brought action against Robert William Holtslander and others for damages resulting from collision between automobile driven by Carr and one driven by Holtslander. Thelma G. Carr, as administratrix of estate of W. W. Carr, deceased, was substituted as a party plaintiff. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that finding that plaintiffs were guilty of contributory negligence was unsupported by the evidence.

Judgment reversed.

1. Appeal and Error 🔑931(1)

Appellate court must take that view of the evidence and inferences which tend to support the findings of the trial court.

2. Automobiles 🔑171(4)

Approaching automobile, approximately sixty feet from intersection, constituted an "immediate hazard" to motorist intending left turn, within statute providing that motorist intending left turn shall yield right-of-way to approaching vehicle within intersection or so close thereto as to constitute immediate hazard. Vehicle Code, § 551.

See publication Words and Phrases, for other judicial constructions and definitions of "Immediate Hazard".

3. Automobiles ⚷171(12)

Where motorist turned in front of approaching automobile without making estimate of its speed and slowly drove into its path making collision inevitable, motorist was guilty of gross negligence and conduct which could not reasonably have been anticipated.

4. Automobiles ⚷208

Where driver of automobile proceeding at lawful speed of forty miles per hour approximately sixty feet from intersection swerved to right, applied brakes and skidded automobile 18 feet in effort to avoid collision, he was not guilty of negligence contributing to collision with motorist making left turn, to whom he owned no duty to yield right-of-way. Vehicle Code, § 551.

Kenneth Sperry, Long Beach, for appellants.

Albert N. Minton, Los Angeles, for respondent Louise M. Brown, Los Angeles, as administratrix of the Estate of Roy L. Brown, deceased.

SHINN, Presiding Justice.

W. W. Carr and Thelma C. Carr, husband and wife, brought this action against Robert William Holtslander and others for damages resulting from a collision between an automobile driven by Mr. Carr, in which Mrs. Carr also was riding, and a car driven by defendant Holtslander. Mr. Carr departed this life before the trial and Mrs. Carr was substituted in his stead as administratrix of his estate. In a trial to the court judgment was for the defendants, and Mrs. Carr appeals individually and as administratrix. We shall refer to Holtslander as defendant. The respondent's brief is filed on behalf of the estate of defendant Brown, deceased.

[1] Pacific Coast Highway is a north and south six lane highway extending southerly from Long Beach to and beyond Laguna Beach. It is intersected by 7th Street which extends easterly from the highway at an angle some 20 degrees south of east. At about midnight Mr. Carr was driving north on the highway in the inside of the three easterly lanes. Holtslander was driving south in his inside lane. The cars were lighted and the night was clear and dry. Holtslander made a left turn at 7th Street and when his car was in the southeast part of the intersection, south of the center lane of 7th Street and about midway between the center line and the east line of the highway, it was struck on the right front side by the plaintiffs' car, as a result of which Mrs. Carr suffered personal injuries and Mr. Carr injury to his property. The court found that defendant was guilty of negligence and that Mr. Carr was guilty of contributory negligence, which was imputable to his wife. It is contended on the appeal that as a matter of law Mr. Carr was not guilty of contributory negligence. The point has merit. With full appreciation of the familiar rules which require a reviewing court to take that view of the evidence and inferences which tend to support the findings of the trial court, we are obliged to conclude that the question of contributory negligence, as it is presented by the record, is one of law, and that the finding that Mr. Carr was guilty of contributory negligence is not supported by the evidence.

Holtslander testified that when he was a block away he observed that the green light was on at 7th Street for traffic on the highway; he slowed down as he approached the intersection, gave a signal for a left turn, watched for two cars traveling north to pass in front of him, observed plaintiffs' car some 60 feet behind the second car that had passed him, slowly made his turn, believing that he had time to cross in safety and, when it was too late, accelerated his car just before the collision; he saw plaintiffs' car approaching but misjudged its speed until it was too late to avoid the accident. He did not stop before making the turn and he did not make any estimate as to the speed of plaintiffs' car before turning. He thought it would stop for him. With respect to plaintiffs' car Mr. Carr testified, by deposition, that he had been driving 45 or 50 miles an hour, that as he approached 7th Street he slowed down to about 40, that he saw cars approaching him from the north, saw defendant's car pull out to make a left turn, immediately applied his brakes and skidded his car about 18 feet before the impact. The traffic on the highway was heavy and much greater than that on 7th Street.

[2] Plaintiffs' car as it approached the intersection constituted an immediate hazard to defendant's car as the latter made the turn. Mr. Carr therefore had the right of way under section 551, Vehicle code.[1]

[3] Holtslander was guilty of gross negligence and of conduct which could not reasonably have been anticipated. When he turned in front of plaintiffs' car, without even making an estimate of its speed, and drove slowly into its path, a collision became inevitable. The testimony of the witnesses and the physical facts clearly indicate that Mr. Carr made every effort to avoid the collision. He swerved to the right so as to avoid a head-on collision and he applied his brakes, skidding his car 18 feet. Lawful speed in the area was 55 miles per hour. Forty miles per hour is not an unusual speed upon a through highway. The two cars stopped where they came together. A driver in Mr. Carr's situation would have had no reason to expect that an approaching car would arrive at the intersection and, without stopping, turn directly into his path. The demands of the law are not so extreme as to require one to anticipate such suicidal conduct.

[4] We have not found in the brief of the respondent any tenable theory, based upon the evidence, which would justify the finding of contributory negligence. It is said: "How many times have we who drive automobiles been compelled when desiring to make a left hand turn to sit in the middle of the intersection and wait while car after car has whizzed past us from the opposite direction, some for many hundreds of feet back, particularly in crowded traffic, with none of them yielding the right of way as required by subsection (b) quoted above!" The argument is that defendant had the right of way and that Mr. Carr had a duty to slow down or stop. The facts were just the reverse. Mr. Carr was not several hundred feet away, but almost upon the intersection. Holtslander did not stop or wait nor even make an estimate of the speed of plaintiffs' car. And we find no suggestion in the brief of any act of negligence upon the part of Mr. Carr, other than that he should have yielded the right of way to Holtslander. He did not have that duty, and there was no evidence that he failed in any respect to act promptly to avoid the accident.

In its legal aspects the present case closely resembles Flannery v. Koch, 103 Cal.App.2d 55, 228 P.2d 580. In that case the defendant, driving lawfully, was suddenly put in danger by the failure of another driver to make a boulevard stop. The defendant applied his brakes but could not stop in time to avoid the accident. A finding of negligence upon his part was reversed. The same reasoning has application to the plaintiffs' situation, where the violation of law was such as we have described.

Other points raised by appellant need not be discussed.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

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[1] "(a) The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

"(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn."

112 Cal.App.2d 503

IOWA MFG. CO. v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

Civ. 8177.

District Court of Appeal, Third District, California.

Aug. 1, 1952.

Rehearing Denied Aug. 20, 1952.

Hearing Denied Sept. 25, 1952.

Proceedings upon the petition of the Iowa Manufacturing Company for writ of prohibition to enjoin the Superior Court, in and for the County of Sacramento, from proceeding in an action against petitioner and others for conversion. The District Court of Appeal, Adams, P. J., held that from the facts of the case the petitioner was doing business in the state and was therefore amenable to service of process.

Writ denied.

1. Corporations ⚿642(4½)

If the representative which a foreign corporation maintains in the state gives it, in a practical sense and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, the corporation is clearly doing business in the state so as to be amenable to civil process.

2. Corporations ⚿642(1)

The essence of doing business in the state, which will make foreign corporations amenable to civil process that the corporation is present within the state sufficiently to constitute such subjection just and equitable, and in the final analysis it is not a question of the power of the state, but whether there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere.

3. Commerce ⚿81

In determining whether a foreign corporation is in the state for purposes of service of process against it, any distinction as to where, exactly, interstate commerce ends and local commerce begins is largely immaterial.

4. Corporations ⚿642(4½)

Where an Iowa manufacturing corporation had a worldwide dealer organization, appointed a California corporation its dealer, often accepted without recourse the chattel mortgages and conditional sales contracts of dealers, and where dealer sold machinery, delivery of which manufacturer refused until buyer signed drafts payable to it, and thereafter sent factory man to put equipment in working order, manufacturing company had an interest in the machinery and was doing business in the state for purpose of service of process in buyer's action for conversion of the machinery by an alleged wrongful repossession by dealer.

* * *

Anthony J. Kennedy, Sacramento, for petitioner.

Thomas W. Loris, Sacramento, for real party in interest.

J. Francis O'Shea, Dist. Atty., Sacramento, for respondent.

ADAMS, Presiding Justice.

Iowa Manufacturing Company, hereinafter called Iowa Company, on January 18, 1952, filed in this Court a verified petition for a writ of prohibition to enjoin the Superior Court of Sacramento County from proceeding further in an action brought by the American River Sand and Gravel Company, hereinafter called American Company, against petitioner and others, petitioner alleging that said action was brought to recover damages for conversion of certain construction equipment in which, it asserted, petitioner had an interest. Petitioner further alleged summons was served upon it through the Secretary of State of California, that it is a foreign corporation organized and existing under the laws of Iowa, its principal place of business being Cedar Rapids, Iowa, and that at no time did petitioner consent in fact or by force of law to service of process upon the Secretary of State of the State of California as service of process upon it; that on the 30th day of August, 1951, petitioner had not been and was not doing business in the State of California and had never withdrawn from doing business here, had not and did not have a place of business in the State of California, had not had and did not have any agents, offices or employees in the

State of California and had not owned and did not own any property in the State of California. It also alleged that it had appeared specially before the Superior Court of Sacramento County for an order quashing said service of summons, but that said court had denied its motion and purposed to proceed against petitioner unless prohibited by this court.

The American Company, on January 23, 1952, filed a verified opposition to the issuance of the requested writ.

We issued an alternative writ on March 5th, whereupon the American Company, on March 21st, filed a return, wherein it asserted that the Iowa Company "has a world-wide dealer organization and often times accepts in addition to, or in substitution of, the direct obligation of its dealers an assignment without recourse of chattel mortgages or conditional sales contracts between dealers and purchasers", that it has appointed Edward F. Hale Company, a California corporation, to act as its authorized dealer in the sale of its products in California, that in its dealings with this respondent the Hale Company purported to sell to said respondent, on its conditional sales contract, a certain plant; that after said contract was signed it was forwarded by the Hale Company to the Iowa Company, but delivery of the equipment was refused until the American Company had signed a series of drafts payable to the Iowa Company, which drafts were to be used to make payment of each of the installments as and when same became due; that after said drafts were executed by the president of the American Company the equipment was shipped to the latter from Cedar Rapids; that a number of said drafts were paid which indicated on their backs that they were presented by the Iowa Company; that on a later date a dispute arose in connection with the air freight of certain equipment sent by the Iowa Company to the American Company, and that the Hale Company referred the matter to the Iowa Company which allowed the credit, notifying the Hale Company that it would be deducted from the last note in the series; that subsequently the Hale Company sought to take possession of the equipment on the ground that the American Company had defaulted in its payments, whereupon the latter wired the Iowa Company requesting authority to pay the arrearage to the Hale Company; that the Iowa Company authorized the acceptance of the payment, but the Hale Company refused. Respondent also stated in its answer that the Iowa Company sent a factory representative to put the equipment in good working condition. From the foregoing it argued that the Iowa Company was doing business in California, that the assignment of the conditional sales contract gave it a security interest in the property in plaintiff's possession and, therefore, it held property in this State, and that trial court properly refused to quash the summons.

By stipulation of the parties the transcript of proceedings in the lower court, the exhibits there introduced, and the affidavit of James F. Plumb, President of the Iowa Company, are before us, but we have not been furnished with the Clerk's record in the lower court.

The affidavit of Plumb consists in the main of conclusions. The facts as shown by the testimony of plaintiff and his witnesses are substantially the same as the allegations in its return.

[1] In the words of the opinion in Sales Affiliates, Inc., v. Superior Court, 96 Cal. App.2d 134, 136, 214 P.2d 541, 542:

> "* * * There is no need for us to indulge in a repetitious analysis of the authorities. Every factual situation where the question arises calls for a comparison of the business advantages derived from the methods employed by the corporation, with those it would enjoy if it conducted its business through its own offices or paid agents in the state. If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process."

Also see Thew Shovel Co. v. Superior Court, 35 Cal.App.2d 183, 187, 95 P.2d 149.

[2-4] In the more recent case of Fielding v. Superior Court, 111 Cal.App.2d 490 at page 494, 244 P.2d 968, at page 970 (hearing in Supreme Court denied) it was said:

"* * * The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state. Milbank v. Standard Motor Const. Co., 132 Cal.App. 67, 22 P.2d 271; Boote's Hatcheries & Packing Co. v. Superior Court, 91 Cal.App.2d 526, 528, 205 P.2d 31."

Also at page 496 of 111 Cal.App.2d, at page 971 of 244 P.2d:

> "It is proper to note * * * that the injured party is a resident of this state; that it would undoubtedly be burdensome for him to go to New York to sue; that the corporations felt that they were bound to stand behind their products it least as far as Federal regulations and actions were concerned. In the final analysis it would seem that this is really not a question of the power of the state, but whether there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere. See 20 C.J.S., Corporations, § 1918, P. 148; International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 [161 A.L.R. 1057]. It can be assumed that adequate notice has been or will be received by the corporations. If this is the case the following language is pertinent: 'In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action. The tendency is to hold that whatever is reasonably effective for this purpose is a good service.' Beach v. Kerr Turbine Co., D.C., 243 F. 706, 708.
>
> "Any distinction as to where, exactly, interstate commerce ends and local commerce begins seems to be largely immaterial in deciding the precise problem at hand. Whether the particular business of these corporations is denominated intra or interstate commerce does not change the fact that they are still doing business in this state."

The writ of prohibition is denied.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

112 Cal.App.2d 430

PEOPLE v. JONES.

Cr. 4807.

District Court of Appeal, Second District, Division 2, California.
July 25, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Ellsworth Meyer, J., of occupying a room with paraphernalia for purpose of recording or registering bets and of selling and registering bets, and motion for new trial was denied, and she appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Gaming ⚷98(3, 5)

Evidence sustained conviction for occupying room with paraphernalia for purpose of recording or registering bets and for selling and recording bets. Pen.Code, § 337a, subds. 2, 4.

2. Criminal Law ⚷317

From defendant's failure to testify, trier of fact was privileged to consider her conduct as tending to indicate the truth of the evidence and as indicating that among inferences that might reasonably be drawn therefrom, those unfavorable to defendant were the more probable.

Horace Appel, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Dep. Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by information of violating section 337a, subdivisions 2 and 4, of the Penal Code, by keeping a store with books, papers, and paraphernalia for the purpose of recording and registering bets upon the result of a trial and contest of skill, speed and power of endurance between horses and in the second count thereof by registering bets. The case was submitted upon the record made before the committing magistrate. Before the last named court only two witnesses testified, to wit, officer Halliburton who arrested appellant, and Donn Mire, an examiner of questioned documents, both of whom testified on behalf of the people.

It appears that about 3:15 p. m. officer Halliburton took a position across the alley from the cleaning shop operated by appellant. He saw her seated near the front at a low counter when a man entered and received a scratch sheet from some clothes hanging on a rack. Accompanied by appellant the man approached and stood near a small table where they studied the contents of the sheet. The visitor handed appellant a small roll of currency and she made a notation on a piece of paper which she rolled and walked toward the rear window of the shop where she bent over. The gentleman took his departure and she returned to her work. Subsequent to the stranger's leaving, officer Halliburton observed appellant bend down on a number of occasions. At 4:45 p. m. another stranger entered the shop and as his predecessor had done, took a scratch sheet from the clothes on the rack, sat by the table where he examined it. He finally placed currency on the table which appellant appropriated, as she made notations on a small piece of paper. She bent over near the same window and on rising approached her patron. Thereupon officer Halliburton and his associate entered the shop and found appellant reading a scratch sheet which she threw under the counter. This was promptly recovered by the officers who searched the premises. They found nothing but a dust pan and several empty bottles under the rear window where appellant had been bending down. On closer inspection they discovered the hollow handle of the dust pan contained several pieces of paper with hand-written notations thereon which were received in evidence as exhibit B. Appellant denied knowledge of the papers, and declared that the dust pan had been there for some time. The shop contained a radio and telephone, and on the table there were other white slips of paper of about the same size as those found in the dust-pan handle.

The scratch sheet contains lists of horses running at various tracks throughout the country, their handicap positions, the jockeys' names, probable odds, probable post times, post positions, how the horses ran in previous races and the favorite on the day of appellant's arrest. Officer Halliburton was qualified as an expert on the equipment commonly employed by bookmakers in recording wagers and bets on horse races. His testimony was that a betting marker is a piece of paper on which a person making or accepting a wager on a horse race will record the track, the horse and the race the horse is in the bettor's initial or some identifying code number, and the amount wagered. He testified that the papers found in the handle of the dust pan were betting markers and that they contained notations of horses by handicap position. While the officer did not see the papers as appellant wrote upon them and since they bore no date, he could not say they were records of races run on the day of the arrest, but from the circumstances in evidence, the court was warranted in drawing the inference that they were such records. The markers were of the same size as the pieces of paper handed by appellant during her transactions with her visitors and the names of the tracks were indicated by the initial letter of the names of each of them. A handwriting exampler was taken from appellant and the witness Mire testified that the memoranda on the betting markers is that of appellant.

[1, 2] The evidence establishes that the premises occupied by appellant were maintained for the purpose of recording bets upon horse races and that appellant registered bets on such races. She accepted money from two different customers after

they had consulted a scratch sheet for the day. She made a betting marker on a piece of paper in each instance and inserted the markers in the handle of the dust pan. On being decoded by the officer it was learned that a bet on a certain race had been placed by each of the patrons who had called on the afternoon of her arrest. The occupancy of the shop by appellant is not disputed. That by her using the room and by selling and recording bets she violated both subdivisions 2 and 4 of section 337a * is proved by substantial evidence. She made no attempt to explain or deny the evidence adduced against her, although she could reasonably be expected to do so inasmuch as the facts were within her knowledge. From such failure to testify, the trier of fact was privileged to consider her conduct as tending to indicate the truth of the evidence "and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to defendant are the more probable." People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17. Not only were the notations on the betting markers hers, but she had other blank slips in her pocket identical with those which had been used to record the bets. Such evidence, taken with the testimony that the visitors both paid appellant money before she registered their bets leaves no factor absent from the record that is essential to a conviction on both counts. People v. Jerman, 29 Cal.2d 189, 195, 173 P.2d 805; People v. Renek, 105 Cal.App.2d 277, 283, 233 P.2d 43; People v. Cohen, 107 Cal.App.2d 243, 244, 236 P.2d 837; People v. Foley, 108 Cal.App.2d 514, 517, 238 P.2d 1023.

The contention is made that occupancy for the purpose of recording bets was not established; that the officer testified to only one race scheduled at Jamaica track. Proof of many races is not material to the issue. The question was whether the accused had and used paraphernalia for recording bets. Guilt is not avoided where not even one race is run. The statute forbids the maintenance of such equipment for registering bets on a purported contest.

Proof of recording the bets of her two patrons is abundant. She kept the blank sheets; she made notations upon them in the view of the officer, and they were betting markers. She deposited them in the handle of the dust pan. Making them as she did after receipt of currency for which no explanation was given, no inference is apparent other than that she prepared the betting markers. See authorities last cited; also, People v. Tenedor, 107 Cal.App.2d 581, 584, 237 P.2d 679.

Order denying motion for new trial affirmed.

McCOMB and FOX, JJ., concur.

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* "Every person * * * 2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or * * * 4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; * * * Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year. This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive."

112 Cal.App.2d 416

COLE v. PACIFIC TEL. & TEL. CO.

Civ. 18933.

District Court of Appeal, Second District, Division 2, California.

July 25, 1952.

Hearing Denied Sept. 18, 1952.

Action by James E. Cole, doing business as Cole's Detective Investigators, against Pacific Telephone & Telegraph Company for omission from defendant's telephone directory of advertisement which defendant had contracted to print therein. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment dismissing complaint, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that defendant's rule, limiting its liability for omission from directory of such advertisement to the charge therefor, which was of record with the Public Utilities Commission, was binding upon the parties to the contract and would operate to limit the defendant's liability according to its terms.

Judgment affirmed.

1. Telegraphs, Telephones and Radio ⚷54(6)

When rule, limiting liability of telephone company for omission from directory of advertising contracted for by subscriber, is of record with Public Utilities Commission, its provisions, if reasonable, are binding upon parties to contract and will operate to limit telephone company's liability as therein set forth. Public Utilities Code, § 489.

2. Public Service Commissions ⚷6.5

Principle that public utilities, being strictly regulated in all operations with considerable curtailment of their rights and privileges, shall likewise be regulated and limited as to their liabilities, is neither harsh nor inequitable when considered in light of fact that rates as fixed by Public Utility Commission are established with such limitation of liabilities in mind, and that reasonable rates are in part dependent upon such a rule.

3. Telegraphs, Telephones and Radio ⚷54(6)

Question of reasonableness of telephone company rule, by which it limited its liability for omission from directory of advertisement contracted for by subscriber to the charge therefor, should be first directed to the Public Utilities Commission which is vested with jurisdiction to make such a determination, and if after complaint to Commission, complainant is still dissatisfied, he is then free to invoke appropriate extraordinary remedy. Gen.Laws, Act 6386, § 35.

◆

Kenny & Morris, Eleanor V. Jackson, Los Angeles, for appellant.

Lawler, Felix & Hall, Leslie C. Tupper, L. B. Conant, Los Angeles, for respondent.

MOORE, Presiding Justice.

In January, 1950, appellant contracted with respondent for the latter to insert certain advertising script in its Los Angeles Classified Telephone Directory. The contract contemplated a one-inch advertisement under the title "Detective Agencies" and appellant's name listed in bold-face type. The listing and the advertisement were to commence with the next succeeding issue of respondent's directory scheduled for distribution in September, 1950. After the utility failed to include either appellant's name in the listings or his one-inch advertisement in its directory, he commenced this action for $25,500 as damages allegedly suffered by reason of the breach of contract.

The answer denied any damages resulted from the omission of appellant's material and pleaded affirmatively that pursuant to its rules and regulations on file with the Public Utilities Commission, liability for omissions from the listings of subscribers in its directories is limited to the amount of the charge therefor, that by virtue of the fact that appellant had paid nothing on account of the contract, appellant is not entitled to recover any damages for the alleged omission.

When the action was called for trial, respondent, in anticipation of its affirmative defense objected to any evidence. Such objection having been sustained and judgment of dismissal having been entered, the sole question for decision is whether the facts pleaded by respondent constitute a complete defense to the demands of appellant.

As a public utility corporation, respondent is required under the Public Utilities Act (Deering's Gen. Laws, Act 6386, sec. 14[1]) to file with the Public Utilities Commission a complete schedule of "rates, tolls, rentals, charges * * * to be collected or enforced, together with all rules, regulations, contracts * * * which in any manner affect or relate to rates, tolls * * or service. * * *" Pursuant to that requirement, respondent had on file the form of contract involved herein and also the rules and regulations relating to its liability for errors in the compilation of its directories. The contract specifically recited, "In case of error or omission of the advertisement by the company, the extent of the company's liability shall be limited to a *pro rata* abatement of the charge paid to the company as the error or omission may affect the entire advertisement." Such provision is substantially the same as the company regulation duly filed with the Commission.

[1] When such rule is of record with the Public Utilities Commission, its provisions, if reasonable, are binding upon the parties to the contract and will operate to limit the telephone company's liability as therein set forth. Riaboff v. Pacific Telephone & Telegraph Company, 39 Cal.App. 2d Supp. 775, 778, 102 P.2d 465, 466. The facts in the Riaboff case are almost identical with those involved in the case at bar. There the subscriber sought to recover damages for the telephone company's error in misspelling his name with the result that it did not appear in the proper place in the directory. In reversing judgment for the plaintiff the court stated, "The rates charged for such service are governed and fixed by the Public Utilities Act, supra. They cannot be varied or departed from and are in part dependent upon appellant's rule of limitation of liability. When such service is contracted for, the rate so fixed by law represents 'The whole duty and the whole liability of (appellant)' (Western Union Telegraph Company v. Esteve Bros. & Co., 256 U.S. 566, 572, 41 S.Ct. 584, 586, 65 L.Ed. 1094) and 'becomes a part of the contract, and the rights and liabilities under the contract must be determined with reference to the law in effect'."

In Correll v. Ohio Bell Telephone Company, 63 Ohio App. 491, 27 N.E.2d 173, 174, cited in the Riaboff decision, the public utility was held to be limited in its liability to a subscriber whose name was omitted from a directory. There a general exchange tariff, a regulation similar to that of respondent's had been duly filed with the Public Utilities Commission. It exempted the telephone company from liability for damage claimed on account of errors in omissions from its directories. The theory upon which the utility's liabilities are regulated and limited by statute is declared to be that "since it renders a service affecting the public, the state shall regulate and control it in order to prevent injustice, and, further, in consideration of such regulation and control, its liability is and should be defined and limited. * * * In a sense it is a matter of contract, on the one hand by the utility, and on the other by the state representing all its citizens."

The Western Union case cited in support of the Riaboff decision sustained a similar limitation on the liability of the telegraph company for errors in the transmission of a message from Barcelona to New Orleans. The rule providing for such limitation had been filed with the Interstate Commerce Commission. In deriving its conclusion, the Supreme Court in the language of Mr. Justice Brandeis declared, "The limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered. * * * Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement * * *. 'If the charges filed were unreasonable, the only attack which could be made upon such regulation [limiting liability] would be by proceedings contesting their reasonableness before the Interstate Commerce Commission.'" [256 U.S. 566, 41 S.Ct. 586.]

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[1] Now Public Utilities Code, section 489.

Appellant attempts to distinguish the authorities relied upon by respondent in that they arose out of losses sustained by virtue of errors in the transmission of messages. That was not the basis for the decision of the Supreme Judicial Court of Massachusetts in Wilkinson v. New England Telephone & Telegraph Company, 327 Mass. 132, 97 N.E.2d 413, 415. That utility had filed with the department of public utilities a rate schedule and regulations. Thereafter, the plaintiff, a hair dresser, caused a telephone to be installed in her shop and paid all bills. Because her telephone gave only desultory service she sued the company for loss of patronage. The court held that (1) the regulation providing for a "'pro rata adjustment of charge'" in the event of complete failure of local exchange service for more than 24 hours was an integral part of the relationship which the plaintiff entered into with the defendant and was not unreasonable; (2) the obligations of defendant are limited by that regulation if it is reasonable; (3) there is nothing to prevent parties from prescribing reasonable rules for the management of the business so long as such rules are made known to their patrons; (4) those rules will operate to abridge the general liability of the public utility at common law.

[2] The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, "its liability is and should be defined and limited." Correll v. Ohio Bell Telephone Company, supra. There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule.

Although appellant zealously urges that such provision seeking to limit the company's liability for its own negligence is void because contrary to public policy, he cites no authority where consideration is given the problem with regard to tariff regulations on file with the Public Utilities Commission. Cases such as Union Construction Company v. Western Union Telegraph Company, 163 Cal. 298, 125 P. 242, and Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 P. 947, are therefore not pertinent.

[3] Appellant contends that he has been forestalled of an opportunity to question the reasonableness of respondent's rule limiting liability. Such questions of reasonableness should first be directed to the Public Utilities Commission which by section 35 of the Public Utilities Act is vested with jurisdiction to make such determination. See Carpenter v. Los Angeles Gas & Electric Corporation, 41 Cal.App.2d 369, 373–374, 106 P.2d 916. If after complaint to the Commission, a party is still dissatisfied, he is free to invoke the appropriate extraordinary remedy.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

112 Cal.App.2d 450

WILSON v. LOS ANGELES COUNTY CIVIL SERVICE COMMISSION et al.

Civ. 18949.

District Court of Appeal, Second District,
Division 1, California.

July 28, 1952.

Rehearing Denied Aug. 18, 1952.

Action by H. J. Wilson against Los Angeles County Civil Service Commission, and others, to annul an eligibility list relative to the position of county clerk. The Superior Court of Los Angeles County, Julius V. Patrosso, J., granted motion to dismiss action and discharging writ of certiorari, and petitioner appealed. The District Court of Appeal, Drapeau, J., held that where only question presented by petition was validity of eligibility list, and list had long since expired, question had become moot and would not be considered by appellate court.

Order affirmed.

See also 106 Cal.App.2d 572, 235 P.2d 620.

1. Appeal and Error 🔑909(1)

Where plaintiff's petition to cancel eligibility list for office of county clerk had been denied, and denial had been affirmed on appeal, it would be presumed on appeal from granting of motion to dismiss proceeding involving prior eligibility list, that new list was valid and not void.

2. Action 🔑6

A "moot question" is a subject for argument not settled by judicial decision, and, although a case may originally present an existing controversy subject to judicial determination, if, before decision, the acts of the parties or other causes cause controversy to lose its essential character, question presented becomes moot and will not be considered by the court.

See publication Words and Phrases, for other judicial constructions and definitions of "Moot Question".

3. Appeal and Error 🔑1097(1), 1195(3)

Where the Supreme Court, when deciding an appeal, states in its opinion a principle of law, necessary to decision, that principle or rule becomes law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeals.

4. Certiorari 🔑70(5)

Where only question presented by original petition for certiorari was validity of eligibility list for office of county clerk, and list had expired prior to taking of appeal, question had become moot, and would not be considered by appellate court.

Lionel Richman, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Los Angeles, Andrew O. Porter and John B. Anson, Deputies County Counsel, Los Angeles, for respondents.

DRAPEAU, Justice.

By his petition of April 12, 1948, the plaintiff Wilson sought a writ of certiorari to annul an eligible list promulgated on November 25, 1947, as the result of an examination theretofore held for the position of county clerk of Los Angeles County.

On October 5, 1948, the trial court ruled in favor of petitioner Wilson and issued a peremptory writ of mandate requiring defendant commission to cancel such eligible list and hold a new examination not later than February 1, 1949. Thereupon Mr. Earl O. Lippold, who had been appointed county clerk from the disputed eligible list, resigned effective as of midnight of October 5, 1948. At a meeting held that day, defendant commission cancelled said eligible list and appointed Mr. W. G. Sharp acting county clerk pending another examination. As a result of the examination held February 1, 1949, a new list was promulgated on February 24, 1949, and Mr. H. J. Ostley was appointed county clerk.

In March of 1949, plaintiff filed another petition for writ of certiorari to cancel the eligible list of February 24th, on the ground that it was void. He appealed from a denial of his petition, and this denial was affirmed by this court on December 12, 1949. Wilson v. Los Angeles County Civil Service Comm., 95 Cal.App.2d 51, 212 P.2d 260.

In the meantime, to-wit, on November 17 and 18, 1948, plaintiff Wilson and defendant Commission, respectively, appealed from the judgment of October 5, 1948. Plaintiff's appeal was later abandoned and on May 13, 1950, was dismissed. Defendant's appeal resulted in a reversal on May 26, 1950; of the judgment of October 5th. Wilson v. Los Angeles County Civil Service Comm., 97 Cal.App.2d 777, 218 P.2d 547. Remittitur issued on July 26, 1950. Retrial of the cause was never set. More than a year elapsed, and on September 17, 1951, the trial court granted defendant's motion to dismiss the proceeding of April 12, 1948, and to discharge the writ of certiorari. This motion was made on the ground "that the issues in said action are moot and that the eligible list sought to be annulled herein is no longer in existence and has expired by operation of law and otherwise."

The instant appeal is from the order granting the motion to dismiss. Although a formal judgment of dismissal was subsequently entered, the minute order of September 17, 1951, from which this appeal is taken, may be considered a judgment and effective for all purposes pursuant to section 581d, Code of Civil Procedure.

When the instant motion to dismiss was made, the eligible list in question was no longer in existence. It was cancelled by respondent Commission on October 5, 1948. On that day the trial court held that the list was void, whereupon the incumbent county clerk resigned. A temporary county clerk could be appointed only in the absence of an eligible list. L.A. County Charter, Rule 34, section 9.

Rule 34, supra, authorizes the commission to prescribe rules for the classified service which shall have the force and effect of law, among others: "(4) For the creation of eligible lists upon which shall be entered the names of successful candidates in the order of their standing in examination. *Such lists shall remain in force not longer than two years.*" (Emphasis added.)

Authority to cancel an eligible list is given to the commission by its Rule XI, sec. 3, to-wit:

> "When in the opinion of the Commission, a real emergency exists, any eligible list may be terminated; and in addition in cases where less than three names remain on an eligible list, any such list may be terminated. *Except when otherwise ordered, the period of eligibility for an eligible list shall be one year from the date of promulgation,* but the Commission may order that the period of eligibility be for a shorter period of time or in its discretion, may extend the period of eligibility, or may restore any eligible list which has expired, *provided no such extension or restoration shall extend the effective date of the list beyond the period of two years from the date of original promulgation of such list.*" (Emphasis added.)

[1] Instead of extending the effective date of the list beyond the one year period provided, the commission cancelled it. Even though such cancellation were invalid, nonetheless, the list expired on November 25, 1948, by operation of law. However, appellant by his argument assumes that it remained in full force and effect until November 25, 1949—two years after its original promulgation. This assumption ignores the new list promulgated February 24, 1949, as result of the examination of February 1st, and from which the present incumbent of the office of county clerk was appointed. As hereinbefore stated, appellant's petition to cancel the new list was denied, and the denial affirmed on appeal. Hence it must be presumed that the new list was valid and not void, as claimed by appellant.

[2] The word "moot" is usually defined as "A subject for argument; unsettled; undecided." 58 C.J.S., Moot, p. 1199. "Discussion of a hypothetical case by students at the Inns of Court for practice. * * * That which can be argued; debatable; not decided, doubtful." The Oxford English Dictionary, 1933 edition. "A discussion of fictitious causes by way of practice. To argue or plead in a supposed case." Webster's New International Dictionary, Second edition, 1937. "A moot question is one which has not been decided." 2 Bouvier's Law Dictionary—Rawle's Third Revision, p. 2246. "A subject for argument; undecided; unsettled. A moot point is one not settled by judicial decision. A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights." Black's Law Dictionary, Second edition, 1910.

Developing the theme of mootness, it is stated in 1 C.J.S., Actions, § 17a, p. 1012: "A judicial tribunal ordinarily may consider and determine only an existing controversy, and not a moot question or abstract proposition. * * * as a general rule it is not within the function of a court to act upon and decide a moot question or speculative, theoretical, or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition * * *. Accordingly a court ordinarily will not entertain an action or proceeding merely for the purpose of passing on a moot question or abstract proposition, unless * * * the determination of such question or proposition is necessary to the disposition of an actually pending controversy, or unless some question of general public interest is involved." Again in section 17d of the same work; "* * * although a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character it becomes a moot case or question which will not be considered by the court [Southern Pacific Co. v. Eshelman, D.C., 227 F. 928; Neill v. Five C Refining Co., 79 Cal.App.2d 191, 193, 179 P.2d 818]."

Appellant contends that "the question of mootness" is not here applicable since it was impliedly considered by the court on appeal, Wilson v. Los Angeles County Civil Service Comm., 97 Cal.App.2d 777, 218 P.2d 547, and that decision became the law of the case.

[3] "The doctrine of the law of the case is this: That where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal". Tally v. Ganahl, 151 Cal. 418, 421, 90 P. 1049, 1050.

An examination of the opinion in Wilson v. Los Angeles County Civil Service Comm., 97 Cal.App.2d 777, 218 P.2d 547, reveals that the only principles or rules of law necessary to that decision were (1) that the oral evaluation procedure used by the commission was not subject to the objection that it was not competitive because based on "subjective" rather than "objective" standards; that the record kept was sufficient to show the basis of rating and that the standards used were adequate within the meaning of the charter requirements. (2) That the mere fact that the recipient of a temporary appointment achieves high honors in subsequent examinations provides no logical basis for an inference of favoritism. The so-called question of mootness was not an issue in that case.

[4] The only question presented by the original petition for certiorari herein was the validity of the eligible list of November 25, 1947. That list has long since expired, hence any decision regarding it would now be completely ineffectual. Moreover, appellant has failed to show wherein any public interest would be served by a retrial of the case.

If appellant is entitled to a determination of the rights and duties of the parties, as he here asserts, that relief can be given in his pending action for declaratory relief. See Wilson v. Los Angeles County Civil Service Comm., 106 Cal.App.2d 572, 576, 235 P.2d 620.

For the reasons stated, the order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.

112 Cal.App.2d 410

PEOPLE v. RICK et al.

Cr. 4811.

District Court of Appeal, Second District,
Division 3, California.
July 24, 1952.

The defendant pleaded guilty to burglary in the Superior Court of Los Angeles County, Jesse J. Frampton, J., and made application for probation. The application was denied, and defendant was referred to the Youth Authority, thereafter the defendant made a motion for an order staying execution of commitment, and a motion requesting that cause again be referred to probation officer for consideration of probation. The Superior Court entered orders denying the motions, and the defendant appealed. The District Court of Appeal, Vallée, J., held that Superior Court had no jurisdiction to hear and determine the motions.

Affirmed.

1. Criminal Law ⚷1023(12)

An order made after judgment in a criminal prosecution is not appealable where motion on which order was made merely asked court to repeat or overrule a former ruling on the same facts. Pen. Code, § 1237.

2. Criminal Law ⚷1023(12)

If superior court had jurisdiction to grant motions of defendant to stay execution of commitment and refer cause to probation officer for consideration of probation, denial of motions affected substantial rights of defendant, and orders denying motions were appealable. Pen. Code, § 1237.

3. Criminal Law ⚷999(1)

A "commitment" is an order by a court or other authorized agency sending a person to prison or to other place of detention, and is the process and authority for carrying the judgment and sentence into effect.

See publication Words and Phrases, for other judicial constructions and definitions of "Commitment".

4. Criminal Law ⚷999(1)

When a person is sentenced to imprisonment in a state prison, and the sheriff is directed to deliver him to the warden of one of the state prisons, and thereafter he is transferred to another state prison, there is a "commitment" to the latter prison.

5. Infants ⚷69

A "commitment" to the Youth Authority is a judicial determination of the fact of defendant's conviction and a pronouncement of the sentence for the offense, namely, commitment to the authority for the term prescribed by law. Welfare and Institutions Code, §§ 745, 1737.

6. Infants ⚷69

Commitment of a defendant to the Youth Authority places him in its custody. Welfare and Institutions Code, §§ 745, 1737.

7. Infants ⚷69

Superior court had no power to hear and determine motions of defendant for an order staying execution of commitment of defendant to Youth Authority and motion requesting that cause again be referred to probation officer for consideration of probation. Welfare and Institutions Code, §§ 745, 1737.

◆

Herbert Grossman and Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant, having pleaded guilty to burglary which the court found to be of the second degree, made application for probation. The application was denied and he was referred to the Youth Authority. On January 8, 1952, the court committed defendant to the Youth Authority for the term prescribed by law, and remanded him to the sheriff to be held in custody under the jurisdiction of the Youth Authority and subject to any orders it might issue.

On January 18, 1952, the Youth Authority had designated Chino as the place of detention of defendant, but he had not been transferred to that institution and was still in the custody of the sheriff. On that day defendant moved the court for an order staying execution of the commitment and requested that the cause again be referred to the probation officer for consideration of probation. The motions were denied on the sole ground that the signed commitment had been placed in the United States mail on January 9, 1952; that sufficient time had elapsed for the Authority to have received it; and that, therefore, under section 1737 of the Welfare and Institutions Code, the court had lost jurisdiction.[1] Defendant appeals from the order denying the motions.

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[1] The court said: "I am of the opinion that the signing of the commitment, and the forwarding of the commitment as of the 9th day of January, was sufficient time for said commitment to now have been received, and to be in the hands of the Youth Authority in Sacramento; and therefore under Section 1737, the Court has lost jurisdiction. I want the record to be clear so that the mat-

[1, 2] The People assert that the order is not appealable and that the appeal should be dismissed. Penal Code section 1237 provides that an appeal may be taken by the defendant "[f]rom any order made after judgment, affecting the substantial rights of the party." An order made after judgment is not appealable where the motion merely asked the court to repeat or overrule a former ruling on the same facts. People v. Palmer, 49 Cal.App.2d 579, 580, 122 P.2d 114. There is nothing in the record to show that the case comes within this rule. We think that if the court had jurisdiction to grant the motion to stay execution of the commitment the denial of the motions affected the substantial rights of the defendant and that the order is appealable. People v. Stein, 31 Cal.2d 630, 632–633, 191 P.2d 409.

Defendant contends the court had jurisdiction to hear and determine the motions. We have concluded it did not.

Section 1737 of the Welfare and Institutions Code provides: "After a court has committed a person to the Authority such court has no power to suspend execution of the commitment. Nothing in this section shall limit or restrict the jurisdiction and powers of the juvenile court under Section 745 of this code."

The argument is that the word "committed" in section 1737 refers to a physical turning over, a physical transfer of the person. It is said that because section 745 of the Welfare and Institutions Code provides that a commitment made by the juvenile court "may at any time be changed, modified, or set aside," it was not the intention of the Legislature in enacting section 1737 to take away from a trial court the power to consider probation but rather to prevent a trial court from interfering with the Youth Authority after it had physically taken custody of the defendant. The argument is not tenable.

Section 1737 as enacted in 1941 read: "After a court has committed a person to the Authority such court has no power to suspend execution of the commitment." In 1945 the last sentence was added as quoted above. Stat.1945, ch. 779, sec. 3. It is apparent that all the Legislature did by the 1945 amendment was to make it clear that the section was not to be construed as denying to a juvenile court the power to change, modify, or set aside a commitment once it had been made. The section as it existed prior to 1945 was not changed insofar as it applies to a commitment to the Youth Authority made by the superior court when it is not acting as the juvenile court.

Section 1732 of the Welfare and Institutions Code provides that "the court shall commit to the authority" specific classes of persons. Defendant is in one of the classes specified. The order of January 8, 1952, reads: "The defendant having heretofore been referred to the California Youth Authority and accepted, said defendant is committed to the Youth Authority for the term prescribed by law. Defendant is remanded to the Sheriff of Los Angeles County to be held in custody of the County Jail under the jurisdiction of the Youth Authority of the State of California, subject to any orders the Youth Authority may issue."

[3–6] A commitment is an order by a court or other authorized agency, People v. Scherbing, 93 Cal.App.2d 736, 209 P.2d 796, sending a person to prison or other place of detention. It is the process and authority for carrying the judgment and sentence into effect. 7 Words and Phrases, "Commitment," p. 832, and cases there cited. When a person is sentenced to imprisonment in a state prison and the sheriff is directed to deliver him to the warden of one of the state prisons, and thereafter he is transferred to another state prison, he is "committed" to the latter prison. People v. French, 61 Cal.App. 275, 276, 214 P. 1003. A commitment to the Youth Authority "is a judicial determination of the fact of defendant's conviction and a pronouncement of the sentence for the of-

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ter may be tested in a higher court if counsel is so advised, and to show that the Court is not exercising a discretion. In other words, the Court is not denying the motion on the grounds that in its discretion it does not feel that it is a proper case."

fense, namely, commitment to the Authority for the term prescribed by law, * *." In re Herrera, 23 Cal.2d 206, 214, 143 P.2d 345, 349. "Committing a defendant to the Youth Authority places him in its custody." In re Ralph, 27 Cal.2d 866, 869, 168 P.2d 1, 3. The order of January 8, 1952, was a commitment to the Authority; and upon its being made, defendant was "committed" to the Authority.

When defendant was remanded to the sheriff he was not remanded to him in any capacity other than as an agent of the Authority. He was then in the custody and under the jurisdiction of the Authority, execution of the commitment had commenced, and he was subject to the orders of the Authority.

[7] We hold that at the time the motions referred to were made defendant had been committed to the Authority and the court had no power to suspend execution of the commitment.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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112 Cal.App.2d 304

JOHN BREUNER CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15287.

District Court of Appeal, First District,
Division 2, California.

July 21, 1952.

Hearing Denied Sept. 18, 1952.

John Breuner Company brought an original proceeding in certiorari to review an order of the Superior Court of the State of California, in and for the City and County of San Francisco, adjudging James G. Bryant, as director of employment of the State of California, not to be in contempt of court. The District Court of Appeal, Dooling, J., held that a finding of Superior Court in contempt proceedings would be res judicata in mandamus action subsequently brought only as to matters actually litigated in contempt proceedings.

Order affirmed.

1. Contempt 🔑54

Affidavit charging a constructive contempt constitutes complaint and frames issues before court in contempt proceeding. Code Civ.Proc. § 1211.

2. Judgment 🔑735

Where only issue tendered by affidavit charging director of employment of state with contempt of court was failure of director to remove charges from employer's account under state unemployment insurance act as required by judgment, and effective date of removal was not referred to in affidavit, and trial court did not consider matter of date of removal and did not intend to make adjudication of it, finding that director had fully and completely complied with judgment did not amount to judicial approval of date on which order of director was made effective by director, and finding could not be urged as res judicata of proper date of removal of charges in subsequent proceedings in which such issue was raised. St.1935, p. 1226; Code Civ. Proc. § 1211.

3. Judgment 🔑720

Finding in proceeding charging director of employment of state with contempt of court for refusing to comply with judgment requiring director to remove charges from employer's account under state unemployment insurance act would be res judicata in mandamus action subsequently brought by employer to review adverse decision of commission and board of appeals in administrative proceedings commenced by employer through department of employment only as to matters actually litigated in contempt proceedings. St. 1935, p. 1226; Code Civ.Proc. § 1211.

Fabian D. Brown, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen. of California, Irving H. Perluss, Deputy Atty. Gen., William L. Shaw, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

This is an original proceeding in certiorari to review an order of the Superior Court adjudging James G. Bryant, as director of the Department of Employment of the State of California, not to be in contempt. To understand the questions involved a review of the litigation between the parties is necessary.

On June 22, 1944 petitioner commenced an action to recover a refund of unemployment taxes paid by it and to remove certain charges from its account under the California Unemployment Insurance Act, St. 1935, p. 1226. This action resulted in a judgment in favor of petitioner ordering the refund of $35,462 and the removal of charges from its account in the sum of $36,636, covering the years 1941, 1942 and 1943. This judgment was appealed and affirmed, John Breuner Company v. Bryant, 35 Cal.2d 897, 218 P.2d 4, on May 11, 1950. Shortly thereafter the money judgment was paid to petitioner and the entries made in petitioner's "Employer Reserve Account Ledger" which led to the contempt proceeding against Bryant.

When unemployment taxes are paid by an employer they are entered in an account headed "Employer Contributions". The accounts are open accounts so that the contributions of one year are added to the total theretofore paid in previous years by the same employer. When benefits are paid to employees of this employer the amounts are entered in a parallel column headed "Insurance Charges". The difference between the total contributions and the total benefit payments is then entered in a third column headed "Reserve Balance".

What Bryant through a subordinate in his department actually did in compliance with petitioner's judgment was to deduct from the amount shown in the "Insurance Charges" column the sum of $36,636 as directed by the judgment and to deduct from "Employer Contributions" the amount of $35,462 paid to petitioner pursuant to the judgment. The difference between the two accounts as thus altered was thereby increased by the sum of $1,174 which was added to the "Reserve Balance" to increase it by that amount. Actually this was accomplished by a bookkeeping shortcut in which the sum of $1,174 was added to the petitioner's "Reserve Balance", and the following notation entered on the reverse of the sheet:

> "The previous reserve of the 11th Rating Period has been adjusted as follows pursuant to court order
>
> | | |
> |---|---|
> | "charges removed | $36,636.00 |
> | "refund made | $35,462.00 |
> | "adjustment increase | $ 1,174.00" |

Petitioner conceived that under its judgment it was entitled to have the sum of $36,636 removed from the charges against it and that the amount of $35,462 refunded to it should not have been deducted from its "Employer Contributions" column, so that the entire deduction of $36,636 should have been added to its "Reserve Balance". This is important because the ratio of the average annual pay-roll of an employer over the preceding three year period to the total in the "Reserve Balance" is reflected in the rate of the pay-roll tax imposed on the employer for the succeeding year.

Petitioner thereupon filed an affidavit charging Bryant with contempt. The affidavit recited the entry of the judgment in petitioner's favor "directing, among other things, that defendant remove charges from the merit or experience rating of plaintiff with defendant, charges made against said account in the sum of $36,636.00."

It then proceeded: "That defendant has wilfully and contemptuously refused and failed to do so and further refuses and fails to do so with the full knowledge of the said judgment."

At the contempt hearing it was testified that, because the sum of $35,462 refunded to petitioner pursuant to the judgment had been added to the total in his "Employer Contributions" account when originally paid in by petitioner, upon its payment back to petitioner a corresponding deduction must be made in order to truly state the actual amount of petitioner's contributions after the refund. The court was satisfied with the correctness of this procedure under the judgment and entered the order here in question adjudging Bryant not in contempt.

That order contained the following recital which is the only part of the order here sought to be annulled: "Said defendant has fully and completely complied with the provisions of said judgment and order."

Petitioner filed a notice of appeal from this order and the appeal was dismissed by the Supreme Court on March 30, 1951 on the ground that an order made in a contempt proceeding is not appealable. John Breuner Co. v. Bryant, 36 Cal.2d 877, 229 P.2d 356.

The rectification of the account was made "as of July 31, 1949". Petitioner claiming the rectification should have been made effective as of the years for which the judgment spoke with a consequent reduction of its pay-roll tax for all succeeding years commenced an administrative proceeding through the Department of Employment seeking to have this done. After adverse decisions by the Commission and the Board of Appeals in this proceeding petitioner filed a mandamus action in the Superior Court to review these actions. This mandamus action is now pending in that court.

Petitioner alleges in his petition before us: "That the time of the removal of said charges from the reserve account of petitioner will seriously and materially affect his rights to further rectification of the reserve account and deprive him of substantial rights in connection with the overpayment of taxes for succeeding years."

It is petitioner's theory that the finding of the court in the contempt proceeding hereinabove quoted, that "defendant has fully and completely complied with the provisions of said judgment", amounts to a judicial approval of the date on which the order was made effective by respondent, i.e., July 31, 1949, and may be effectively interposed as res judicata of that fact in the mandamus action now pending in the Superior Court.

Properly construed we have concluded that this finding may not be given such legal effect. The only matter put in issue by the affidavit charging contempt above quoted from was whether respondent had failed and refused to comply with the judgment insofar as it directed "that defendant remove charges * * * in the sum of $36,636.00." This put in issue only the *fact* of such removal, not the *date* of removal.

[1] The affidavit charging a constructive contempt constitutes the complaint and frames the issues before the court in the contempt proceeding. Code Civ.Proc. sec. 1211; Hotaling v. Superior Court, 191 Cal. 501, 505, 217 P. 73, 29 A.L.R. 127; Frowley v. Superior Court, 158 Cal. 220, 222, 110 P. 817; In re Felthoven, 75 Cal. App.2d 465, 470, 171 P.2d 47; 5 Cal.Jur. pp. 938–939.

[2, 3] Since the only issue tendered by the affidavit charging the contempt was the failure to remove the charges of $36,636 and the effective date of the removal was not referred to in the affidavit the latter issue was not before the court in the contempt proceeding, and from a review of the transcript of the contempt hearing we are satisfied that the court did not consider that matter nor intend to make any adjudication of it. The finding here attacked must be construed as limited to the issue then before the court and as so limited it amounts only to a finding that in charging the petitioner's "Employer Contributions" account with the $35,462 refunded to it and increasing the "Reserve Balance" by $1,174 rather than $36,636 the defendant had not departed from the terms of the judgment insofar as it directed "that defendant remove charges * * * in the sum of $36,636.00". So construed the finding is not here subjected to attack, nor can it be successfully urged as res judicata of the proper date of the removal of the charges in any subsequent proceeding in which that issue is raised between the parties, since a judgment or order in a collateral proceeding of this character is res judicata in a subsequent action only as to matters actually litigated in the prior proceeding. Estate of Williams, 36 Cal. 2d 289–293, 223 P.2d 248, 22 A.L.R. 2d 716; Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025; Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 142, 69 P.2d 849; Ball v. Stephens, 68 Cal.App.2d 843, 851, 158 P.2d 207.

For the reasons herein stated the order is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

112 Cal.App.2d 893

G. L. TILDEN & CO., Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

WALKUP DRAYAGE & WAREHOUSE COMPANY, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

MERCHANTS EXPRESS CORPORATION, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

HAGSTROM'S FOOD STORES, Inc., Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

HASLETT WAREHOUSE CO., Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

MANNINGS, Inc., Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

J. A. CLARK DRAYING COMPANY, Limited, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

HIGHWAY TRANSPORT Incorporated, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

ROBERTSON DRAYAGE COMPANY, Inc., Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

FOSTERS LUNCH SYSTEM, Limited, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

UNION ICE & STORAGE COMPANY, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

UNION ICE COMPANY, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

PENINSULA ICE COMPANY, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 15288–15300.

District Court of Appeal, First District,
Division 2, California.
Hearing Denied Sept. 18, 1952.

Fabian D. Brown, San Francisco, for petitioners.

Edmund G. Brown, Atty. Gen. of California, Irving H. Perluss, Deputy Atty. Gen., William L. Shaw, Deputy Atty. Gen., Sacramento, for respondent.

PER CURIAM.

The facts and issues in these proceedings are similar to those involved in John Breuner Co. v. Superior Court, Cal.App., 246 P.2d 694, this day decided. For the reasons therein stated the orders are affirmed.

Hearing denied; SCHAUER, J., dissenting.

112 Cal.App.2d 569

BROWN et al. v. VOIGHT.

Civ. 4406.

District Court of Appeal, Fourth District, California.

Aug. 6, 1952.

Rehearing Denied Sept. 5, 1952.

Hearing Denied Oct. 2, 1952.

Action by George L. Brown and another against Mary T. Voight to compel removal of certain installations from plaintiffs' land. The principal defense was that defendant and her predecessor in title had acquired an easement by prescription. The Superior Court, Inyo County, Ernest D. Wagner, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence supported the finding that the installations had been erected under a revocable license.

Affirmed.

1. Easements ⚷53

Easement for purpose of traveling over undedicated road would not include any right to install poles on roadway.

2. Licenses ⚷49

In action to compel removal of certain installations from plaintiffs' property, wherein defendant contended that she and her predecessor in title had acquired easement by prescription, evidence supported finding that installations had been erected under revocable license.

3. Boundaries ⚷37(1)

In action to compel removal of certain installations from plaintiffs' property, wherein defendant claimed title to property in question, evidence supported finding that such installations were on plaintiffs' property.

◆

Mary T. Voight, in pro. per.

Howard A. Andrews, Bishop, for respondents.

BARNARD, Presiding Justice.

This is an action to compel the defendant to remove certain installations used in connection with her motel property at Olancha.

In 1938, one J. F. Saner acquired title to 30 acres of land in the Southwest Quarter of the Northwest Quarter of Section 18–19–37, M. D. B. & M. This land is some 300 feet westerly from Highway 395 and for many years a road has run from that land to the highway, crossing lands owned by the plaintiffs. This road, herein called the motel road, had never been dedicated or accepted as a county road but has long been used for entry to this land and by the general public.

After he acquired this land, Saner built and operated a motel thereon, and made certain installations for the purpose of advertising his business. He installed three concrete pillars marking a fan-shaped entrance from Highway 395 to the motel road, and installed a large sign on Brown's land at the south side of this entrance, and another sign on Lacey's land some half mile north of that entrance. He erected a line of poles to carry electric wires from his motel for the purpose of lighting the sign and pillars at this entrance. In June, 1946, Saner sold the 30 acres and motel to the defendant, the deed describing the land by government description. He gave the defendant a bill of sale covering a long list of furniture and fixtures going with the motel, but nothing was said in the deed or bill of sale about the motel road or the installations here in question.

The complaint in this action, filed on October 25, 1948, alleged, so far as material here, that Saner had erected the signs, pillars and pole line on the plaintiffs' properties with their permission; that he had sold the motel land and business to the defendant; that she had been requested to remove the signs, pillars and pole line from their respective properties; and that she had refused to do so claiming a right or easement by prescription to maintain and use them permanently. An injunction was asked ordering the defendant to remove the signs, pillars and poles from the respective lands of the plaintiffs. The defendant answered admitting that Saner had requested and received permission from the respective plaintiffs to erect two signs, and alleging that he also erected three concrete pillars at the entrance to her private roadway leading from her motel property to Highway 395; that he erected a pole line consisting of three poles upon and along her said private roadway; that these poles, line and pillars are appurtenant to her real property; that she and Saner had, since 1938, openly, notoriously and under a claim of right operated and maintained these pillars, poles and signs; that each plaintiff, in 1946, and again in 1948, had told her that these signs, poles and pillars could remain upon their property as long as she desired; that the plaintiffs also stated to her that Saner had obtained and was possessed of a prescriptive right to the location of these installations adverse to them; and that she now owns a right or easement to maintain these or similar signs, poles and pillars upon the lands of the plaintiffs, which right or easement is adverse to them and to the whole world.

The case was set for trial for February 3, 1949. It was continued three times and finally tried on May 26 and 27, 1949, before Judge Dehy and taken under submission. A minute entry was made on October 27, 1949, ordering judgment for the plaintiff and the presentation of findings and a decree. Judge Dehy died before the findings and decree were signed. The case was again set for trial on May 8, 1950. Many continuances followed and the case was again tried on October 2, 3, 4 and 5, 1950, before Judge Wagner. The defendant was represented by counsel at the first trial before Judge Dehy, and was represented by several attorneys at various times prior to the second trial, but at that time appeared without counsel. When a further continuance was refused she acted in propria persona.

The court found in favor of the plaintiffs finding, among other things, that Saner erected the signs on plaintiffs' lands under a parol license given him by them, respectively, each license being expressly made revocable at the will of the licensor; that Saner erected the three pillars on Lacey's property under an assumed and implied license from Lacey; that Saner erected a line of poles, two being on Brown's property and one on Lacey's property, under assumed and implied licenses from them respectively; that the defendant became the owner of these signs, pillars and poles as a part of her purchase of the motel property from Saner, the cost of the same to her being nominal or none at all; that the licenses under which Saner erected the signs, pillars and poles on the properties of the plaintiffs were personal to him and were revoked; that the defendant has not acquired and does not now have any license or other right to maintain the signs, pillars or poles on the properties of the plaintiffs; that Saner knew that his erection of these installations was permissive only, and never claimed that his erection or maintenance of the signs, pillars or poles on the properties of the plaintiffs was adverse or hostile to them; and that the defendant has acquired no right or easement, by prescription or otherwise, to maintain these signs, pillars or poles. Judgment was accordingly entered ordering the defendant to remove these signs, pillars and poles within 30 days, and she has appealed.

The record was filed in this court on September 14, 1951. Time for filing the opening brief was extended several times, and finally to May 1, 1952. At that time the appellant filed a long affidavit in support of her request for a further continuance, which was denied. At her request that affidavit was considered as her opening brief. The respondent filed no brief but the cause was orally argued on July 8, 1952, at which time the appellant also filed a petition to correct the record on appeal, which matter was also submitted.

As near as we can understand, the appellant contends that the trial was not fairly conducted and that she was "continuously weedled and confused by" the judge; that no evidence was received showing that she did not own "the land and property of my said motel roadway"; that all surveys are wrong and her land in section 18 actually runs over to Highway 395; that, in any event, she has an easement for the maintenance of these installations, acquired by prescription; that the witnesses against her committed perjury; and that the clerk's and reporter's transcripts do not truly and correctly set forth the respective proceedings.

The criticism of the manner in which the trial was conducted is entirely unwarranted. The appellant was most courteously treated by opposing counsel, and the trial judge handled the difficult situation with the utmost fairness and with a degree of patience and consideration that has probably seldom been equaled.

[1, 2] The real question involved was as to whether the appellant had acquired a prescriptive right to maintain these installations. There was ample evidence that they were on lands owned by the respondents. While the three poles were on the road side of the fence to the south of the motel road, and while the evidence indicates that the appellant had an easement for the purpose of traveling over the motel road between her land and the highway, that easement would not include any right to install poles on this roadway. The respondents testified that they had given Saner permission to install the two signs and the pillars, contingent upon their right to have them removed at any time. Saner testified, by deposition, to the same effect and that he had agreed with the respondents that the signs and pillars should be removed whenever this was desired by the respondents. The respondents also testified that the appellant had not discussed the matter of the signs and pillars with them, and they had not given her any permission to maintain them. The appellant, her husband and her mother testified that both before and after the motel property was purchased the respondents had told them that they had no interest or claim in the signs, pillars or poles, and that they told her these things could remain there as long as the motel was operated. Nothing more than a conflict appears.

[3] While it was not pleaded, appellant contended at the trial, and contends here, that all the surveys are erroneous and that her land in section 18 actually runs over to Highway 395, so that these installations are in fact upon her own land. There is no evidence to sustain this contention. The map and deeds in evidence indicate to the contrary. There is evidence that appellant's land, as fenced and occupied by her and her predecessors for more than 20 years, is some 300 feet from the highway. The appellant employed a licensed surveyor, who was also employed by the State Highway Department, who surveyed her land and the area in question in 1948. His map, which was admitted in evidence, shows that her land is some 300 feet from the highway and he testified that these installations were not on her land but on lands owned by the plaintiffs. Four documents signed by the appellant in 1947 and 1948, in which she acknowledged that the signs were on the plaintiffs' properties, were admitted in evidence. The findings that these signs and pillars are on respondents' properties are fully sustained by the evidence.

While the appellant contends that the record before us is incomplete, erroneous and dishonestly prepared, these contentions are neither supported by anything tangible nor is our attention called to any alleged defect which could possibly be material to the decision of this case.

The motion to have the record on appeal corrected is denied, and the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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112 Cal.App.2d 475

PEOPLE v. RICKSON.

Cr. 919.

District Court of Appeal, Fourth District, California.

July 30, 1952.

The defendant was convicted in the Superior Court of San Bernardino County, A. D. Mitchell, J., of forgery, and she appealed. The District Court of Appeal, Griffin, J., held that evidence pertaining to other checks which had been raised by defendant while in employ of complaining witness, was properly admitted as tending to explain facts relating to crime charged, and as bearing on common scheme or plan.

Judgment affirmed.

1. Criminal Law ⚷372(12)

In forgery prosecution in which defendant was charged with raising amount of check payable to her, wherein it appeared that defendant had served as bookkeeper for complaining witness and had had duty of comparing canceled checks with records, evidence tended to show that other salary checks of defendant were missing and that they had been raised in amount was admissible as tending to prove or explain facts relating to crime charged, and as bearing on a common scheme or plan.

2. Criminal Law ⚷369(2), 370, 371(1, 12), 372(1)

Evidence of crimes other than those charged is admissible where it tends to establish intent, guilty knowledge, motive, a common scheme or plan embracing commission of several crimes so related that proof of one tends to establish the other, or if it tends to connect defendant with crime charged.

3. Criminal Law ⚷374

Where defendant who was bookkeeper for prosecuting witness was charged with forgery by having raised amount of checks payable to her, evidence of other instances in which defendant's salary checks had purportedly been raised, in order to be admissible, need not have been proved as to each check beyond a reasonable doubt, but it was sufficient that such evidence was relevant to explain or clarify the facts.

4. Witnesses ⚷2(1)

Section of Code of Civil Procedure permitting court to appoint expert whenever it deems expert evidence necessary, does not create an absolute right to defendant in criminal case to appointment of expert witness to testify in his behalf. Code Civ.Proc. § 1871.

5. Witnesses ⚷2(1)

In forgery prosecution in which defendant was charged with having raised the amount of her pay check, wherein defendant had introduced witness who testified on issue of whether writing on check was defendant's, and testimony was also given by hand writing expert, refusal of court to appoint expert to examine check and testify on behalf of defendant was not an abuse of discretion. Code Civ.Proc. § 1871.

6. Criminal Law ⚷656(2)

It is duty of judge to control all proceedings with view to expeditious and effective ascertainment of truth regarding matters involved, and court did not act improperly in forgery prosecution when it interrogated witnesses on mere foundational points which prosecution would have developed in any event for purpose of satisfying mind of court as to authenticity of certain bank records and audits of accounts which were sought to be introduced in evidence. Code Civ.Proc. §§ 2042, 2044; Pen.Code, §§ 1044, 1093, 1094.

7. Criminal Law ⚷982

A petition for probation is addressed to the sound discretion of the trial court.

8. Criminal Law ⚷982

The benefits of the probation law are intended for defendants who deny guilt and are convicted, as well as those who plead guilty.

9. Criminal Law ⚷982

Where defendant who had been convicted of forgery made application for probation and hearing was held thereon, and there was express denial of probation, suspended sentence as to three of six months sentence could not be construed as constituting a probation order.

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Hyer & Graeber, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Dep. Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with the crime of forgery in raising the amount of a check payable to her in the amount of $74.63 to $174.63. She waived a jury trial and was convicted by the court. Probation was denied. She was sentenced to six months in the county jail. Three months of that sentence was suspended.

Between May 1, 1950, and March, 1951, defendant was employed as a bookkeeper for a San Bernardino furniture dealer, Abe Morris, at $175 per month. She prepared the checks used to pay the firm's obligations as well as her own salary checks. She also compared returned canceled checks with the firm's records. On February 28, 1951, she handed Morris a check prepared by and payable to her in the sum of $74.63 (being one-half month's salary). Before he signed it he noticed the amount payable by the check was $74.63. On March 19, the bank informed him the check had been charged to his account for the sum of $174.63. There had been added the word "One" in front of the words "Seventy Four and 63/100 Dollars" and the figure 1 had been inserted before the figures $74.63. It was later discovered that several other checks which had been similarly raised in this amount had been cashed by the bank. Morris's check stubs showed the check here involved as being issued in the sum of $74.63. The evidence shows that after defendant obtained Morris's signature to the check she took it to a liquor store where she owed $15, and it was cashed by one Tham. He testified at the time it was presented that it appeared to be made out for $174.63; that he cashed it for her and deducted the $15 which defendant owed to him; and that he deposited the check with the bank. (The deposit slip so indicates.) When Morris learned that the check had been altered he employed an accountant to audit his books. He endeavored to reconcile the bank statement with the company's check stubs and canceled checks. Certain canceled checks were missing. Between November 18, 1950 and February 16, 1951, eleven checks were unaccounted for. The amounts recorded on the check stubs differed from the amounts paid by the bank in the sum of $100 each as to eight checks which were made payable to defendant. All other checks paid agreed with the sums for which they had been issued.

A handwriting expert compared the handwriting on the check involved with other checks known to have been written by defendant, and with other handwriting exemplars. He concluded that the letter "One" was written by the defendant, at a different time, with a different pen and ink than the remainder of the face of the check.

Defendant testified she wrote the check in question for $74.63. She denied raising the amount of it and insisted that she cashed it for only $74.63 at the liquor store and that after paying her $15 debt, the manager gave her $59.63 in change. She denied knowing anything about the alteration of the check in question. She produced as her witness her husband, who had received letters from defendant while he was overseas. He testified he was familiar with her handwriting and that in his opinion the word "One" was not written by defendant.

[1, 2] It is first argued by defendant that the court prejudicially erred in admitting evidence, over objections, pertaining to the missing checks that had been raised $100 each. She cites such rules as are set forth in People v. Albertson, 23 Cal.2d 550, 145 P.2d 7, in reference to the admissibility of other offenses. The evidence pertaining to these other claimed checks was clearly admissible as tending to prove or explain facts relating to the crime charged, and as bearing on a common scheme or plan. Defendant had charge of all canceled checks and she made no attempt to explain the disappearance of the ones payable to her for salary and which apparently had been raised and cashed for the amounts indicated. An incriminating inference clearly arises from such conduct. Evidence of crimes other than those charged is admissible where it tends to establish intent, guilty knowledge, motive, a common scheme or plan embracing commission of several crimes so related that proof of one tends to establish the other, or if it tends to connect defendant with the crime charged. People v. Robinson, 102 Cal.App.2d 800, 228 P.2d 583; People v. Woods, 35 Cal.2d 504, 218 P.2d 981; People v. Dabb, 32 Cal.2d 491, 197 P.2d 1.

[3] Defendant also contends that the commission of a crime by her as to each check claimed to have been raised was not

established beyond a reasonable doubt. If the evidence is relevant to explain or clarify the facts in the case, or is a circumstance pointing toward guilt of the defendant, such evidence does not need to be established beyond a reasonable doubt. People v. Klinkenberg, 90 Cal.App.2d 608, 632, 204 P.2d 47, 613.

[4, 5] It appears that after the expert witness testified that the raised check was all in the handwriting of the defendant, counsel for defendant moved the court, under section 1871, C.C.P., to appoint a handwriting expert to examine the questioned document and testify on behalf of the defendant. The court denied the motion. Defendant claimed the court abused its discretion in so doing. The section referred to does not create an absolute right to a defendant in a criminal case to the appointment of an expert witness to testify in his behalf. People v. Porter, 99 Cal. App.2d 506, 510, 222 P.2d 151; People v. Conte, 17 Cal.App. 771, 122 P. 450, 457; In re Horowitz, 33 Cal.2d 534, 540, 203 P.2d 513. That section recites that whenever it shall be made to appear to any court that expert evidence is or will be required, such court "may" appoint such expert. Defendant had full opportunity to examine the expert witness who testified as to his competency and ability. The trial court properly concluded that further expert testimony was not needed to enlighten the court as to the facts. Defendant produced a witness who testified on that subject. In view of all the surrounding facts, no abuse of discretion appears. People v. Shafer, 101 Cal.App.2d 54, 59, 224 P.2d 778.

[6] It is next argued that defendant was denied a fair and impartial trial in that the "court took over the prosecution", laid "the foundation for evidence and then introduces the same". This complaint is predicated upon certain questions propounded to a witness by the court, after the prosecution had questioned the witness in respect to laying the foundation for the admission in evidence of certain bank records and audits of accounts. No doubt this line of endeavor was to satisfy the mind of the court as to the authenticity of the evidence sought to be introduced and of its admissibility. It is the duty of the judge to control all proceedings with a view to the "expeditious and effective ascertainment of the truth regarding the matters involved." (Penal Code secs. 1044, 1093, and 1094; C.C.P. Secs. 2042 and 2044; People v. Goodwin, 132 Cal. 368, 372, 64 P. 561; People v. Hernandez, 100 Cal. App.2d 136, 138, 223 P.2d 76. There is nothing in this case to show that the court was endeavoring to assist any particular party, but he was merely endeavoring to expedite the case. The matters upon which the court interrogated the witnesses were merely foundational points which it is obvious the prosecution would have developed in any event. There was no error in this regard.

Lastly, defendant contends that the court erroneously denied probation. It appears that the trial of the case was before Judge Mitchell. The probation hearing was set down for hearing before Judge Hilliard, without objection. The probation officer, by his report, recommended probation. Prior to the hearing defendant's attorney had filed a notice of appeal. It was charged that the latter judge ignored the recommendation for probation by the investigating officer, and since he did not hear the trial of the cause, he erroneously denied probation. It is further argued that since the court discovered that counsel for defendant filed a notice of appeal in the case before defendant's application for probation was considered, and since she still professed her innocence, the trial court became biased and prejudiced against her. An examination of the proceedings taken at the time of the pronouncement of judgment indicates that the judge stated: "I have received, here, and considered the report of the probation officer". The district attorney then called the court's attention to the fact that the defendant had filed a notice of appeal, that she insisted she was not guilty and had committed no wrong. He then stated that he "Can't follow with the recommendation of the probation officer. * * * Also, one other thing that does not appear in the probation officer's report, Your Honor, there were a number of other checks involved here, but only one had not been destroyed, * * * consequently we had no evidence except the differences in amount, and that does not appear in the probation officer's report at all, although the bank records and the records of the complaining witness would so indicate." The court then summarized the report and stated that: "It appears rather obvious that a defendant who persists in his or her innocence should exhaust their remedy rather than ask for extension of leniency by way of probation * * *." He concluded that rehabilitation was not possible, and he stated that he was inclined to agree with the district attorney in that regard.

[7, 8] A petition for probation is addressed to the sound discretion of the trial court. People v. Dunlop, 27 Cal.App. 460, 470, 150 P. 389. It is true that the benefits of the probation law are intended for defendants who deny guilt and are convicted, as well as those who plead guilty. People v. Jones, 87 Cal.App. 482, 262 P. 361. In the Jones case the trial court refused to allow the defendant to apply for probation. The court's sole reason was that the defendant had pleaded not guilty and had been convicted by the jury, instead of pleading guilty. In the instant case a full hearing was had on the merits, the probation officer's report was fully considered, and after due deliberation the application was denied.

[9] Had the trial court not considered defendant's formal application for probation and denied it, the effect of the suspended three months sentence might have constituted a probation order, In re Herron, 217 Cal. 400, 19 P.2d 4, but where there is an application for probation, a hearing had upon it, and an express denial of probation, there is no room for an implication or construction of the immediately following order suspending part of the sentence, and according to Ellis v. Department of Motor Vehicles of State of California, 51 Cal.App.2d 753, at page 757, 125 P.2d 521, it is said that in such a case, where the court does not act under the probation law, it has no power to suspend execution of any part of the sentence, and an order purporting to do so is void. See, also, In re Taylor, 140 Cal.App. 102, 34 P.2d 1036; In re Clark, 70 Cal.App. 643, 646, 234 P. 109; and In re Eyre, 1 Cal.App.2d 451, 36 P.2d 842, where it is similarly held that where probation is denied no part of the sentence imposed may be suspended. Defendant should not be heard to complain.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

112 Cal.App.2d 494

PEOPLE v. WERWEE.

Cr. 4792.

District Court of Appeal, Second District,
Division 3, California.
Aug. 1, 1952.

As Corrected Aug. 6, 1952.
Hearing Denied Aug. 28, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Joseph M. Maltby, J., of forcible rape and attempted violation of sex perversion statute, and his motion for new trial was denied, and he appealed. The District Court of Appeal, Shinn, P. J., held that since the jury had been permitted to separate overnight after submission of the case, the conviction would be set aside.

Reversed.

1. Criminal Law 🔑854(1), 1174(4)

Where, after submission of case to jury, jury was permitted to separate overnight, conviction would be reversed. Pen. Code, §§ 288a, 1121, 1128.

2. Criminal Law 🔑1163(6)

The presumption of prejudice arising from separation of jury may be overcome by evidence that jurors did not discuss merits of case and were not subjected to any possible influence during separation. Pen. Code, §§ 1121, 1128.

3. Criminal Law 🔑1174(4)

Where jurors after submission of case have been completely separated overnight, or otherwise under circumstances which would bring them into contact with many people, and defendant would have no opportunity to prove whether jurors had indulged in discussion of merits of case or had been guilty of other misconduct, conviction will not be allowed to stand. Pen.Code, §§ 1121, 1128.

4. Criminal Law 🔑854(3)

Statutory requirement that jurors, after submission of case, must be kept together in charge of officer is mandatory and cannot be avoided by agreement between prosecution and defendant. Pen.Code, § 1128.

5. Criminal Law 🔑660

Consent to waiver of a right of accused should be entirely free from compulsion.

6. Criminal Law 🔑854(3)

Where counsel in open court are requested, in presence of jury, to consent to an irregularity of procedure that is exclusively for convenience of jurors, they are not free to withhold consent, and therefore where suggestion for separation of jury after submission of case came from court, with statement that counsel would probably consent to it, defendant's consent was not "voluntary." Pen.Code, § 1128.

See publication Words and Phrases, for other judicial constructions and definitions of "Voluntary Consent".

7. Criminal Law 🔑1186(4)

Constitutional prohibition against setting aside judgment for procedural error unless error has resulted in miscarriage of justice does not apply in case of substantial abridgment of right to jury trial. Pen.Code, § 1258; Const. art. 6, § 4½.

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Smith & Wymore, by Milo S. Smith, San Pedro, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Dept. Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant Werwee was convicted in a jury trial of forcible rape and attempted violation of § 288a, Penal Code. His motion for a new trial was denied. Proceedings for imposition of sentence were suspended and defendant was placed on probation. He appeals from the order denying his motion for a new trial.

The sole ground of appeal is that after the cause was submitted and while it was under consideration by the jury the court, after admonishing the jurors, and with the expressed consent of counsel in open court, ordered their release to go home for the night and to return to court the following morning for further deliberation. The jurors went to their homes, convened on the following day and returned verdicts of guilty.

The point was raised on motion for new trial, whereupon eleven of the jurors were sworn and testified that during the separation, while they contacted and conversed with many people, they did not converse with anyone and were not communicated with concerning the case. It was stipulated that the twelfth juror, if called, would testify to the same effect.

[1] Defendant's contention is that the power of the court to permit separation of the jurors is limited by sections 1121 and 1128 of the Penal Code; that under section 1121 separation may be permitted only "* * * before the submission of the cause to the jury,"; that by express mandate of section 1128 of the Penal Code, the jurors, after submission of the cause, must be kept together in charge of an officer, who must not permit any person to speak to or communicate with them, with the exception that when the jury is composed of both men and women and it becomes necessary to retire for the night, the women must be kept separate and apart from the men, and that the separation of the jurors overnight was such an irregularity as to have required the granting of a new trial. He relies upon People v.

Hawley, 111 Cal. 78, 43 P. 404, a case which fully supports his position. There the jurors, with the consent of the defendant, were allowed to separate late in the evening and reassemble the following morning. The court, citing authorities, stated, 111 Cal. at page 85, 43 P. at page 405: "Our statute permits such separation in all cases before the submission of the case, in the discretion of the court, but expressly provides that, after retiring to deliberate upon their verdict, they must be kept together. Pen.Code, § 1128. The court, therefore, had no authority, either under the statute or at common law, to permit the separation; nor could the consent of the defendant or his counsel operate to empower or excuse the violation of an express provision of the statute." We deem this holding to be controlling in the present case.

[2] There is a familiar rule, relied upon by the attorney general, that the presumption of prejudice, which all courts agree arises when there has been a separation, may be overcome by evidence that the jurors did not discuss the merits of the case and were not subjected to any possible influence during the separation. The problems involved in the separation of jurors have been discussed in many cases. People v. Backus, 5 Cal. 275; People v. Lee, 17 Cal. 76; People v. Bonney, 19 Cal. 426; People v. Brannigan, 21 Cal. 337; People v. Symonds, 22 Cal. 348; People v. Moore, 41 Cal. 238; People v. Thornton, 74 Cal. 482, 16 P. 244; People v. Wheatley, 88 Cal. 114, 26 P. 95; People v. Bemmerly, 98 Cal. 299, 33 P. 263; People v. Dinsmore, 102 Cal. 381, 36 P. 661; People v. Hawley, 111 Cal. 78, 43 P. 404; People v. Adams, 143 Cal. 208, 76 P. 954, 66 L.R.A. 247; People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Cord, 157 Cal. 562, 108 P. 511; People v. Carson, 49 Cal. App. 12, 192 P. 318; People v. Knight, 63 Cal.App. 63, 218 P. 79; People v. Cross, 64 Cal.App. 443, 221 P. 684; People v. Page, 86 Cal.App. 148, 260 P. 591; People v. Murphy, 92 Cal.App. 729, 268 P. 927; People v. Truesdell, 124 Cal.App. 360, 12 P.2d 476; People v. Martin, 87 Cal.App.2d 581, 197 P.2d 379; People v. Lloyd, 98 Cal. App.2d 305, 220 P.2d 10.

In the leading case of People v. Brannigan, 21 Cal. 337, it was conceded there had been a separation of the jury after submission and the rule was laid down that the burden was upon the People to prove defendant was not prejudiced rather than upon him to show prejudice. It was said that the separation raised a presumption of prejudice which might be overcome by evidence as to the conduct of the jurors and others with whom they had been in contact. There being no such showing by the People the judgment was reversed. The nature of the separation was not shown, although, if the jurors had been sent home for the night, the opinion doubtless would have stated that important fact.

The question whether the accused has suffered prejudice is a judicial one and has always been so regarded. If it is a factual question it must be judicially determined under recognized procedure. There can be no judicial determination of a fact in question when there is no opportunity to present the evidence on both sides of the issue. This does not mean that the opposing parties must have equal opportunities, but it does mean that there must at least be a reasonable opportunity for verification or refutation on the part of each party of the evidence produced against him; otherwise the determination would be of no more value than one made ex parte. Our courts have rejected the idea that the burden is ever upon the accused to prove actual prejudice from separation of the jury. Manifestly, he could not sustain that burden when evidence of the facts was unavailable to him. And it has been emphasized, when only the jurors know what their conduct has been, that their unsupported affidavits are the weakest sort of evidence. When there has been a prolonged separation, during which jurors moved about at will, affidavits or testimony of the jurors that they had not discussed the case or been guilty of other misconduct would be a mere formality, and not capable of refutation by the accused. To give such evidence effect as proof of absence of prejudice, against a helpless defendant, would be as illogical as to give the same effect to the presumption that the jurors had faithfully performed their lawful duties. In People v. Backus, 5 Cal. 275, the court said: "During the trial of this case in the Court below, after the Court had adjourned, and directed the jury to be kept together under the control of an officer, one of the jurymen absented himself from the jury room without the custody of the Sheriff for the period of two hours.

"The statute of this State provides that the jury may separate by leave of the Court. In the present case the juror left his fellows without such permission. How far this would vitiate the verdict is a disputed point among the Courts of the various States of the Union; it is universally conceded that it is an irregularity. In New Hampshire, Connecticut, North Carolina and Indiana, it has been held that the mere separation of the jury is not sufficient of itself to authorize the Court to set aside the verdict, but that the party must show facts and circumstances tending to establish improper influence, while in Virginia and Tennessee it has been held that if the separation was such that the juror might have been improperly influenced by others, the verdict would have been set aside.

"The latter rule we think is the correct one, because it would be impossible in almost every case for the prisoner to establish the fact of any corrupt or improper communications between the juror and others. This doctrine is substantially sustained by the Supreme Court of Massachusetts in the case of the Commonwealth v. Roby, 12 Pick. 496, 519 and in a late case, Organ v. State, 26 Miss. 78, in which the whole doctrine is reviewed. In the latter case the Court says:—'If any separation is to be allowed without incurring the imputation of irregularity—for what length of time, and for what purpose may it be; how frequently may it be practiced, and to what distance may it extend—by what means are communications between the juror and other persons which may take place, and which must necessarily be secret, to be disclosed?'

"In the present case the consequences of the jury's separation is sought to be avoided by the affidavit of the juror himself, that he left the room by consent of the prisoner's counsel, and that no improper communication had taken place between himself and anyone else during his absence. The first fact is denied by the appellant's counsel; and, even if it was true, we are at a loss to conceive how his consent could excuse the consequences of an act which could only be permitted by the Court. Neither can the affidavit of the juror be admitted to purge his conduct from the imputation of corruption or impropriety—for, say the Court in the case just cited, if a party had been guilty of any corruption he would not hesitate to conceal the same by direct perjury."

[3] The courts have been accustomed to classify as separation of jurors all manner of removal of one or several jurors from the immediate presence of the others. Many of the occurrences have been of such a trivial nature as not to constitute separation in a legal sense. Technical and brief separations, when they deserve that appellation, are of common occurrence and unavoidable. Many of those described in the cases listed above were of that character. All the authorities which have applied the rule that a presumption of prejudice may be overcome by evidence to the contrary were necessarily grounded in the fact, established or assumed, that the conduct of the jurors, during the separation, was susceptible of proof and a subject of judicial determination. Therein lies the fundamental distinction between the factual situations in which the rule has been given application and the situations in the Hawley case and the present case. The range is so great between a separation consisting of a dispersion during which the jurors remain in sight and hearing of each other and a separation overnight that each case must be judged upon its own facts. However, we believe it to be fundamental in our jurisdiction that where the jurors after submission have been completely separated

overnight, or otherwise under circumstances which would bring them into contact with many people, and where the defendant would have no opportunity to prove whether they had indulged in discussion of the merits of the case, or had been guilty of other misconduct, a conviction should not be allowed to stand. If it be said that there may be emergencies in which it would be impossible or impracticable to keep the jurors together until they have resolved a verdict we would reply that in such rare instances a mistrial could be declared. Arrangements for the convenience of jurors must be kept within lawful procedure.

[4] If it should be contended that a defendant under such circumstances waived his right to claim irregularity in the separation of the jury by consenting to it, our answer would be that he could not waive the right to have the statutory procedure observed. The Hawley case and the authorities therein cited so held, and there is no want of additional authority to the same effect. Dibbles v. State, 1921, 89 Tex.Cr.R. 427, 231 S.W. 768; Osborne v. State, 1939, 136 Tex.Cr.R. 125, 124 S.W. 2d 366; Hepp v. State, 1934, 46 Ohio App. 360, 188 N.E. 664; State v. Lamoreaux, 1932, 62 N.D. 55, 241 N.W. 595; People v. Casino, 1920, 295 Ill. 204, 129 N.E. 145, 34 A.L.R. 1102.

The jury system, which our constitution and statutes preserve in all respects which embrace its fundamental principles and established procedure, is an institution in which all the people of the land have a vital interest. It is safe to say that among the features which have led to its preservation, and the confidence which is generally reposed in it, none have been of more importance than the rules by which the conduct of jurors is regulated and the strictness and vigor with which the law has shielded them from improper influence. Even now, in capital cases, it is customary that the jurors be sequestered from the time they are empaneled, as was the invariable custom under the common law. It is unnecessary to enumerate reasons for keeping the jurors together after the cause has been submitted. The State, through its legislature, adopted the then existing practice in the beginning and has never departed from it. That is sufficient reason for adherence to the statutory procedure.

Although a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally. If the prosecution and the defendant should be permitted to adopt their own procedure, wholly at variance with that prescribed by statute for the conduct of criminal cases, confusion and uncertainty would exist, and if it should become the custom to permit separation of jurors after submission of the cause, the tendency would be toward a lessened respect for and confidence in the independence of jurors and the justness of their verdicts. The law is mandatory. It does not give the parties the right to agree to a separation. If that exception is to be written into the law it must be by the legislature, not the courts. The principle that jurors should be kept together after the cause has been submitted is one that does not change with the times. It does not call for "modernization" upon any theory that human nature is no longer subject to the frailties and faults which have made it desirable throughout our history to keep jurors together while they deliberate upon their verdict.

The views we have expressed, and those which follow, are not stated as being applicable in all respects to civil cases. The principles are not the same as in criminal cases. McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 160 P.2d 797.

[5, 6] There is another feature of the case pertaining to defendant's acquiescence in the separation of the jury which we think merits consideration, although it is not decisive of any point of the case. The proceedings at the time the jurors were allowed to go to their homes are set out below.[1] The suggestion for separation of the

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[1] The jury had deliberated from 10:45 a. m. until 4:10 p. m. at which time the following occurred:

"The Court: Do you think there is any chance of the jury reaching a verdict by further deliberation? The Fore-jury came from the court, with the statement that counsel would probably consent to it. We do not think the consent, given under such circumstances, should be regarded as voluntary. Consent to waiver of a right of the accused in a criminal case should be entirely free from compulsion. If counsel in open court are requested, in the presence of the jury, to consent to an irregularity of procedure that is exclusively for the convenience of the jurors, they are not free to withhold consent. In People v. Casino, supra, 295 Ill. 204, 129 N.E. 145, the court was considering the failure of the defendant to object, which it was contended amounted to consent to the separation of the jury before the cause was submitted. The court stated to the jury that he was not going to enforce the rule under which the jury would be kept together in charge of an officer, and defendant's counsel registered no objection. The court said, 129 N.E. at page 147: "This cannot be taken against the plaintiff in error as a waiver of his right to have the rule enforced. For him then to have made a request that the rule be enforced was in all human probability to be done at the risk of prejudicing the jury against him. Men on juries, even in capital cases, are still men, only, and do not take kindly in all instances to the enforcing of this rule. They like their liberty even as jurors, and are prone to believe that such a rule is useless and only an infringement upon their personal liberty and perhaps a reflection upon their integrity and ability to act under all circumstances as fair and impartial jurors. When placed under the same circumstances as the plaintiff in error was in this case, any experienced lawyer or judge must concede that it would be better diplomacy for a defendant to not place himself in the position of an objector to the court's action, even though his positive desire and wish might be ever so strong to have the rule enforced and although he might believe that he would be in serious danger of being prejudiced thereby. The court had no right to thus take advantage of plaintiff in error's silence, and the doing so was a violation of the plaintiff's right without any justification whatever. That plaintiff in error may have been prejudiced by the action of the court cannot be gainsaid. * * * Whether or not the plaintiff in error was actually prejudiced by this action of the court this court can never know, and it is too much to expect of plaintiff in error that he would or could know whether he was actually prejudiced." Whether the question of waiver be as to consent by silence, or expressed consent, the principle is the same. It is better that such matters be taken up out of the presence of the jury. It is a matter that we would not mention except for the fact that we have heretofore referred to defendant's consent as if it had been given voluntarily, and it seems advisable to make this qualification lest it be assumed, at some future time, that we deemed it to have been given freely.

[7] Section 4-1/2 of Article VI of the Constitution does not apply in the case of a substantial abridgment of the right to a jury trial. People v. Diaz, 105 Cal.App.2d 690, 234 P.2d 300.

Section 1258 of the Penal Code, enacted in 1872 and found in the chapter governing appeals to the Supreme Court reads: "After hearing the appeal, the court must give

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man: I don't right now. The Court: What I had in mind was this: if counsel would agree to stipulate, and I think probably they would, that you might separate and go home tonight and then come back tomorrow morning at ten o'clock and resume your deliberations, do you think there is a chance of you getting together and reaching a verdict? If you are reasonably certain there is no chance, there is no point in it. The Foreman: What I meant is that at the present time it seems a deadlock, but I don't know. It is possible with a little more deliberation on it that it might bring forth a verdict. The Court: Gentlemen, would it be agreeable to both of you to stipulate that the jury might separate and go to their homes and come back tomorrow morning at ten o'clock to resume their deliberations? Mr. Whichello: We will so stipulate. Mr. Smith: Yes, your Honor. The Court: Then I am going to let you go home and separate, and you will come back tomorrow morning, including the alternate juror, and resume your deliberations and with the thought or hope that you might arrive at a verdict."

judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." The decision in the Hawley case was of necessity a holding that the separation of the jury affected a substantial right of the defendant. Since there has been no material change in the statutory law, that decision directly supports our conclusion that the proceedings now under review resulted in a miscarriage of justice.

The order denying the motion for new trial is reversed. There being no judgment or sentence the purported appeals therefrom are dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; GIBSON, C. J., and SPENCE, J., dissenting.

FARBER v. OLKON et al.*

Civ. 19008.

District Court of Appeal, Second District, Division 2, California.

July 25, 1952.

Rehearing Denied Aug. 22, 1952.

Hearing Granted Sept. 18, 1952.

Action by George Farber, an incompetent person by Joshua Farber, guardian of his person and estate against David M. Olkon, and others, a corporation, doing business under the fictitious firm name and style of the Los Angeles Neurological Institute, and others for damages allegedly resulting from alleged negligent administration of shock treatments. Judgment for defendants in the Superior Court for Los Angeles County, David Coleman, J., and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that a recovery was properly denied on ground there was no unwarranted invasion of the plaintiff's rights to be secured against the battery of another and that the treatment was not negligently administered and that the doctrine of res ipsa loquitur did not apply.

Judgment affirmed.

1. Assault and Battery ⚷2

Where state hospital pursuant to father's request paroled mental patient to a licensed private sanitarium which was authorized to render medical and custodial care to the patient, sanitarium was not liable to the patient for injuries sustained during administration of shock treatments on the ground that sanitarium and its staff unlawfully assaulted the body of the patient.

2. Insane Persons ⚷51

Superintendent of the state hospital may parole a mental patient to a private home or sanitarium regardless of the language of the commitment so long as the parole is given under general conditions prescribed by the department of mental hygiene. Welfare and Institutions Code, § 6726.

3. Parent and Child ⚷2(1)

A parent of a minor child is vested with power to give such consent as is necessary to enable a physician to proceed with non-emergency treatment.

4. Parent and Child ⚷2(1)

Where an adult child is incompetent and the parent is duty bound to maintain him, such duty encompasses the authority to authorize whatever medical treatment may be necessary. Civ.Code, § 206.

5. Insane Persons ⚷49

The statute inhibiting admission into private mental institutions of an involuntary patient except upon certain conditions were designed to protect an incompetent from an irresponsible or dishonest operator who might detain a person not mentally ill. Welfare and Institutions Code, §§ 5750, 5750.5.

6. Parent and Child ⚷3(1)

While a parent is not obligated to maintain his normal adult child, a parent is obligated under the statute to the extent of his ability, to furnish such medical care as is reasonably required for the health and well being of an adult child who is ill and is without property. Civ.Code, § 206.

7. Parent and Child ⚷3(1)

While liability of parent for support of the ordinary child ceases at his majority, such rule does not apply where child is physically or mentally unable to support himself. Civ.Code, § 206.

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* Subsequent opinion 254 P.2d 520.

8. Physicians and Surgeons 🔑18(8)

Generally plaintiff in malpractice litigation must prove negligence of the physician by expert proof.

9. Physicians and Surgeons 🔑18(6)

Negligence of a physician is not presumed, but must be affirmatively shown.

10. Physicians and Surgeons 🔑18(6)

In action for injuries resulting from alleged negligent administration of a shock treatment, doctrine of res ipsa loquitur was not applicable where machine of the respondent was not defective, no extraneous force was applied and the injury was foreseeable as possibility was a calculated risk.

11. Physicians and Surgeons 🔑18(9)

In action for damages allegedly resulting from negligent administration of a shock treatment, evidence of negligence of the physician was insufficient for the jury.

12. Physicians and Surgeons 🔑18(8)

In action for injuries sustained from alleged negligent administration of shock treatments by physicians, where expert testimony established that reputable practitioner serving in the area used less than three attendants, use of only two attendants during the treatment would not make out a prima facie case of negligence.

13. Trial 🔑139(1)

Where to permit a jury to return a verdict for plaintiff would be to sanction a verdict based wholly upon conjecture and surmise a verdict was properly directed for the defendants.

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Fred Girard and Joseph D. Flaum, Los Angeles, for appellant.

Reed & Kirtland, David Sosson, and Henry E. Kappler, Los Angeles, for respondents.

MOORE, Presiding Justice.

In an action for damages allegedly resulting from the negligent administration of a shock treatment by defendant physicians, appellant George Farber was denied relief when the trial court directed a verdict in favor of respondents. He now assigns as error the trial court's refusal to submit the case to the jury contending the evidence establishes as a matter of law (1) that there was no lawful consent to defendants' administration of electro-shock therapy; (2) that he was entitled to recover under the doctrine of res ipsa loquitur; (3) that there is ample direct proof of respondents' negligence such as to require a factual determination thereof.

Appellant suffered from chronic schizophrenia with hebephrenic and paranoid features with progressive mental deterioration. The incipient stages of his infirmity appeared at the age of 19. At the time of his injury in 1948 he was 32 years of age. He was at his father's direction treated in various institutions until 1944 when by court order he was confined in the State Hospital at Camarillo. He remained until August 8, 1947, when he was paroled to the Los Angeles Neurological Institute under agreement with the father that he would care for and maintain George and cause his return to the Camarillo hospital at his own expense. On the same day the State Hospital caused George to be transported to respondent, Los Angeles Neurological Institute herein referred to as the "Institute." He had been there only three days when with Dr. Olkon's permission the father took George for a ride. He did not return the long suffering patient to the Institute until August 29, 1948. In the interim George had been kept at the father's home, in a sanitarium at Downey and in the Temple Hospital. At the latter place a lobotomy[1] was performed by Dr. Seletz with the father's consent on June 27, 1948. The doctor learned then that George had "no discipline, rambles in speech, thoughts are disjointed, seldom completes a sentence, refuses to wash his hands or bathe or to use a toilet, has had some 80 shock therapy treatments; his behavior is stereotyped; will not answer a question." After leaving Dr. Seletz, George's condition deteriorated; he became more easily upset and disturbed. After conferring with Seletz on the advisability of electro-shock treatments, the father returned George to the Institute and reported on the patient's experiences and current, agitated and confused condition. Influenced by the opinion of Dr. Seletz that shock treatments are sometimes effective after a lobotomy and by the opinion of Dr. Wayne that the patient was worse than a year before, the father signed a consent to the administration of the shock. The first treatment on August 30 appeared to cause favorable results. But during the course of the second on September 1 when the current was applied and while George was in a convulsive state the doctor heard a snapping sound. It was then the patient's legs were broken.

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[1] A brain operation.

The unfortunate boy was thereafter removed to the Temple Hospital where he underwent three separate operations and remained until January 26, 1949. He was then taken to the Golden State Hospital and thence to his father's home. In March, 1949, the father on demand of the authorities at the Camarillo hospital returned George to that institution. During his absence the patient was provided with such medical and surgical care as he required.

We are now to determine (1) whether the shock treatment of September 1, 1948 was an unwarranted invasion of appellant's right to be secure against the battery of another, and, if it was lawfully undertaken, (2) whether it was negligently administered.

The State Hospital at Camarillo paroles about 450 patients monthly. Pursuant to such practice, its staff of physicians convened April 24, 1947, to discuss the possibility of a parole for appellant. They considered the father's request for George's parole to a sanitarium, the son's unimproved mentality, his inability to serve himself, his filthy habits, and the father's lack of insight into George's mental condition. They recommended indefinite parole to a licensed sanitarium. They thereupon paroled him to the Los Angeles Neurological Institute, a mental hospital licensed pursuant to Rule 21 of the rules relating to management, conduct and personnel of institutions under the jurisdiction of the Department of Institutions. It was established by an officer of the Camarillo hospital that it was customary prior to August, 1908, for parolees to be furnished medical and custodial care by either a state-licensed institution or the person to whom they were paroled; that George was paroled to the Institute upon the father's written agreement to maintain his son. Thereupon, both the father and the Institute were obligated to see that the patient received such therapeutic care as he might reasonably require as well as sustenance, shelter and clothing. At the time of the parole, the superintendent of the State Hospital knew that the Institute was a place where medical and psychiatric care could be furnished. At the same time it was a rule applicable to all licensed, mental hospitals that all patients[2] who reside within them "must be supervised and visited by a regularly licensed physician and treatment must be outlined and shown in the records." Also, during the term of his parole there was no other place authorized to furnish George medical care.

In view of the facts above related it is a far-fetched notion that the administration of the shock treatment to appellant was an unauthorized abuse of his body. The State Hospital did all within its power to authorize the parole and to obligate both the Institute and the father to render medical and custodial care to its patient. If it was a custom for state-licensed institutions to furnish medical care to such parolees as might be sent to them from Camarillo, upon what theory should the Institute have withheld shock treatments from appellant?

Doctor Wayne found that George's condition had grown worse than it was at the time of parole. Because the shock treatment was recognized as a cure or a palliative for such mental conditions as that suffered by appellant, because the first treatment produced no unfavorable reaction, and because of the deterioration following the recent lobotomy, the doctor opined that the second treatment should be administered. Dr. Thompson testified that the prompt administration of the electric shock treatment was necessary as a means of retaining the advantage gained by virtue of the brain surgery. George was suffering an increasing mental strain which, Dr. Thompson testified, is an emergency.

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[2] Except those whose religious beliefs oppose the receiving of medical attention.

[1] In view of the proof above outlined, how can it be said that respondents, without license, wilfully assaulted the body of appellant? If the Superintendent of the Camarillo hospital specified the Institute as the place for George to go while on parole and authorized it to render medical and custodial care to the patient, how may it be said that the Institute and its physicians unlawfully broke his bones? If the breaking of the femurs is a frequent incident of such treatment, how can that fact make the injuries an occurrence unwarranted? That the father abducted his son from the Institute and kept him out for a year is not material to the fact that in September, 1948, the authorities of the Institute deemed it good practice to administer the shock. While George was absent from the Institute, the authorities at Camarillo knew of his "escape" but took no steps to terminate his parole. In fact they made no attempt to revoke it until seven months after his injuries. Nothing could be clearer than that by its conduct in paroling appellant and by its silence while he was absent from the Institute the State Hospital impliedly authorized medical and other therapeutic instrumentalities to be applied for its paroled patient. Any licensed physician called to administer to George was at liberty to exercise his own judgment as to what was best for him so long as the practitioner was as learned, skillful and careful as the average of his profession practising in the community where the patient was treated. Since the authorities at Camarillo had given George 28 shock-therapy treatments during his confinement there and knew his reactions thereto, inasmuch as they prescribed no restrictions against its being applied to appellant it was a fair assumption by Dr. Wayne at the Institute that shock treatments should be given if indicated. He and his associates were entitled to rely upon the parole agreement and upon the authority conferred upon them to exercise their own judgment, particularly when George was accompanied by his father. Because the latter owed the highest duty to care for his unfortunate son, and because respondents believed that any gains resulting from the lobotomy might more likely be conserved by shock treatment, they were justifiably confident that their course was correct.

[2, 3] There was no want of authority in the Superintendent of the State Hospital to parole appellant. That official may not only parole an inmate confined for his incompetency but he may parole him to a private home or sanitarium regardless of the language of the commitment so long as his parole is given "under general conditions prescribed by the Department of Mental Hygiene." (Welfare & Institutions Code, sec. 6726.) All statutory requirements having been observed, no vice can be found in the conduct of the Superintendent in granting appellant's parole. Moreover, the broad discretion granted the Superintendent in such matters by Rules of the Department of Institutions (Rule 21) places his act beyond the reach of an appeal. Not only were no restrictions included in the parole, but in the letter signed by the father, the latter agreed "to care for and maintain him." Because of such agreement as well as the law requiring a father to care for and maintain an incompetent adult child, Civ.Code, sec. 206; see also Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 57 P. 81, respondents could offer no reasonable excuse not to administer to appellant as he appeared at the Institute on September 1, 1949. By virtue of the universal rule that the parent of a minor child is vested with the power to give such consent as is necessary to enable a physician to proceed with non-emergency treatment, 70 C.J.S., Physicians and Surgeons, § 48, p. 968, it is presumed that the child is not competent fully to realize the possible consequences of surgery or medical treatment. Hence, the parent who is most concerned with the patient's well-being is properly vested with the authority to make the decision. It

should logically follow that where an adult child is incompetent and the parent is duty bound to maintain him this duty should also encompass the authority to authorize whatever medical treatment may be necessary. To hold otherwise or to require the formal appointment of a guardian before an effective consent could be given to medical treatment would be to place prohibitive restrictions in the way of sound treatment for those in the miserable condition of appellant.

Answering appellant's contention that it would be contrary to public policy to permit the Superintendent to delegate to the father authority to treat his son, Mr. Farber did not attempt to administer medical aid to George nor did the Superintendent suggest that authority be given for him to do so. The father was merely authorized to obtain for appellant such medical care and attention as might be reasonably necessary from a licensed physician. Although the father might have chosen another physician following the lobotomy, he returned appellant to the Institute to which he had been paroled and which was considered certain to abide by the rules and statutes relating to the practice of medicine. Any argument that the best interests of the incompetent requires that the Camarillo authorities be informed of contemplated medical treatment and that their authorization be first procured ignores the fact that the medical care is being rendered by practitioners who must be duly licensed and qualified to practice. These safeguards which the state has thrown around the medical profession are deemed ample to protect the patient.

[4] Also, sections 5750 and 5750.5 of the Welfare and Institutions Code which inhibit the admission into a private mental institution of an "involuntary patient" except upon the certificate of a doctor "not financially interested" in such institution have no application to the instant case. Those sections were designed to protect an incompetent from irresponsible or dishonest operators who might detain a person not mentally ill. A doctor's certificate may be some protection against such places. The character of the Institute was known to be reputable. Appellant had been mentally unsound for over 20 years and was a parolee of the State Hospital for the insane.

[5, 6] Appellant conceives that by the terms and implications of the father's letter, the latter acquired no power over the son and that his agreement meant no more than that he would supply George with only shelter, food and clothing as required by Civil Code, section 206 and nothing more. Such an assumption is a violent interpretation of the cited statute. While a parent is not obliged to maintain his normal, adult child, a fair interpretation of section 206 would compel a parent to the extent of his ability to furnish such medical and surgical care as would be reasonably required for the health and well-being of an adult child who is ill and without property. See In re Gablers' Will, 140 Misc. 581, 251 N.Y.S. 211, 218. "Maintain" is defined to mean: bear the expense of; to support; to keep up; to supply with what is needed. Alexander v. Parker, 144 Ill. 355, 33 N.E. 183, 184, 19 L.R.A. 187.

[7] While liability for the support of the ordinary child ceases at his majority, such is not the rule where the child is physically or mentally unable to support himself. 67 C.J.S., Parent and Child, § 17, p. 704, note 39. And such obligation of a parent is emphasized where a father agrees in writing to "maintain" his adult incompetent son. Kamper v. Waldon, 17 Cal.2d 718, 721, 112 P.2d 1; Worthington v. Worthington, 207 Ark. 185, 179 S.W.2d 648; 67 C.J.S., Parent and Child, § 17, p. 704. It is inconceivable that the Legislature could have intended for a paroled incompetent to be denied the benefits of shock treatments by a licensed physician. When appellant was paroled the doctors at the State Hospital knew that while he was ill and would require medical attention he had not the intelligence to seek or find a physician and that he could not consent to the administration of any kind of treatment. If they had thought it unlikely that he would receive medical aid, certainly they would not have paroled him to the Institute.

From the foregoing it is seen that appellant's plan to recover on the theory of an unauthorized assault must fail. The Institute had been awarded the custodial care of appellant. It had the facilities designed for such treatments as were required. Under the parole contract it assumed the obligation to administer such medical aid as he might require for his safety and security. Appellant's father returned the boy to the Institute when he found neither the lobotomy nor any medical service had caused an improvement and the father was authorized by law to engage medical aid for his adult incompetent son.

While there is no decision whose facts are similar to those at bar, appellant has undertaken to invoke some authorities wherein the physician was held liable for a technical assault by virtue of his having failed to obtain the consent of the patient. Those are not pertinent. In Pratt v. Davis, 224 Ill. 300, 79 N.E. 562, 7 L.R.A.,N.S., 609, the surgeon removed the plaintiff's uterus. The patient was insane and the husband had not given consent to the operation. In Valdez v. Percy, 35 Cal.App.2d 485, 96 P.2d 142, the surgeon was employed to remove an axillary gland and he also removed the breast without authority to do so. It was therefore for the jury to determine whether the surgeon was guilty of a technical assault. None of the decisions cited by appellant, In re Tuttendario, 139 A.L.R. 1372; Hively v. Higgs, 120 Or. 588, 253 P. 363, 53 A.L.R. 1052; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 469, 13 P.2d 905; Estrada v. Orwitz, 75 Cal.App.2d 54, 170 P.2d 43; Markart v. Zeimer, 67 Cal.App. 363, 227 P. 683; where no authority for the operation existed, is authority for guidance in the instant situation where the patient had been adjudged insane; had been committed to a state hospital; had been paroled to respondents who were capable physicians. They administered the shock with the consent of the patient's father who owed the duty to furnish medical service to his incompetent son.

No Negligence.

[8, 9] The foregoing leads to a consideration of the charge of negligence on the part of respondents in administering to appellant. In seeking to invoke the aid of the doctrine of res ipsa loquitur he contends that both femurs of insane patients do not break during the rendition of hospital and medical care in the absence of negligence. In support thereof he cites Cavero v. Franklin General Benevolent Soc., 36 Cal.2d 301, 223 P.2d 471; Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12; Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. These decisions lend no support to appellant. The law of this state is that generally the plaintiff in malpractice litigation must prove the negligence of the physician by expert proof. Huffman v. Lindquist, 37 Cal.2d 465, 473, 234 P.2d 34; Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757; Moore v. Belt, 34 Cal.2d 525, 529, 212 P.2d 509. Negligence on the part of a physician is not presumed, but must be affirmatively shown. Those decisions in which the doctrine of res ipsa loquitur has been invoked are situations "where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised." Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695, 698.

[10] Quinley v. Cocke, 183 Tenn. 428, 192 S.W.2d 992, is the only shock treatment decision cited by counsel. The court there rejected the doctrine of res ipsa loquitur. So indeed, the court below in the case at bar did likewise and properly so. The machine of respondents was not defective. The convulsion was the indispensable element of the treatment. If it did not affect violently all parts of the body, it would bring no soothing effects to the mind of one in George's condition. The trial judge acutely observed: There was no extraneous force applied; no failure of the apparatus; no explosion of an anesthetic; no leaving of a sponge within the body; no infected needle point in the gum. "The injury, the evidence shows, was foreseeable, and its possibility was a calculated risk * * * Whether or not fractures of the bones are accepted hazards of electroconvulsive therapy, whether or not they occur, even though all the standards of procedures of good practice are observed, the manner in which such treatments are given, their purposes and their effects, what is likely

or unlikely to happen in the course of their administration, what is the usual and what is the unusual consequence, and the mental and physical effect of the treatment are not matters of common knowledge with which laymen are familiar. To know about them, to evaluate them, to say whether ordinary fractures would not occur in the absence of negligence, we require the opinions of experts."

[11] The trial court's determination that there was no direct evidence of defendants' negligence is likewise free from error. The only evidence as to the standard of practice was supplied by respondents. The testimony established that, in general, such standards are in a state of flux; that some practitioners utilize one nurse to assist in restraining the patient, others use as many as five assistants, but that respondents followed a middle course being of the opinion that moderate restraint is necessary. Concerning the dangers inherent in such therapy the doctor testified that the chief hazard was injury to bones, that the incidence of fractures of all types was between 10 and 40 per cent but less for fractures of the long bones.

Plaintiff argues that the evidence is susceptible of the conclusion that Dr. Wayne utilized only two nurses for purposes of restraint since there was a conflict between the testimony at the trial and the depositions taken prior to trial as to the identity of one nurse. The respondents in their depositions related that a Miss Slivka was one attendant whereas their later testimony was that it was one Mr. Dorsey. Regardless of such disagreement, a review of the evidence in its entirety does not lead to an inference that only two nurses were assisting Dr. Wayne, but, on the contrary, establishes that three were present at all times during the treatment.

[12, 13] In any event, since expert testimony established that reputable practitioners serving in the Los Angeles area used less than three attendants, it cannot be said that the use of only two would make out a prima facie case of negligence. Sim v. Weeks, 7 Cal.App.2d 28, 37, 45 P.2d 350. To permit the jury to return a verdict for plaintiff based upon such a paucity of proof would be to sanction a verdict based wholly upon conjecture and surmise.

Because there was no opinion from an expert to prove that respondents acted negligently in administering to appellant in his great distress, the court correctly instructed a verdict to be returned in favor of respondents.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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112 Cal.App.2d 263

HARD v. HOLLYWOOD TURF CLUB et al.

Civ. 18750.

District Court of Appeal, Second District, Division 2, California.

July 18, 1952.

Rehearing Denied Aug. 7, 1952.

Hearing Denied Sept. 11, 1952.

Action by Dan E. Hard against the Hollywood Turf Club, a corporation, and L. E. Dixon Company for injuries sustained when scaffold, erected by subcontractor who employed the plaintiff, collapsed. The Superior Court, Los Angeles County, A. W. Ashburn, J., awarded judgment against the Dixon Company for its alleged negligence, and it appealed. The District Court of Appeal, Moore, P. J., held that nothing in statutes or decisions authorized holding a general contractor liable for injuries suffered by a workman as the result of a defective scaffold made and supplied by subcontractor who employed the injured man.

Reversed.

1. Master and Servant 🔑330(3)

In action brought by painter against general contractor for injuries sustained when defective scaffold, furnished by subcontractor which employed him, collapsed, evidence failed to establish affirmative evidence failed to establish affirmative negligence on the part of the general contractor.

2. Master and Servant ⚿315

A subcontractor bears the same relation to the general contractor as the latter does to his employer, and the rule governing each status is the same.

3. Master and Servant ⚿321

Statutes imposing duty on "employers" to comply with certain safety requirements with respect to scaffolds and other safety devices are only applicable to employers in a traditional sense and are not, by reason of Workmen's Compensation Statute defining "employer", applicable to a general contractor who employs a painting contractor whose employee is injured. Labor Code, §§ 6304, 6401, 7151, 7152.

4. Master and Servant ⚿315

The aim of safety and insurance statutes is not to hinder or do harm to employers, but rather to serve the best interest of management and of society by preserving the manpower of industry and by maintaining the established economy, and such statutes were not intended to operate a hardship upon employers by making one contractor liable for the neglect of another.

5. Master and Servant ⚿321

If a general contractor leaves holes in the floor or grease upon it whereby any invitee might suffer injury, such contractor would be liable for injuries to an employee of the subcontractor injured thereby.

6. Statutes ⚿223.2(34)

Fact that sections of Workmen's Compensation Law and sections with respect to safety on buildings both contain safety provisions, does not make them pari materia so as to require that definition of "employer" contained in the Workmen's Compensation Law apply to statutes regarding safety on buildings.

7. Statutes ⚿223.2(1)

Rule of pari materia is a rule of statutory construction that is invoked as an aid in determining the meaning of a statute whose purpose is not clear, but it has no application where legislative intent is made unambiguous by the language employed.

8. Workmen's Compensation ⚿2110

Because the Workmen's Compensation Act was adopted pursuant to constitutional amendment, the traditional defenses were abrogated, judgment is to be speedily derived and prompt payment of the value of the injury must be awarded with a minimum of delay. Labor Code, §§ 6300–6603; Const. art. 20, § 21.

9. Workmen's Compensation ⚿2233

Where painter injured when scaffold collapsed recovered a workmen's compensation award against subcontractor who employed him, such judgment was, in a subsequent negligence action by the painter against the general contractor, presumed to have been in full satisfaction of his industrial injuries. Labor Code, §§ 6300–6603, 7100–7332.

10. Master and Servant ⚿332(4)

Workmen's Compensation ⚿2238

In workmen's compensation action by painter who was employed by subcontractor and who was injured when scaffold collapsed, instruction that general contractor was under a statutory nondelegable duty to provide safeguards required by statutes relating to scaffolds and safety devices for workmen working on buildings was erroneous.

11. Master and Servant ⚿321

An owner or general contractor has the duty to exercise reasonable care in the management of activities under his control, and if he engages a painter to do all the painting, to haul his own paints, to mix and apply them and to furnish all facilities to be used, the general contractor does not thereby assume control over paint brushes, ladders and scaffoldings supplied by the painter.

12. Master and Servant ⚿321

A general contractor is liable for injuries resulting from defective appliances only when he has the privilege of inspecting them or the materials out of which they are made.

13. Master and Servant ⚷321

There is nothing inherently dangerous in doing work on a high scaffold and therefore a general contractor was not under a duty to advise a painter who was employed by a subcontractor against using a scaffold furnished by the subcontractor.

14. Constitutional Law ⚷70(1)

While it is the tendency of statutory law to guarantee workmen against loss, a court may not go beyond the statutory law in fixing liability.

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Shell, Delamer & Loring, Los Angeles, for appellant.

Samuel P. Young, Los Angeles, for respondent.

MOORE, Presiding Justice.

The Hollywood Turf Club by a writing engaged appellant to remodel and renovate its grandstand by removing two floors of a section and by reconstructing three floors. For the purpose of executing its contract, appellant let 21 subcontracts with the approval of the Club and employed 125 men for the general work. The Arenz-Warren Company had the subcontract to do the painting and it employed a superintendent and two foremen besides workmen. Respondent was one of the painters. On December 15, 1947, he was at work on a defective scaffold when it collapsed and precipitated him 40 feet causing severe injuries. As his employer, Arenz-Warren submitted to the jurisdiction of the Industrial Accident Commission which awarded respondent compensation for his injuries. By this action respondent has been awarded judgment for damages against the general contractor based upon the latter's alleged negligence.

Respondent claims that he had two employers at the grandstand, namely, Arenz-Warren who engaged him to work and the L. E. Dixon Company which did not employ him to work. As to the former there is no dispute. They have answered for the industrial accident in the proper forum. They constructed their scaffold and their employee was injured by using it. But respondent contends that he is entitled to a second judgment against appellant on the theory that the latter was also his employer; that its superintendent, Mr. Ayers, was "responsible for the job as a whole," scheduled and coordinated the work of the subcontractors, had to "push" the painters and other subcontractors to speed up their work, knew for two weeks of the high painting being done on the scaffolding. He saw that the painters were not equipped with such safety belts as he would have required his own men to wear. However, there is no evidence that appellant directly controlled the movements of respondent or of any employee of a subcontractor. Neither did appellant direct the details of the painting. It gave only general instructions as to the work to be done. But at the same time, Mr. Ayers knew that Arenz-Warren kept on the grandstand its own superintendent and two foremen, Messers Sheldon and Malone who supervised the rigging of scaffolds and directed the course of the painters' work.

[1, 2] Appellant had nothing to do with the construction of the scaffold. Its nearest approach thereto was transporting some of the materials to the overhead site by use of its crane. Included among such materials was a steel strip taken from an old section of the grandstand and used as support for one end of the scaffold. It was the buckling of this piece of metal which apparently caused the collapse of the scaffold from which respondent fell. There is no proof of the latter's assertion that the strip was actually supplied by appellant. In such event, any theory of direct or affirmative negligence on appellant's part is without evidential support. It supervised the reconstruction operations and accommodated Arenz-Warren by hoisting their materials to the higher levels. It follows that in the absence of proof of appellant's negligence, the only proposed theory upon which it can be adjudged the debtor of respondent is that it was respondent's "employer," as that term is defined in the Labor Code discussed below.

It could not have been respondent's employer in the traditional sense of that term. "A subcontractor bears the same relation to the contractor that the latter does to his employer, and the rule governing each status is the same." George v. Trinity Church, 176 Cal. 553, 556, 169 P. 69, 70. Therefore, respondent as employee of a subcontractor is in no position to enforce a right to judgment against appellant. Slyter v. Clinton Construction Co., 107 Cal. App. 348, 353, 290 P. 643.

While the trial judge recognized the general rule governing the liability of a general contractor, under instructions given, the jury was encouraged to find facts from which appellant's liability was the logical sequitur. It was successfully maintained below that (1) appellant was under statutory duty to provide a safe place for respondent to work and, (2) pursuant to the contract with the Turf Club, appellant had undertaken to provide for the safety of all workmen engaged in the reconstruction operations.

Safe Place to Work

Respondent was entitled to a safe place to work and to such devices as would reasonably have guarded him against injury. The State and the world of industry had reached that conclusion when in 1911 the legislature was directed by section 21 of Article XX of the Constitution to create the first "Workmen's Compensation Insurance and Safety Act." While the lawmakers are at liberty to enact bold and revolutionary measures in the exercise of the police power, the statesmen of that period sought to forestall contentions based upon archaic doctrines and contradictory statutes and to extend the judicial power to the Industrial Accident Commission authorized by section 21. The preservation of manpower, its security against loss or impairment and poverty were undertaken amid dire misgivings. How well it has succeeded is recorded nowhere with deeper-cut letters than in the archives of this state. All industries and commercial houses at first and, finally, all places where men and women toil, must guarantee the laborer against injury by any kind of accident, whatever its origin, so long as he is occupied in the course of employment at the time of injury. Measures for insuring the collectibility of such awards as might be made were also incorporated in statutes and the system works well.

But in the case at bar, the trial court instructed the jury that appellant, a general contractor, was under statutory duty to provide a safe place for respondent, employee of an independent subcontractor, to work and in particular to supply safe scaffolding in conformance with statutory regulations. The statutes involved are sections 6401, 7151 and 7152 of the Labor Code[1]. They

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[1] Section 6401: "Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes, which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees."

Section 7151: "If the working platform of any scaffolding swung or suspended from an overhead support is more than 10 feet above the ground, floor or area to which an employee on the scaffolding might fall, it shall have a safety rail of wood or other equally rigid material of adequate strength. Such rail shall be in compliance with the applicable orders of the Division of Industrial Safety.

"Suspended scaffolding shall be fastened so as to prevent the same from swaying from the building, or structure, or other object being worked on from such scaffolding. All parts of such scaffolding shall be of sufficient strength to support, bear, or withstand with safety any weight of persons, tools, appliances, or materials which might reasonably be placed on it or which are to be supported by it." [In effect Sept. 19, 1947.]

Section 7152: "In addition to the duties imposed by any law regulating or relating to scaffolding, an employer who uses or permits the use of scaffolding described in Section 7151 in connection with construction, alteration, repairing, painting, cleaning or doing of any work upon any building or structure, shall:

"(a) Furnish safety lines to tie all hooks and hangers back on the roof of such building or structure.

"(b) Provide safety lines hanging from the roof, securely tied thereto, for all swinging scaffolds which rely upon stirrups of the single point suspension type to support the working platform. One relate to the duty of an employer to provide for the safety of his employees. Section 6401 requires every employer to furnish and use safety devices and to use practices and processes reasonably adequate to render the employment safe. Section 7151 requires all scaffolding suspended from an overhead support more than 10 feet above a solid surface to be equipped with a rigid safety rail and so secured as to prevent swaying and to have sufficient strength to support any weight which might reasonably be placed thereon. Section 7152 requires safety lines to be furnished to tie the hooks on the roof, and a line secured above to the individual workman.

[3] While the three sections clearly impose upon the employer definite responsibilities toward his employee, difficulties have arisen by virtue of the emplacement of section 6304 [2] in the definition chapter of Part 1, Division 5 of the Labor Code. That section declares that "employer" includes every person having direction, management, control or custody of any place of employment or employee. Because the comprehensive language of that section describes in general terms the work or office of the "employer" and because those terms describe the work of appellant in performing its contract with the Turf Club, respondent leaps to the conclusion that appellant was the employer of respondent and owed the latter the care prescribed by sections 6401, 7151 and 7152.

Such conclusion is erroneous. There is nothing contained in such statutes which indicates a legislative intent to apply the provisions of the scaffolding laws to a general contractor in his relations with a subcontractor's employee.

A scrutiny of the labor code and its statutory forbears leads only to the conclusion that sections 7151 and 7152 were intended to be applicable solely to an employer in the usual sense, to wit, one who has employed and managed the toiler. The definition of "employer" relied upon by respondent is found in section 6304, Chapter 1, Part 1, Division 5 of the code, while sections 7151 and 7152 are under Part 3—"Safety on Buildings"—with buildings under construction or repair heading Article 1 and scaffolding being the subject of Article 2. The language of section 7152 requires that an "employer" who uses scaffolding must furnish safety lines to tie all hooks and hangers back on the roof and also provide safety lines hanging from the roof to support the platform and further to provide each workman with a line from the roof. Could it be said upon any reasonable construction that the intention there was to require the general contractor to provide such "lines" to an employee of a subcontractor who has undertaken to do the painting? Such a requirement would impose an unreasonable burden. Multiply that item by the number of employees on the premises serving 21 subcontractors and it would leave the office of a general contractor one to be avoided.

[4, 5] This leads to the observation that the aim of safety and insurance statutes is not to hinder or do harm to employers. Taking them by and large, those laws serve the best interest of management and of society as a whole by preserving the manpower of industry and by maintaining the established economy. The Legislature could not reasonably have intended to operate a hardship upon employers by making one contractor liable for the neglects of another. If as the generalissimo of a construction job, the general contractor leaves holes in the floor or grease upon it whereby any invitee might suffer injury, of course he would be liable. But where he has agreed by subcontract with an experienced and reputable painter to paint the ceilings and walls of the building under repair and the reputable painter negligently constructs an inferior scaffold that cannot support his workmen, it is nothing short of oppression to require the general contractor to pay the total amount of damages suffered by the

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such line shall be provided for each workman with a minimum of one line between each pair of hangers or falls."

[In effect Sept. 19, 1947.]

[2] "'Employer' shall have the same meaning as in section 3300 and shall also include every person having direction, management, control, or custody of any employment, place of employment, or any employee."

injured workman as the result of the painter's negligence and thereby relieve the subcontractor of all charges he might have been obliged to pay on account of the accident.

Division 5 of the Labor Code has five parts. The definition of employer falls in the fifth section in Part 1 and is preceded by section 6301 which reads: "As used in *this part* the terms described in the following sections shall have the meaning therein given them." If the legislature had intended that the word "employer" shall have the meaning given in section 6304 in all other "Parts" of Division 5, surely they would have said so. They could have said "Division" as easily as "Part." Such restriction upon the use of the terms employed in "Part 1" must have been intended. It cannot in all fairness be attributed to the indolence or indifference of the lawmakers. The foregoing observation is emphasized by the language of section 6300 which reads: "As used in *this division*:" commission, commissioner and insurer severally mean, etc. Thus, in two adjoining sections, the Legislature exercised the opportunity to demonstrate that in the 53 sections of Part 1 "employer" shall include "every person having control of a place of employment" whereas the terms defined in section 6300 shall have the same meaning throughout the entirety of Division 5. Had it been the purpose of the Legislature to have "employer" mean the same thing throughout the "Division" it could have done so by substituting that word for "Part" in section 6301. Because it failed to make the substitution the conclusion is irresistible that it was a part of the general design that the term employer used in section 7152 has the traditional meaning of employer, that is the one who has actually employed the plaintiff.

Other Intrinsic Proof

The original Workmen's Compensation Act was enacted in 1911. Stats.1911, ch. 399, p. 796. Section 4 thereof defined "employer" to be a person who has another in service under a contract of hire and who has elected to come under the Act. While the provisions of that original statute were changed in some respects, in 1913, Stats. 1913, ch. 176 p. 279, it retained virtually the same definition of "employer." But the amended act added section 51, page 305. It included a definition similar to the present section 6304 of the Labor Code. However, the language used emphasizes that the definitions laid down apply to sections 51 to 72 inclusive and to no others. Not one of those 22 sections contains a provision similar to the present scaffolding statutes. It thus appears from the original Act and its first amendment that appellant could not have qualified as respondent's employer under the scaffolding act.

The Workmen's Compensation Act (herein called the Act) remained unchanged insofar as the sections here involved are concerned until 1917. Stats.1917, ch. 586, p. 831. Section 33 of the Act as amended that year included the definition of "employer" as set forth in the 1913 edition of section 51, supra. Its meaning was again restricted to a certain portion of the Act, to wit, sections 33 to 54 inclusive, which were substantially the same as sections 51 through 72 of the 1913 Act. Sections 33 through 54 of the 1917 edition were subsequently codified as Part 1, Division 5 of the Labor Code, and no statute has ever been adopted to extend the definitions thereby included to apply to the scaffolding statute.

Included in Part 3 of Division 5 are sections 7151 and 7152 which had their origin in "an act to regulate certain scaffolding" adopted in 1913, Stats.1913, ch. 48, secs. 1 and 2, pp. 49–50, on April 22—one month prior to the adoption of the amended Workmen's Compensation Act. The provisions of such scaffolding act were substantially the same as sections 7151 and 7152 of the present Labor Code. Neither in 1913 nor now did those sections contain a definition of "employer." But it is a fact not without significance that at the time of the first adoption of the scaffolding act in 1913, the word "employer" had not been so used as to include either an owner or a general contractor in his relation to a subcontractor. Carstens v. Pillsbury, 172 Cal. 572, 580, 158 P. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 582, 158 P. 222. Inasmuch as the scaffolding act contains no indication that the term "employer" was to have other than its usual, orthodox meaning, it would approach judicial legislation for a court now to hold that it means the master of the premises or the general contractor who had nothing to do with the engagement of the workman who has served only the subcontractor. California Highway Commission v. Industrial Accident Commission, 200 Cal. 44, 48, 251 P. 808, 49 A.L.R. 1377. The all-inclusive nature of the word had never been suggested prior to the amended Workmen's Act in 1913.

[6, 7] Respondent argues that Parts 1 and 3 of Division 5 both contain safety provisions, that by reason thereof they are in *pari materia* and that consequently the same terms in each must be given the same meaning. Such reasoning is not persuasive. The rule of *pari materia* is a rule of statutory construction that is invoked as an aid in determining the meaning of a statute whose purpose is not clear. But it has no application where the legislative intent is made unambiguous by the language employed by the lawmakers. 59 C.J. p. 1050, sec. 620.

[8, 9] Moreover, the Legislature must have been moved by considerations of sound public policy in not expressly extending the meaning of "employer" as used in section 6304 to sections 7151 and 7152. The lawmakers must have reflected that to impose the duty upon the general contractor directly to oversee all labor being performed and to inspect every device imported for use by the workmen on a particular construction and to impose nondelegable duties upon him to enforce all statutory safety provisions would be to place an extremely onerous burden upon him who has the general control over the ultimate result of the labor done yet without control or management of the means utilized to achieve the purpose planned. To adjudge appellant liable for errors of judgment on the part of 21 separate subcontractors and to hold him responsible for the enforcement of the safety statutes would be tantamount to making it an insurer of every subcontractor's activities. For appellant efficiently and effectively to direct the operations of 21 subcontractors essential to the successful consummation of so stupendous a task as the contract with the Turf Club demanded would have required such an outlay in time, labor and expense as to frustrate computation. At the same time it is doubtful that the undertaking of such manifold duties would have proved to be of greater safety or protection to the workers on the grandstand than they enjoyed under the provisions of the Workmen's Compensation and Insurance Act whereby every immediate employer is in duty bound to furnish his employees with all necessary, safe appliances and safe working area. Certainly such employer is in the best possible position more effectively to guard his own employee's welfare. Because the Legislature adopted this view it did not direct the scaffolding legislation to apply to an owner or general contractor. Adequate provision was made for the benefit of an injured worker to recover from his own employer before the Industrial Accident Commission which was granted judicial power. Because the Act was adopted pursuant to the constitutional amendment, Art. XX, sec. 21, the traditional defenses were abrogated, judgment is to be speedily derived and prompt payment of the value of the injury must be awarded with a minimum of delay. Respondent immediately took advantage of the Act and obtained relief. That judgment is presumed to have been in full satisfaction of his industrial injury. There is neither pleading nor proof that appellant committed an act of negligence outside and beyond the industrial processes of which respondent's labor was a part and in which he was injured. Since that is so, liability to respondent on the part of appellant must not be adjudged. Neither should the courts by an unjustified interpretation of the statute impair the rule of nonliability of the general contractor in the absence of legislative authority.

[10] From the foregoing the conclusion is unavoidable that the trial court committed prejudicial error by instructing the jury that appellant was under a statutory nondelegable duty to provide the safeguards required by sections 7151 and 7152 of the Labor Code.

In support of his contention that he is entitled to recover against the general contractor as the party in charge of the grandstand while undergoing repairs, respondent has cited a number of authorities from foreign jurisdictions. The judgment in each instance was predicated upon a statute that was properly construed. In Claffy v. Chicago Dock & Canal Co., 249 Ill. 210, 94 N.E. 551, 552, the statute required the *owner* or *contractor* to "cause the shafts or openings in each floor to be enclosed or fenced in on all sides by a substantial barrier or railing at least eight feet in height", Ill.Rev.Stat.1951, c. 48, § 66, and gave a right of action to a party injured. In Semanchuck v. Fifth Avenue & Thirty-seventh St. Corporation, 290 N.Y. 412, 49 N.E.2d 507, 508, a similar statute imposed upon all *contractors* or *owners* when constructing buildings the positive duties for the "protection of employees on building construction * * * work", Labor Law N.Y., McK.Consol.Laws, c. 31, § 241, to plank floor beams and enclose and fence in the sides of a shaft or opening in the floor. The plaintiff having fallen through a shaft was entitled to recover under the statute because the owner and contractor had been negligent in failing to provide the barriers. In Vollstedt v. Jos. A. Mollar Inc., 238 App.Div. 705, 265 N.Y.S. 552; Reilly v. Charles Herman Contr. Co., Sup., 89 N.Y.S. 632; De Haen v. Rockwood Sprinkler Co., 258 N.Y. 350, 179 N.E. 764; Caminiti v. Matthews Const. Co., 241 App. Div. 879, 272 N.Y.S. 245; Employers Liability Assur. Corp. v. Post & McCord, 286 N.Y. 254, 36 N.E.2d 135; Flanagan v. Fred T. Ley & Co., 241 N.Y. 607, 150 N.E. 575, the judgments were authorized by the statute requiring the contractor to guard or fence in uncovered holes in the floor. In McNamara v. Eastman Kodak Co., 220 N.Y. 180, 115 N.E. 452, the contractor and owner had contrary to statute neglected to plank steel beams.

Chandler v. Glaser Construction Co., Sup., 80 N.Y.S.2d 502, is not a holding that the general contractor is liable for a defective scaffold. It decides merely that where a general contractor is charged with negligence he may not sue the subcontractor unless the latter has agreed to indemnify such general contractor. But when the question arose in Portnoy v. United Engineers, Sup., 90 N.Y.S.2d 486, the author of the Chandler opinion did not hold the general contractor liable for an injury caused by a defective scaffold furnished by the subcontractor.

[11] In support of his contention that a duty is imposed upon the general contractor by reason of the latter's supervision and control, respondent relies upon section 414[3] of the Restatement of Torts and two California decisions. Section 414 is not controlling. No California decision is known to have given to it the meaning ascribed thereto by respondent. Neither is there such a decision from a sister state. Good reason. The section merely imposes upon the owner or general contractor the duty to "exercise reasonable care" in his management of the activities under his control. If he engages a painter to do all the painting and that contract obliges the painter to haul his own paints to the premises, to mix and apply them, and to furnish all facilities to be used, the general contractor does not by such contract assume control over paint brushes, ladders and scaffoldings supplied by the painter. In LaMalfa v. Piombo Bros., 70 Cal.App. 2d 840, 161 P.2d 964, the defendants, general contractors, engaged subcontractors to use their own trucks and drivers to haul material to make a fill on the San Francisco Airport. The wages of all drivers were paid by defendants who carried the workmen's compensation insurance on all truck drivers. The latter were reported as defendants' employees to the insurance carrier. LaMalfa as driver of a truck

[3] Rest.Torts, sec. 414: One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

was engaged in doing service for defendants on their roadway and as their invitee. They had built a certain road too narrow for the immediate purposes. The drivers of the several trucks by their confusion increased the hazard of collision. The accident was at night and resulted solely by reason of defendants' negligence in not more intelligently planning the movements of the trucks. They were liable because they were in possession and control of their own roads and negligently directed the driver of plaintiff's truck into a position of peril.

In Moran v. Zenith Oil Co., 92 Cal.App. 2d 236, 206 P.2d 679, the owner of the premises owned the appliances with which the plaintiff and his fellow workmen performed the task of cleaning the Zenith wells. The cable used had, during the five years' use, deteriorated, of which fact neither the plaintiff nor his foreman had knowledge but which fact was known to Zenith. In short, the owner invited the workmen to render a service and supplied them with death-dealing implements.

In DeLee v. T. J. Pardy Construction Co., 249 N.Y. 103, 162 N.E. 599, the defendant falsely represented the scaffold to be strong enough to hold six men and it was not. Not only did that defendant supply the scaffold but also it directed the employees of the subcontractor. On both grounds it was liable.

[12, 13] A general contractor may be liable for injuries resulting from defective appliances only when he has the privilege of selecting them or the materials out of which they are made, Roche Llewellyn Iron Works, 140 Cal. 563, 569, 74 P. 147, but he is not liable for injuries caused by defective scaffolds or other instrumentalities unless he has supplied them, Rae v. California Equipment Co., 12 Cal.2d 563, 569, 86 P.2d 352; Martin v. Food Machine Corp., 100 Cal.App.2d 244, 248, 223 P.2d 293; Dahms v. General Elevator Co., 214 Cal. 733, 739, 7 P.2d 1013; McCall v. Pacific Mail S. S. Co., 123 Cal. 42, 44, 55 P. 706. There is nothing inherently dangerous in doing work on a high scaffold, Schmidlin v. Alta Planing Mill Co., 170 Cal. 589, 592, 150 P. 983, and therefore it was not incumbent upon appellant to advise respondent against using his own scaffold. Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, held it obligatory upon every manufacturer of ladders to create them of such materials and so to construct them as to render them reasonably safe to members of the public. That principle is not involved here.

It follows that neither by the language of the Labor Code nor by appellate decisions is there authority for adjudging a general contractor liable for injuries suffered by a workman on a construction job as the result of a defective scaffold which had been made and supplied by the subcontractor—employer of the injured man.

[14] The trial judge reached a contrary conclusion based largely upon the general language of court decisions and upon what he conceived to be the "tendency" of the law to guarantee workmen against loss. Such tendency does not signify that a workman for a subcontractor shall receive more than his actual loss, assuming the Commission has made a fair award. Neither does it mean that the subcontractor shall be wholly relieved from loss by exacting from the general contractor reimbursement for the award made by the Accident Commission against the employer of the injured workman. The tendency of *statutory* law is as suggested by the trial judge, but by no known doctrine may a court go beyond statutory law in fixing liability. It may construe a statute liberally but not rewrite it.

Judgment reversed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, J., dissenting.

39 Cal.2d 336

PEOPLE v. McCRACKEN.

Cr. 5291.

Supreme Court of California
July 22, 1952.

Rehearing Denied Aug. 21, 1952.

The defendant was convicted in the Superior Court of Orange County, Robert Gardner, J., of murder, and he appealed. The Supreme Court, Spence, J., held that prejudicial error was not committed in denial of motion for change of venue.

Affirmed.

Edmonds, J., dissented in part.

1. Criminal Law 🔑121

Applications for change of venue are addressed to the sound discretion of the trial court. Pen.Code, §§ 1033, 1035.

2. Criminal Law 🔑134(4)

In murder prosecution, evidence was insufficient to establish that trial court abused its discretion in denying defendant's motion for change of venue on ground that people of county were so prejudiced against defendant that a fair and impartial trial could not be had in the county. Pen.Code, §§ 1033, 1035.

3. Criminal Law 🔑625

The primary purpose of the Legislature in enacting the law relative to sexual psychopaths was to protect society against the activities of sexual psychopaths, and the law was not intended by the Legislature to make sexual psychopathy a mitigating circumstance either in prosecution for offense involving sexual deviation or in prosecution for offense not involving sexual deviation. Welfare and Institutions Code, § 5500 et seq.

4. Criminal Law 🔑625

Since sexual psychopathy is not a mitigating circumstance, court in prosecution for offense involving sexual deviation or in prosecution for offense not involving sexual deviation, may in its discretion under the law dealing with sexual psychopaths, proceed to impose sentence before taking up issue of sexual psychopathy. Welfare and Institutions Code, § 5501(a, c).

5. Jury 🔑31(11)

Statutory provisions dealing with determination of a sexual psychopath is not unconstitutional on ground that it circumscribes the right to a jury trial. Welfare and Institutions Code, § 5501(a, c).

6. Criminal Law 🔑625

The question of sexual psychopathy of a defendant becomes wholly immaterial after imposition of sentence involving the death penalty. Welfare and Institutions Code, §§ 5500 et seq., 5501(a, c).

7. Criminal Law 🔑655(1)

In murder prosecution, record did not show that defendant was denied a fair trial on ground of alleged bias of the trial court. Pen.Code, § 189.

8. Criminal Law 🔑713, 1186(4)

In murder prosecution, argument to jury that defense of the defendant was a planned defense and that it did not grow out of the mind of the defendant, was improper, but was not prejudicial misconduct amounting to a denial of a fair trial. Pen. Code, § 189; Const. art. 6, § 4½.

9. Criminal Law 🔑768(1)

Sexual offenses are difficult to disprove, and a cautionary instruction is therefore required where the victim is the prosecuting witness. Pen.Code, § 288.

10. Criminal Law 🔑768(1)

In prosecution for murder of 10 year old girl, who was allegedly killed, according to the prosecution, in perpetration by defendant of a sex offense, trial court did not err in refusing to give cautionary instruction as required in cases involving sex offenses. Pen.Code, §§ 189, 288.

11. Criminal Law 🔑650

In murder prosecution, trial court did not abuse its discretion in refusing request of defendant to permit defendant to be subjected to "truth drugs" while on the witness stand. Pen.Code, § 189.

12. Witnesses 🔑2(1)

In murder prosecution, wherein defendant interposed defense of insanity, question of appointment of independent medical experts was a matter within discretion of the trial court. Code Civ.Proc. § 1871.

13. Witnesses ⚷2(1)

In murder prosecution, wherein defendant interposed defense of insanity, trial court did not abuse its discretion in refusing to appoint independent medical experts. Pen.Code, § 189.

14. Criminal Law ⚷641(6)

In murder prosecution, court in its discretion could refuse to permit defendant's counsel, who had been appointed by the court to represent the defendant, to withdraw from the case, having in mind whether such withdrawal might work an injustice in the handling of the case. Pen.Code, § 189.

15. Criminal Law ⚷641(6)

In murder prosecution, trial court did not abuse its discretion in denying motion of defendant's counsel, who had been appointed by court to represent defendant, to withdraw from the case, though defendant had no money with which to hire medical experts, while public defender, who would have been substituted if defendant's counsel had been allowed to withdraw, could, because of the resources of his office, have hired independent experts. Pen.Code, § 189.

16. Jury ⚷67(3)

Fact that local constable, who had been appointed as elisor by court to summon special venire for murder prosecution, indicated that he would not select uneducated people as jurors, did not establish that he was biased against defendant.

◆

George H. Chula, James C. Monroe, Santa Ana, and Kal W. Lines, San Francisco, for appellant.

Edmond G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., James L. Davis, Dist. Atty., Orange, and Robert P. Kneeland, Asst. Dist. Atty., Santa Ana, for respondent.

SPENCE, Justice.

By an indictment returned by the grand jury of Orange County, defendant was charged in three separate counts with the crimes of (1) child stealing, Pen.Code, § 278, (2) kidnapping, Pen.Code, § 207, and (3) murder, Pen.Code, § 189 of Patricia Jean Hull, aged ten years. The crimes were alleged to have been committed on May 19, 1951. The indictment was returned on May 25, 1951, and on June 8, defendant was arraigned and entered pleas of not guilty and not guilty by reason of insanity.

On the day set for trial, July 9, 1951 defendant moved for a change of venue on the ground that the people of Orange County were so prejudiced against him that a fair and impartial trial could not be had in that county. He also moved for a continuance. Both motions were denied, and trial proceeded on July 9. During the course of trial defendant moved for leave to file "Sexual psychopath papers", Welf. & Inst.Code, § 5500 et seq., to which motion the prosecution objected and the objection was sustained. On August 2, the jury returned verdicts of guilty on count one (child-stealing) and not guilty on count two (kidnapping). The jury was unable to agree on count three (murder), and the matter was set for retrial on August 13, 1951. Prior to the retrial defendant again made motions for a change of venue and a continuance, which motions were denied. The second trial resulted in a verdict of first degree murder without recommendation.

On October 8, 1951, defendant was tried on his pleas of not guilty by reason of insanity on counts one (child-stealing) and three (murder). The jury returned verdicts finding defendant sane at the time of the commission of both crimes. On October 26, 1951, after denial of defendant's motion for hearing and determination of his status as a sexual psychopath, Welf. & Inst. Code, § 5501, subds. (a) and (c), and his motion for a new trial, the court pronounced judgment and imposed the death penalty. This is an automatic appeal. Pen.Code, § 1239 (b).

No contention is made that the evidence is insufficient to sustain the verdict. As principal grounds for reversal, defendant makes these contentions: (1) that prejudicial error was committed in the denial of a change of venue; (2) that the statutory procedure provided for determination of a "sexual psychopath" is unconstitutional in circumscribing the right to a jury trial, Welf. & Inst.Code, § 5501, subd. (c); and (3) that the trial proceeded in a biased atmosphere.

On May 19, 1951, Patricia Hull, with her two younger brothers, attended a matinee at the Valuskis Theatre in Buena Park. Defendant had also gone to the theatre about 2 o'clock that afternoon. Between 5:30 and 6:00 p.m. that day, he and a girl resembling Patricia Hull were seen entering his auto court cabin.

When Patricia failed to return from the theatre in the late afternoon, her parents began making private inquiry for her, and on the next day, after their report to the sheriff's office, a full scale search was begun. On May 24, 1951, her body, fully clothed, was found in a shallow grave in Live Oak Canyon, some thirty-five miles from Buena Park. Live Oak Canyon is in a mountainous area adjacent to O'Neil Park, a county project on which defendant had worked on different occasions. A yellow bedspread, identified as coming from defendant's cabin, was found buried about fifty feet from the girl's grave. The autopsy revealed small bruises on the girl's arms and in the area of her thighs, dilation of her rectal orifice, some fifteen gashes on her scalp at the back and sides, and three fractures of her skull. Dr. Raymond Brandt, the county autopsy surgeon, testified that the cuts and blows on the girl's head all appeared to have been delivered before death by a fairly sharp, weighted instrument, and that death was caused by consequent exsanguination. His findings and medical opinion as to the post-mortem examination were corroborated by Dr. Maurice Rice, a pathologist present at the performance of the autopsy.

Defendant, a musician, lived in an auto court cabin in Buena Park. A few days prior to May 19, 1951, he had arranged with one Lee Stradley, owner of a local cafe, to play evenings in the latter's cafe upon request of the patrons. Stradley testified that at about 8:45 p.m. on May 19, defendant in a highly nervous state came to the cafe and asked to borrow Stradley's car for the purpose of making a short drive to his cabin; that Stradley loaned defendant the car upon the latter's promise to return within a few minutes; and that defendant did not return until about 1:45 o'clock the next morning, when defendant was still in a nervous and agitated state.

Defendant was taken into custody on May 20, 1951, and he repeatedly denied that he had ever seen the girl or that she had been with him in his cabin. A search of his cabin revealed human bloodstains on the floor of the bedroom and kitchen, strands of hair and bits of fiber from clothing identified as belonging to the girl, an apron appearing to have been recently rinsed of bloodmarks, and towels similar to one found near the road in Live Oak Canyon and on which there had been much human blood. Defendant's clothing worn on May 19 was bloodstained.

Defendant testified as follows concerning his acts on May 19: At the theatre that afternoon a girl, later identified as Patricia Hull, came and sat near him. After they had talked a little while and agreed to show each other where each lived, they left the theatre and walked to his cabin. He felt thirsty and went to the kitchen for a drink of water. While the girl was looking at some pictures in the front part of the cabin, a car approached and she, thinking the people were her neighbors, became panicky with the thought that they might discover her in defendant's cabin. Defendant tried to calm her and locked the door of the cabin. She ran to the kitchen, climbed on the kitchen table, and tried to kick out the screen. In doing so, she stepped on a jelly glass, lost her balance and fell to the floor. Defendant went to the kitchen door, saw her lying on the floor, with considerable blood running from her head. He tried to holler for help, and the next thing he knew, he awoke under the bed. He then again went to the kitchen, where a great deal of blood had apparently accumulated in one corner from the girl's bleeding. He shook the girl's body, but found no signs of life. He held her head under the faucet in the kitchen sink for some twenty minutes. He then reached for a towel from the kitchen cabinet and in the process he pulled down a flat iron. At that moment the landlady entered the kitchen. As she glanced about the room, she accused defendant of killing the girl, and he hit the landlady several times on the head with the iron. He then wiped up some of the blood that was still flowing from the girl's cuts and gashes, and hid her body behind the bed.

Believing this episode was a dream of some kind, defendant left the cabin and went to the cafe to see Stradley. On leaving the cafe in Stradley's car, he remembered the girl at the cabin. He returned there, took the girl's body wrapped in a yellow bedspread, and placed it in the back seat of the car. He drove to a hotel in Santa Ana in search of a friend with whom he wanted to do some business. Then he proceeded to his mother's home in Santa Ana, where he picked up a shovel to dig a grave, and continued to the O'Neil Park location, where he buried the girl's body and the yellow bedspread. He returned the shovel to his mother's home, stopped at his cabin for a few minutes, and proceeded to Stradley's cafe.

Dr. Brandt testified that it was his opinion that the cuts on the girl's head could not have been caused by falling onto broken glass. Three psychiatrists gave as their opinion that defendant's story, as related to them, contained much fabrication. Defendant introduced in evidence mental test findings showing that he had a low intelligence quotient but was not feeble-minded. There was also introduced on his behalf reports of medical examinations disclosing that defendant probably was a "sexual psychopath" and that on previous occasions he had been involved in molesting young girls.

On the trial of the insanity issue, the medical experts unanimously agreed that at the time of commission of the alleged offenses defendant was legally sane. It was the theory of the prosecution that defendant's killing of Patricia Hull was not only premeditated and deliberate, but also was in perpetration of an act punishable under Penal Code, section 288.

Defendant's first contention is that the trial court committed prejudicial error in denying defendant's motion for a change of venue. The motion was supported by affidavits of defendant and his attorney in which it was averred that a fair and impartial trial could not be had in Orange County because the enormity of the alleged crime had aroused the anger and indignation of the people of that county resulting in bias and prejudice against defendant; that there had been sensationalized coverage of the homicide in local newspaper stories, as well as by television cameras showing interviews with many townspeople extending over several days and during which they gave their respective opinions as to defendant's innocence or guilt, all adding to the popular excitement over the alleged sex crime and aiding the prosecution's case through highly emotional statements; and that many of the citizens of the county agreed that strong local sentiment and feeling existed against defendant but were unwilling to execute affidavits to that effect for fear of suffering prejudice from any charge of association with defendant's case.

Counter-affidavits were filed (bank official, news bureau manager, Santa Ana Chief of Police, State Highway Patrol Officer, Orange County Sheriff, and Orange County District Attorney) whereby it was conceded that there was publicity and general discussion of the missing girl at the time of defendant's arrest and during the five-day search for her body. However, it was further averred that the newspaper accounts on the whole were fair and factual; that there were no threats of violence or molestation against defendant; that affiants had heard no statements which would lead them to believe that defendant could not have a fair trial in Orange County; that any exceptional public interest had largely subsided by the time the affidavits were executed, July 6, 1951, which was three days before the date of the first trial, July 9; and that defendant had been conducted several times along the public street from the county jail to the court house for various hearings and had not been subjected to any threats of violence. In addition, the district attorney's counter-affidavit referred to the numerous local citizens whom the prosecution had subpoenaed as witnesses for the trial and the increased expense that would be incurred, as well as prejudice to the prosecution's case, if the venue should be changed. As above stated, defendant's motion for change of venue, as submitted on the conflicting affidavits, was denied.

Prior to the commencement of the second trial, on August 13, defendant made another motion for change of venue, supported by affidavits of himself and his attorney. These affidavits largely repeated the averments made at the time of the first trial and, in addition, referred to various emotionally-slanted newspaper articles and pictures which appeared in the local newspapers during the first trial, including a statement by the district attorney to the press and given wide circulation, wherein he berated the jury for failing to convict defendant on the murder charge and expressed his opinion that the testimony was "sufficient on which to base a first degree murder verdict calling for the death penalty." A counter-affidavit was filed by the district attorney, wherein he reaffirmed his statements that defendant could have a fair trial in Orange County and that there had been no molestation or threats against defendant. He further asserted that the inability of the first jury to agree on a verdict on the murder charge demonstrated the fairness and impartiality of the people of Orange County in the matter. He also mentioned again considerations of convenience of the witness subpoenaed by the prosecution for the second trial, as well as the increased expense which would be incurred upon a trial of the case, in addition to the already large expenses involved.

[1, 2] Applications for change of venue are addressed to the sound discretion of the trial court. Pen.Code, §§ 1033, 1035; People v. Wallace, 6 Cal.2d 759, 764, 59 P.2d 115; People v. Cullen, 37 Cal.2d 614, 627–628, 234 P.2d 1. It must be recognized that the type of crime here involved is one which is generally condemned and receives widespread publicity. But there was no claim of threats or open acts of hostility shown against defendant by the people of Orange County. People v. Yoakum, 53 Cal. 566; People v. Suesser, 132 Cal. 631, 64 P. 1095; People v. McKay, 37 Cal.2d 792, 236 P.2d 145. The first trial commenced over six weeks after the indictment was returned and four weeks after defendant entered his pleas, and the second trial commenced over eleven weeks after the indictment was returned, during which periods of time, according to the counter-affidavits, any public feeling of indignation had largely subsided and reached a normal level. People v. Yeager, 194 Cal. 452, 483, 229 P. 40; People v. Brite, 9 Cal.2d 666, 689–690, 72 P.2d 122. Counsel for defendant made thorough and searching inquiry into the state of mind of the prospective jurors on voir dire examination at the second trial, and no special difficulty was encountered in securing a jury. Although a juror may have read newspaper articles of the crime and surrounding circumstances, that fact does not render him disqualified where he swears that he can act impartially on the evidence presented. People v. Yuen, 32 Cal.App.2d 151, 157, 89 P.2d 438, 90 P.2d 291. The trial judge ordinarily is a resident of the county in which the venue lies, and his familiarity with conditions prevailing there enables him to pass more understandingly on a motion for change of venue than an appellate court. People v. Hall, 220 Cal. 166, 170, 30 P.2d 23, 996. Under all the circumstances, it does not appear here that the trial court abused its discretion in denying defendant's motion for a change of venue. People v. Cullen, supra, 37 Cal.2d 614, 628, 234 P.2d 1.

Defendant next contends that the statutory procedure providing for the determination of a "sexual psychopath", Welf. & Inst.Code, ch. 4, pt. 1, div. 6, is unconstitutional in circumscribing the right to a jury trial. Section 5501 of the Welfare & Institutions Code sets forth the requirements for invoking the law relative to sexual psychopaths. The pertinent portions of the section, as amended in 1950, read as follows:

> "(a) When a person is *convicted of a criminal offense,* the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by

> affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such person is a sexual psychopath within the meaning of this chapter, *may adjourn the proceeding or suspend the sentence,* as the case may be, and *may certify* the person for hearing and examination by the superior court of the county to determine whether the person is a sexual psychopath within the meaning of this chapter. * * *

Defendant argues that if trial on the murder charge had been had before a court sitting without a jury, the court would have had to adjourn the proceeding after a finding of guilt until his status as a sexual psychopath had been determined. People v. Barnett, 27 Cal.2d 649, 657, 166 P.2d 4. The court would then have assessed punishment in light of the information made available to it by the medical profession. But by seeking trial before a jury, defendant claims that he was prevented from raising the issue of sexual psychopathy, and it was not considered in determining the verdict and the punishment which resulted therefrom. Defendant argues therefore that his choice of trial before a jury subjected him to a more stringent penalty, and that the statutory procedure is therefore unconstitutional.

This argument is based on the erroneous assumption, which finds no support in the cited case, that sexual psychopathy is a mitigating circumstance. The sexual psychopath law was passed by the Legislature because experience had shown that persons who came within the classification of sexual psychopaths were unable to benefit from ordinary penal confinement and were in need of medical treatment. People v. Hector, 104 Cal.App.2d 392, 394, 231 P.2d 916. The Legislature therefore gave the courts power to commit a person determined to be a sexual psychopath to a medical facility for an indeterminate period of time until the person had been cured or was unable to benefit from further treatment. Welf. & Inst.Code, § 5512, 5517. After a cure, or after it had been determined that further treatment was of no benefit, the courts were given the power to resume the proceeding in the criminal matter. Welf. & Inst.Code, §§ 5517, 5518. If treatment was determined to be of no further benefit and the patient still was considered dangerous to society, the courts were given power to order the recommitment of the person to an appropriate medical facility for an indeterminate period. Welf. & Inst. Code, § 5518.

[3] It should be noted that the above procedure is applicable regardless of the nature of the crime of which defendant has been convicted. Welf. & Inst.Code, § 5501 (a). Thus a person convicted of a felony or misdemeanor, unconnected in any manner with sexual deviations, may be committed as a sexual psychopath if the evidence so justifies. It is obvious therefore that the primary purpose of the Legislature was to protect society against the activities of sexual psychopaths People v. Hector, supra, 104 Cal.App.2d 392, 394, 231 P.2d 916, and that it was not intended to make sexual psychopathy a mitigating circumstance. On the contrary, the sexual psychopath may be removed from society under the sexual psychopath law until he is cured or until he is no longer considered a menace to the safety of others. The court may thereafter resume the criminal proceeding and impose the punishment allowed by law since the confinement as a sexual psychopath is not a substitute for punishment, the entire statutory procedure being civil in nature rather than penal. In re Keddy, 105 Cal.App.2d 215, 216, 217, 233 P.2d 159; "Sane Laws for Sexual Psychopaths," 1 Stan.L.Rev. 486, 492.

[4–6] Section 5501 of the Welfare and Institutions Code provides that in a proper case the trial judge may adjourn the proceedings or suspend the sentence. The Legislature thus has given the court an alternative which it may choose within its discretion. Since sexual psychopathy is not a mitigating circumstance, the court may in its discretion proceed to impose sentence before taking up the issue of sexual psychopathy. Defendant would, consequently, be in no different position after a trial by a court sitting without a jury than after trial by jury, for in neither case would he be entitled, as a matter of right, to have his status as a sexual psychopath determined prior to sentence. We therefore conclude that there is no merit in defendant's claim that the sexual psychopath law circumscribes his right to a jury trial. Furthermore, we are of the opinion that the question of sexual psychopathy becomes wholly immaterial after the imposition of sentence involving the death penalty. The nature of the sentence in such case assures the protection of society from any future activities of the defendant, regardless of whether or not he may be a sexual psychopath.

[7] Defendant also contends that his trial proceeded in such an atmosphere of bias that he was denied a fair trial. He complains particularly of certain acts by the court and the district attorney.

Defendant's trial was a prolonged, hard fought proceeding. It was surrounded by the intense public interest which so often is present in notorious criminal cases. As a result counsel for both sides and the court were under tension, and this tension at times found expression between the court and defense counsel. It culminated in one of defendant's counsel being convicted of contempt of court and sentenced to the county jail. Upon certiorari, the order adjudging guilt and imposing sentence was annulled. Chula v. Superior Court, 109 Cal.App.2d 24, 240 P.2d 398.

The proceeding resulting in the citation for contempt occurred in the course of defendant's sanity hearing The alleged contemptuous acts relate to the attorney's procedure in attempting to elicit certain medical testimony from one of the court appointed psychiatrists bearing on the theory of defendant's case. The citation for contempt was made outside the presence of the jury, and the contempt proceedings were instituted by the trial judge after the jury had returned its verdict on the insanity issue and also after the court's imposition of the death penalty on defendant. In reviewing the propriety of the contempt sentence, the appellate court in a detailed opinion, noted the prolonged trial periods which had been necessary in determination of the case, the record's failure to show any act by defendant's attorney in wilful disobedience of the court's ruling, and the apparent feeling of responsibility on the part of defendant's attorney to fully protect his client's interests in pursuing his examination of the medical experts. Accordingly, the appellate court concluded that the record did not show that defendant's attorney was guilty of acting "wilfully," "deliberately," and "with complete disregard and in flagrant violation of" the admonitions of the trial court.

We have closely examined the record to determine whether any actions by the court indicated bias against the defendant. Rather than finding bias we find that the court here made every effort to see that defendant received a fair and impartial trial, unprejudiced by any improper comments or conduct. All discussions between the court and counsel were held out of the presence of the jury. Mostly they were held in chambers. In the few instances that defendant's counsel requested the court to give an admonitory instruction because the jury might have been influenced by the tone or wording of the court's comments, the court immediately gave such instruction. If any bias did appear during the trial, and we cannot say from the record that it did, it was certainly cured by the instructions of the court.

The conduct of the district attorney was, however, not as faultless. During the closing argument by Mr. Davis, the district attorney, the following took place:

> "Mr. Davis: * * * And counsel says, and I am only quoting him, he says, 'I had an awful time pulling out of the Defendant—', that is the words he used, '—pulling out of the Defendant this story he told'. I submit to you the appropriate language counsel should have said, 'I had an awful time pushing that story into his—'.
>
> "Mr. Chula: Your honor, I object to that as being prejudicial and absolutely a lie.
>
> "Mr. Davis: That is exactly what the facts are.

"Mr. Chula: If Your Honor please, the facts will bear me out nobody could tell it like that that would—

"The Court: The jury will be instructed to disregard the statement of both counsel.

"Mr. Chula: I wish to cite the prosecution's action as misconduct and request a mistrial at this time.

"The Court: Motion denied.

"Mr. Davis: I will leave it to you jurors now. May I discuss this in any way, Judge? This defense, and I have had a good many years of experience, men, and you too, ladies, handling cases such as this, and I submit in all fairness to everybody that this is a planned defense and it didn't grow out of the mind of this Defendant.

"Mr. Chula: If Your Honor please, I wish to further cite this prosecutor's statement as misconduct in the face of the attitude of the Court and the ruling of the Court to disregard those statements. The prosecutor knows full well what he is doing.

"Mr. Davis: Sure, I do.

"Mr. Chula: That he is making those statements that are unfair and not a fair deduction from the evidence that we have before us.

"The Court: The jury will be instructed to disregard all conversation of counsel." And shortly thereafter:

"Mr. Davis: * * * Jurors, that's not true—most damnable thing that I believe I ever heard stated in a courtroom—a little ten-year-old girl, gone to her God, not a smear or a blemish on her except what this defendant said. *What some people won't do for a fee.* (Italics added.)

"Mr. Chula: If Your Honor please, I would like to object to that last statement and ask that—I cite it as prejudicial misconduct on behalf of the District Attorney, and the jury should be ordered to disregard it. I request a mistrial on that statement.

"The Court: The jury will be instructed to disregard the last statement; the motion for a mistrial will be denied. Go ahead, Mr. Davis."

[8] Such conduct on the part of the district attorney was highly improper, People v. Charlie, 34 Cal.App. 411, 415, 167 P. 703, and could not have been intended to serve any legitimate purpose. The admonition given by this court in People v. Lee Chuck, 78 Cal. 317, 329, 20 P. 719, 722, might well be remembered by the prosecuting officer: "They [prosecuting officers] seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it."

While the misconduct of the district attorney was serious, we cannot, in the face of the overwhelming evidence of defendant's guilt, come to the conclusion that it was so prejudicial as to have caused a miscarriage of justice. Cal.Const. art. VI, § 4½. The prompt objections of defense counsel, and the admonitions of the court corrected any prejudice which flowed from these remarks. See People v. Charlie, supra, 34 Cal.App. 411, 415, 167 P. 703.

Defendant makes a number of other contentions but fails to support them with argument. Nevertheless, because of the nature of this case, we have examined them closely. We find them, however, to be without merit.

[9, 10] Complaint is made of the trial court's failure to give a precautionary instruction as required in cases involving Penal Code, Section 288. The charge against defendant was murder, Pen.Code, § 189, and not a violation of Penal Code,

Section 288. Sexual offenses are difficult to disprove, and a cautionary instruction is therefore required where the victim is the prosecuting witness. People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485. However, in the case of murder the reasons listed in People v. Benson, 6 Cal. 221, 223, are inapplicable since the victim is dead and physical evidence is usually present. The trial court therefore did not err in refusing to give the precautionary instruction.

[11] Defendant also complains of the trial court's refusal to permit the defendant to be subjected to the "truth drugs" while on the witness stand. It is questionable whether the results of such examination would have been admissible in evidence. People v. Cullen, 37 Cal.2d 614, 626, 234 P. 2d 1. But even if they were admissible, the procedure would be discretionary with the trial court, and it cannot be said that the court abused its discretion.

[12, 13] The trial court also refused to appoint independent experts. This was a matter within the court's discretion, Code Civ.Proc. § 1871, and no abuse thereof appears from the record.

At the beginning and the conclusion of the first trial, defendant's counsel made a motion to withdraw from the case. The motion was denied in each instance. Defendant claims that he was prejudiced thereby because he had no money with which to hire experts, while the public defender, who would have been substituted if defendant's counsel had been allowed to withdraw, could, because of the resources of his office, have hired independent experts.

[14, 15] Defendant's counsel was appointed by the court to represent defendant. The court could in its discretion refuse him permission to withdraw, having in mind whether such withdrawal might work an injustice in the handling of the case. See Linn v. Superior Court, 79 Cal.App. 721, 723, 250 P. 880. Here no abuse of discretion appears.

[16] The court appointed the local constable as elisor to summon the special venire for the second trial. Defendant claims that he was biased, citing an instance where the elisor, on voir dire examination, indicated that he would not select uneducated people as jurors. This does not appear to indicate bias. The fact that no particular difficulty was encountered in selecting the jury for the second trial would indicate that the elisor performed his duty in a fair, unbiased manner.

The record discloses that defendant had a fair trial, free from any error which would warrant a reversal.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I cannot join in the holding that "the question of sexual psychopathy becomes wholly immaterial after the imposition of sentence involving the death penalty." The Welfare and Institutions Code (§§ 5500 et seq.) makes no distinction between conviction of a criminal offense for which the penalty is death and conviction for any other crime. Although it may seem anomalous to include one under sentence of death in legislation giving persons convicted of crime the benefit of medical treatment intended to cure them of criminal propensities, the code sections so provide. The statutory language is plain and admits of no construction.

At the time of the homicide, section 5501 (a), as amended by Stats. 1st Ex.Sess.1950, ch. 7, § 1, provided: "When a person is convicted of a criminal offense, the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such person is a sexual psychopath within the meaning of this chapter, may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a sexual psychopath within the meaning of this chapter."

While the trial was in progress, and prior to rendition of the verdict, the 1951 amendment to section 5501(a), Stats.1951, ch. 1759, § 1, became effective. Its first sentence, even more explicit that the prior statute, reads: "When a person is convicted of *any* criminal offense, *whether or not a sex offense* * * *." (Emphasis added.)

If there had been any question as to the criminal offenses included within the operation of the statute prior to the 1951 amendment, cf. People v. Haley, 46 Cal.App.2d 618, 623, 116 P.2d 498, the Legislature, by that enactment, made it crystal clear that the procedure provided is applicable upon conviction of "any criminal offense, whether or not a sex offense". By the present decision, this court has recognized the broad scope of the code section but holds, nevertheless, that "any criminal offense" does not include one for which the death sentence has been pronounced.

During the first trial, and prior to conviction of any offense, McCracken moved for leave to file a "sexual psychopathic petition". The District Attorney objected to the filing of such a petition at that time and his objection was sustained. This ruling was correct because the benefits of the statute are available only when one has been convicted of a criminal offense. The following day, McCracken's counsel filed an "Affidavit under Section 5501" wherein he averred that McCracken "has a psychopathic personality, and shows marked departures from normal mentality and that indisposition predisposes said Henry McCracken to the commission of sexual offenses against children and in a degree constituting him a menace to the health and safety of others". He further stated that two doctors would testify that McCracken "is a sex psychopath". The affiant expressed his belief that McCracken "should be handled in the manner as set out in the Welfare Code in cases of this type".

The code does not specify when the affidavit provided by section 5501 should be filed. The only restriction is that a hearing upon the question of the defendant's psychopathic status may not be had prior to conviction. For this reason, the renewal of the defense motion for an order for examination, made at the commencement of the second trial, also was properly denied.

McCracken renewed his application for a hearing in compliance with the statute at the close of his trial upon the plea of not guilty by reason of insanity and subsequent to the rendition of the verdict of guilty. The court, without explanation of its ruling, denied the "motion to adjourn or suspend proceedings under Section 5501 of the Welfare & Institutions Code".

Had the affidavit of McCracken's counsel constituted the only evidence upon the question whether McCracken is a sexual psychopath, the ruling of the court clearly would have been within its discretion. Nothing in the affidavit indicates any more than a belief upon the part of counsel that McCracken is a sexual psychopath, a belief which the trial judge, from his own observations, might not have shared. People v. Smith, 100 Cal.App.2d 162, 165, 223 P.2d 82. The court has a sound discretion to determine from the affidavits filed and the evidence adduced whether the defendant is a sexual psychopath. People v. Haley, supra, 46 Cal.App.2d 622, 116 P.2d 498, 501. This is clear from the provision of section 5501(a) that a hearing may be ordered "if it appears to the satisfaction of the court that there is probable cause for believing such person is a sexual psychopath". "The court is not ousted of jurisdiction over the criminal proceeding by the mere filing of an affidavit asserting that the accused is a sexual psychopath. It is not mandatory that the court shall adjourn the criminal proceeding when the affidavit is filed. The word 'may', as it is used in that section should not be construed as a mandatory direction to the court regardless of the sufficiency of the showing. It is merely discretionary. Unless there is an abuse of that discretion the ruling of the court in that regard may not be disturbed on appeal." People v. Haley, supra.

However, in addition to the affidavit of counsel, the court had before it an overwhelming mass of uncontradicted evidence by qualified experts that McCracken is a sexual psychopath. This evidence was presented in the written reports of psychiatrists appointed by the trial judge to examine McCracken and their testimony at his trial upon the issue of not guilty by reason of insanity. He was characterized by them as a sexual psychopath, and one of them added that he is such a person within the meaning of section 5500 of the Welfare and Institutions Code. Under these circumstances, the denial of a hearing to determine whether McCracken is a sexual psychopath as defined by statute was an abuse of discretion. People v. Barnett, 27 Cal.2d 649, 656, 166 P.2d 4.

This is not to say that the trial court was required to find that McCracken is a sexual psychopath and order that he be dealt with accordingly. Had there been a hearing upon the question of his mental status in that regard, the evidence might have justified a determination that McCracken is not one entitled to the benefits of the sexual psychopath law. But I find no basis, either in the language of the statute, nor the evidence which was before the trial court when the motion for a hearing was denied, to justify that ruling.

Since the decision in People v. Barnett, supra, the statute has been amended to increase materially the duty of the trial judge. At that time, section 5501 provided that the court might follow the statutory procedure if "it appears by affidavit to the satisfaction of the court that such person is a sexual psychopath". Thus, if the affidavit were insufficient to satisfy the court it could deny a hearing at its discretion. People v. Smith, supra; People v. Haley, supra. However, in 1950 the section was amended to permit the trial judge to order a hearing "on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such person is a sexual psychopath". Stats. 1st Ex.Sess.1950, ch. 7, § 1. The probable cause may now arise not only from the affidavit, but from the observations of the trial judge or the showing made upon a motion by the prosecuting attorney.

For these reasons, I would reverse the judgment of conviction insofar as it orders McCracken to be delivered into the custody of the warden at San Quentin for execution of the death penalty; otherwise it should be affirmed. I would also affirm the order denying McCracken's motion for a new trial but remand the cause to the trial court with directions to suspend the sentence for the purpose of hearing and determining whether or not McCracken is a sexual psychopath and after such hearing to take appropriate proceedings in the matter as specified in sections 5500 through 5518 of the Welfare and Institutions Code.

Rehearing denied; EDMONDS, J., dissenting.

39 Cal.2d 272

GANTNER v. GANTNER.

S. F. 18573.

Supreme Court of California, in Bank.

July 11, 1952.

Action by a wife against her husband for a divorce and custody of the parties' two minor children. From an order of the Superior Court, San Francisco County, Herbert C. Kaufman, J., denying defendant's motion to modify the custody provisions of a decree granting plaintiff a divorce and physical custody of the children, subject to defendant's rights of visitation, so as to give defendant physical custody of the children, and modifying the decree by limiting defendant's rights of visitation, he appealed, and plaintiff moved for a special order permitting the children to visit Australia and to take additional evidence supporting affirmance of the order denying defendant's motion. The Supreme Court, Traynor, J., held that the evidence supported the trial court's determination that plaintiff's continued physical custody of the children was in their best interests.

Order denying motion to change custody affirmed, and plaintiff's motions denied.

See also, Cal.Sup., 242 P.2d 329.

1. Divorce ⚷296, 312.6(6)

In divorce suit, trial court has broad discretion in matters concerning parties' minor children's custody, and its decision, refusing to transfer to husband children's custody awarded wife by divorce decree, will not be reversed or modified by appellate court, unless record clearly shows abuse of such discretion. Civ.Code, § 138.

2. Divorce ⚿303(3)

On divorced husband's motion to modify custody provisions of divorce decree by awarding him parties' children's physical custody granted their mother by decree, testimony that children were mentally and physically healthy, that relationship between mother and children was one of love and companionship, and that they received proper care and attention by mother, was sufficient to support trial court's determination that mother's continued custody of children was in their best interests, notwithstanding testimony introduced by movant that mother was not taking proper care of children. Civ. Code, § 138.

3. Divorce ⚿303(3)

On divorced husband's motion to modify provisions of divorce decree as to parties' minor children's custody by awarding him their physical custody, trial judge did not err in denying movant's request to ask children in open court which parent they preferred after judge privately interviewed them in chambers and stated for record that they appeared equally devoted to both parents, but informed him that they preferred living in country, where their mother lived, to living in city, where movant resided, in view of judge's statement that little weight would be given to children's preference because of their tender ages. Civ.Code, § 138(1).

4. Divorce ⚿303(1)

In divorce action, trial court has continuing jurisdiction to modify provisions of divorce decree as to parties' minor children's custody, but parties, after court has heard evidence and ruled on question of their fitness, cannot immediately again invoke court's powers to have it inquire into same or other facts existing at time of or before entry of decree. Civ.Code, § 138.

5. Divorce ⚿303(2)

To justify modification of provisions of divorce decree as to parties' minor children's custody, there must be change of circumstances, arising after entry of decree, or showing that facts relied on by party seeking modification were unknown to him and could not have been ascertained by him with due diligence before entry of custody order. Civ.Code, § 138.

6. Divorce ⚿303(3)

In determining whether circumstances have changed, so as to warrant modification of provisions of divorce decree as to parties' minor children's custody, court must consider facts established in former divorce and custody proceeding as basis for comparison. Civ. Code, § 138.

7. Divorce ⚿303(3)

Where judge, hearing divorced husband's motion to modify provisions of divorce decree as to parties' minor children's custody by awarding him their physical custody awarded wife by decree, presided at trial of divorce suit, and fact findings and conclusions of law therein were introduced in evidence at such hearing, evidence that wife, before entry of interlocutory decree containing same provisions, slapped children and said she did not want responsibility of caring for them, was properly rejected as not responsive to issues. Civ.Code, § 138.

8. Divorce ⚿303(3)

Evidence supported modification of provisions of divorce decree, granting wife physical custody of parties' minor children, subject to husband's right to visit them and have them with him several week-ends each month, so that they could live with him only during parts of Christmas holidays and school vacations and he could visit them only on Sundays from breakfast to bed time. Civ.Code, § 138.

9. Divorce ⚿303(3)

In divorced husband's proceeding for modification of provisions of divorce decree as to parties' minor children's custody, trial judge must determine whether division of their custody between parents or undivided custody by one of parents is in children's best interests. Civ.Code, § 138.

10. Divorce ⚿312.5

In absence of affidavits supporting statements of divorced husband's counsel, in brief on appeal from order denying his motion to modify provisions of divorce decree as to parties' minor children's custody to support contention, based on matters not in record, that trial judge was biased and prejudiced against movant, such question must be determined from matters appearing in reporter's transcript. Civ.Code, § 138.

11. Appeal and Error ⚷516

Statements of counsel in briefs are not part of record on appeal.

12. Divorce ⚷303(3)

Where judge, hearing divorced husband's motion to modify provisions of divorce decree as to parties' minor children's custody, admitted in evidence same judge's fact findings and conclusions of law in divorce action, he properly refused to admit in evidence his memorandum opinion therein, since findings superseded opinion. Civ. Code, § 138.

13. Divorce ⚷303(3)

Where divorced wife conceded, on hearing of husband's motion to modify provisions of divorce decree as to parties' minor children's custody, that his relation with children was one of love and devotion, and his counsel attempted to ask a witness whether husband had good influence on children, after trial court refused to allow such question, judge's remark that he was running court and that counsel was going to mind judge and statement, "Let's not have any repetition or cumulative evidence," were proper. Civ.Code, § 138.

14. Trial ⚷29(1)

A trial judge has right and duty, within reasonable limits, to bring out facts in case before him clearly, so that important functions of his office may be fairly and justly performed.

15. Judges ⚷49(1)

The fact that trial judge, hearing divorced husband's motion to modify provisions of divorce decree as to parties' minor children's custody, had been divorced, his refusal to allow movant to develop immaterial matters, and fact that he did not believe movant's evidence and accepted that of divorced wife and her witnesses, did not establish judge's bias and prejudice against movant, where record contained nothing to indicate that judge's personal life led him to be biased against movant and demonstrated that he impartially controlled course of trial. Civ.Code, § 138.

16. Prohibition ⚷31

The Supreme Court's affirmance of superior court's order, denying divorced husband's motion to modify provisions of divorce decree as to parties' minor children's custody, after Supreme Court's issuance of writ of prohibition against superior court's entry of order permitting wife to take children to foreign country for vacation pending appeal from order denying husband's motion, removed jurisdictional barrier against granting of such permission by superior court in its discretion. Civ. Code, § 138.

17. Divorce ⚷312.7

The Supreme Court, on affirming superior court's order denying divorced husband's motion to modify provisions of divorce decree as to parties' minor children's custody after Supreme Court's issuance of writ of prohibition against superior court's entry of order permitting divorced wife to take children to foreign country for vacation pending appeal from order denying husband's motion, was not obligated, as matter of law, to give superior court and divorced wife clear mandate not to take children to such country on theory that superior court, in absence of pending appeal, lacked jurisdiction to grant such permission. Civ.Code, § 138.

18. Appeal and Error ⚷1175(2), 1176(2)

The purpose of statute authorizing appellate court to take additional evidence concerning facts occurring before decision of appeal, give or direct entry of any judgment or order, and make such other orders as case requires, is to permit appellate court to remedy defects in record, so that judgment or order appealed from may be affirmed and further litigation terminated, where otherwise judgment or order would have to be reversed under old practice. Code Civ.Proc. § 956a.

19. Divorce ⚷312.7

A divorced wife's motion in Supreme Court for order permitting divorced spouses' minor children to visit foreign country after superior court's order denying divorced husband's motion to modify provisions of divorce decree as to children's custody was affirmed by Supreme Court on appeal, pending which superior court was precluded by writ of prohibition, issued by Supreme Court, from entering order granting such permission, cannot be granted under statute authorizing appellate court to take additional evidence concerning facts occurring before decision of appeal and give or direct entry of any judgment or order required. Civ.Code, § 138; Code Civ. Proc. § 956a.

20. Prohibition ⚷31

A Supreme Court decision in prohibition proceeding that superior court had no jurisdiction to allow divorced spouses' minor children to leave state pending divorced husband's appeal from order denying his motion to modify provisions of divorce decree as to children's custody did not deprive superior court of jurisdiction to enter order permitting wife to take children to foreign country for vacation after Supreme Court affirmed order appealed from merely because husband might inaugurate new attempts in superior court to modify custody decree for purpose of delaying such visit. Civ.Code, § 138; Code Civ.Proc. § 946.

21. Evidence ⚷577½

When writ of prohibition, granted by Supreme Court against Superior Court's entry of order permitting divorced wife to take divorced spouses' minor children to foreign country for vacation pending appeal from order denying husband's motion to modify provisions of divorce decree as to children's custody, is discharged after affirmance of order appealed from, Superior Court may decide vacation issue on evidence previously presented and additional evidence of facts arising after issuance of writ or unknown to parties and not ascertainable by them with due diligence before previous proceeding, without violating rule that evidence at former trial is usually inadmissible at second trial. Civ.Code, § 138.

22. Divorce ⚷312.6(2)

A divorced wife's motion in Supreme Court to take additional evidence to support such court's affirmance of superior court's order denying modification of divorce decree as to provisions for divorced spouses' minor children's custody will be denied, where there is sufficient evidence in record on appeal to support superior court's findings and order appealed from. Civ.Code, § 138; Code Civ.Proc. § 956a.

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Morris Lowenthal and Juliet Lowenthal, San Francisco, for appellant.

Young, Rabinowitz & Chouteau, Harry S. Young and John E. Anderton, San Francisco, for respondent.

TRAYNOR, Justice.

Neilma and Vallejo Gantner were married in 1941. Two children were born of the marriage, Vallejo and Carillo, now aged eleven and nine. On August 9, 1949, the trial court entered an interlocutory decree granting Neilma a divorce and awarding Neilma and Vallejo joint legal custody of the children. Neilma was given physical custody of the children subject to Vallejo's right to visit them and to have them with him several week-ends each month. Neither party appealed. The final divorce decree contained the same custody provisions as the interlocutory decree.

On April 17, 1951, Vallejo filed a notice of motion requesting that the custody provisions be modified to give him physical custody of the children. The motion was heard before the same judge who had heard the divorce action. The court found that it was in the best interests of the children for them to remain in Neilma's custody and denied the motion. It also modified the decree, limiting Vallejo's right to have the children with him and his right to visitation. The present appeal followed.

[1] Vallejo contends that the trial court abused its discretion in refusing to transfer custody to him. The trial court has broad discretion in such matters, and its decision will not be reversed or modified by an appellate court unless the record clearly shows an abuse of that discretion. Prouty v. Prouty, 16 Cal.2d 190, 191, 105 P.2d 295; Foster v. Foster, 8 Cal.2d 719, 730, 68 P.2d 719; cases collected in 9 Cal.Jur. 798.

[2] There is abundant testimony to support the trial court's determination that

it is to the best interests of the children to remain with Neilma. Witnesses testified that the children were mentally and physically healthy, that the relationship between Neilma and the children was one of love and companionship, and that they received proper care and attention. Vallejo introduced considerable testimony to the effect that Neilma was not taking proper care of the children. The trial court did not accept Vallejo's version of the facts and resolved conflicts in the evidence in favor of Neilma. Foster v. Foster, supra; Bush v. Bush, 81 Cal.App.2d 695, 699, 185 P.2d 38.

Vallejo also contends that the trial court erred in several rulings regarding admission and rejection of evidence.

[3] The parties stipulated that the trial judge could privately interview the children in chambers. Afterwards the judge stated for the record that the children appeared equally devoted to both parents. He stated that the boys informed him that they preferred living in the country to living in the city, but did not express any preference for one parent over the other. Neilma lives in the country and Vallejo lives in the city. Apparently fearing that the court might give undue weight to the children's preference for the country, Vallejo requested the court to ask the children "in open court if necessary" which parent they preferred. The request was denied. No error appears in this ruling. The court pointed out that little weight would be given to the children's preference, since they did not appear to him to be of sufficient age to form an intelligent preference for one parent over the other. Civil Code, § 138(1). The question proposed by Vallejo would thus have had little if any probative value and would have served only to subject the children to serious emotional disturbance.

[4-7] Vallejo contends that the trial court improperly rejected his offer to prove that during the marriage Neilma had slapped the children and had stated that she did not want the responsibility of caring for them. Some of the evidence offered had been presented at the 1949 trial of the divorce action; the remainder had not on the advice of Vallejo's attorney. At that trial the court rejected Vallejo's attack on Neilma's character and found that she was "a fit and proper person to have the joint legal custody, care and physical custody of said minor children." No appeal was taken from the 1949 judgment.

In divorce actions the trial court has continuing jurisdiction to modify the custody provisions of the divorce decree. Civil Code, § 138. "But this does not mean the parties to such litigation may, after a court has once heard evidence upon the subject of their fitness * * * and ruled upon the question, immediately again invoke the powers of the court to have it inquire into the same or other facts existing at the time of or prior to the former decree. Such holding would lay a foundation for interminable and vexatious litigation. * * * The rule is stated to be that to justify a modification there must be a change of circumstances arising after the original decree is entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order, and could not with due diligence have been ascertained." Foster v. Foster, 8 Cal.2d 719, 727, 68 P.2d 719, 722, quoting from Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113; accord: Munson v. Munson, 27 Cal.2d 659, 666-667, 166 P.2d 268; Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295. In determining whether circumstances have changed, however, the court necessarily considers the facts established in the former proceeding as a basis for comparison. Crater v. Crater, 135 Cal. 633, 634, 67 P. 1049; Simmons v. Simmons, 22 Cal.App. 448, 452, 134 P. 791. In the present case, the trial judge had presided at the former trial and was therefore familiar with the circumstances then existing. The findings of fact and conclusions of law at the former trial were introduced in evidence. The evidence of Neilma's conduct preceding entry of the interlocutory decree was therefore properly rejected as nonresponsive to the issues in the modification proceeding. See Smith v. Smith, 85 Cal.App.2d 428, 433, 193 P.2d 56; Valentine v. Valentine, 47 Cal.App.2d 438, 440, 118 P.2d 17; cases collected in Hendricks v. Hendricks, 69 Idaho 341, 206 P.2d 523, 9 A.L.R.2d 623.

[8, 9] Vallejo next contends that the trial court abused its discretion in modifying the divorce decree so that the children could live with him only during parts of Christmas holidays and school vacations and he could visit them only on Sundays "from breakfast time to bed time."

The evidence supports the modification. Vallejo himself testified that the children were emotionally disturbed by being shifted from one home to the other on week-ends. Neilma testified that the children were disrespectful to her after visiting Vallejo. Neilma also stated that when she disciplined the children they would say "I'll tell my father on you." Vallejo states in his brief that a divided custody arrangement is unworkable and urges this court to award him undivided custody to end the "pulling and tugging by the parents." The same reasoning would apply on behalf of Neilma. Some experts believe that divided custody is harmful to the welfare of children, Plant, The Psychiatrist Views Children of Divorced Parents, 10 Law and Contemp. Prob. 807, 816, although others believe that barring exceptional circumstances, children should continue their relations with both parents. Weinman, The Trial Judge Awards Custody, 10 Law and Contemp. Prob. 721, 728. In each case, the trial judge must determine what is in the best interests of the children. The trial court in the present case could reasonably conclude from the evidence that a modification of the custody arrangements was advisable. See Cornwall v. Cornwall, 108 Cal.App.2d 95, 108, 238 P.2d 8.

[10, 11] Vallejo contends that the trial judge was guilty of bias and prejudice, an issue raised for the first time on appeal. Much of his argument is directed at matters not in the record. Thus he alleges that "the trial judge ignored appellant's witnesses on the first day and from then on * * * he looked away from them and at the opposite wall all during their testimony, except when he occasionally tried to elicit from them something adverse to Vallejo." Again, he asserts that "the trial judge, in his chambers, ridiculed all of counsel's arguments as to the relevancy of the evidence to be produced by Vallejo's witnesses and revealed a prejudicial attitude against Vallejo." No affidavits were filed to support the statements in the brief. Cf. Webber v. Webber, 33 Cal.2d 153, 164, 199 P.2d 934 (affidavits unnecessary when misconduct of judge appears on face of record). Statements of counsel in briefs are not part of the record on appeal. See Ware v. Security-First Nat. Bank, 7 Cal.2d 604, 608, 61 P.2d 936; Lady v. Barrett, 43 Cal. App.2d 685, 687, 111 P.2d 702. The question whether the trial court was biased must therefore be determined from matters appearing in the reporter's transcript.

[12, 13] Vallejo relies on the trial court's refusal to admit in evidence his memorandum opinion in the 1949 trial, allegedly "directly and unequivocally contrary to his whole attitude in the 1951 proceedings." The court, however, admitted the findings of fact and conclusions of law in the 1949 action. It acted properly in refusing to admit the memorandum opinion, since the findings superseded it. See Belger v. Sanchez, 137 Cal. 614, 618, 70 P. 738; Williams v. Kinsey, 74 Cal.App.2d 583, 600–601, 169 P.2d 487. Vallejo states that the trial court refused to allow him to ask a witness whether Vallejo had a good influence on the children and declared, when Vallejo nevertheless attempted to ask the question, "I am running the court and you are going to mind the judge." Since Neilma had conceded that Vallejo's relation with the children was one of love and devotion, the court's ruling was correct. Its remark was justified by counsel's attitude towards the court. The court also properly stated, "Let's not have any repetition or cumulative evidence of the type we have had for the past twenty-four hours." There was no need to waste time hearing testimony on facts conceded by the other party.

[14] The other charges of prejudice involve only adverse rulings or attempts by the trial judge to direct the course of the trial. There is no evidence of misconduct.

A trial judge is not a mere passive spectator at the trial. "Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed." In re Estate of Du Pont, 60 Cal.App.2d 276, 290, 140 P.2d 866, 873, and cases cited therein.

[15] Vallejo suggests that the trial judge's "own domestic difficulties affected or confused his thinking on the subject" and alleges that the trial judge was divorced in 1950. There is nothing in the record to indicate that the personal life of the trial judge led him to be biased against Vallejo.

In view of the attack on the trial judge, we think it should be said that the record demonstrates that he impartially controlled the course of the trial. In cases relied upon by Vallejo, such as Webber v. Webber, 33 Cal.2d 153, 199 P.2d 934, the trial judge had exhibited bias and prejudice throughout the trial of the issues. In the present case nothing more is shown than that the trial judge refused to allow Vallejo to develop immaterial matters and that the judge did not believe Vallejo's evidence and accepted that of Neilma and her witnesses.

Australian Vacation Order

[16] In a proceeding consolidated for trial with the modification proceeding Neilma sought permission from the trial court to take the children to Australia for a temporary vacation trip to visit her relatives. Court permission was necessary because the divorce decree contained a provision restraining both parents from taking the children from the state. Neilma offered evidence to support her motion and Vallejo vigorously opposed it. Before deciding the matter, however, the trial court denied Vallejo's application for modification of the divorce decree, and he immediately perfected the present appeal. Since the appeal deprived the trial court of jurisdiction to pass on the vacation order, a matter necessarily embraced within the appeal, Lerner v. Superior Court, 38 Cal.2d 676, 681, 242 P.2d 321, we issued prohibition to preclude the trial court's entering the Australian order during the pendency of the appeal. Gantner v. Superior Court, 38 Cal.2d 688, 242 P.2d 328. We also denied Neilma's application to this court for a similar order. Gantner v. Gantner, 38 Cal.2d 691, 242 P.2d 329.

The trial court has therefore never entered an order on the Australian vacation issue. In denying modification of the custody provisions of the final decree, however, it stated that it would be in the best interests of the children to travel with their mother to Australia, that the filing of a cash bond by the mother would be sufficient assurance that the removal would be temporary, and that it would enter an order allowing the removal whenever the appellate court permitted an order to be made.

Since the writ of prohibition in Gantner v. Superior Court, supra, was issued for the pendency of the appeal only, our affirmance here will remove the jurisdictional barrier and allow the trial court, in its discretion, to enter an order allowing Neilma to take the children to Australia. Both Neilma and Vallejo have requested this court to issue an advisory ruling to the trial court informing it whether it may enter the Australian order, even though there is no appeal before us on this issue and no findings of fact or order to review.

[17] Vallejo contends that this court "must as a matter of law * * * give a clear mandate to the trial court and to Neilma that under no circumstances are the children to be taken to Australia, this year or in any other year, until they desire to do so of their own free will and choice." Insofar as this contention is based on the theory that the trial court (in the absence of the pendency of an appeal) lacks jurisdiction to allow Neilma to take the children from the state, it is without merit. If the trial court concludes that the best interests of the children would be promoted by removal to Australia, either permanently or temporarily, and its decision is supported by sufficient evidence, removal would be proper. Clarke v. Clarke, 35 Cal.2d 259, 262, 217 P.2d 401; Shea v. Shea, 100 Cal.App.2d 60, 63, 223 P.2d 32; White v. White, 68 Cal.App.2d 650, 652, 157 P.2d 415; Edwards v. Edwards, 191 Or. 275, 280, 227 P.2d 975; see cases collected in Duncan v.

Duncan, 293 Ky. 762, 170 S.W.2d 22, 154 A.L.R. 552. Vallejo points out that if Neilma is permitted to take the children to Australia, the courts of that country would have jurisdiction to enter a new custody award. See Sampsell v. Superior Court, 32 Cal.2d 763, 779, 197 P.2d 739; In re B's Settlement, 1 Ch. 54 [1940]. He thus presents an argument that the trial court must consider in passing on the vacation matter; but does not show that the trial court could not under any circumstances allow the trip to be made. Vallejo also notes that the 1949 divorce decree restrained Neilma from taking the children from the state. The trial court, however, has continuing jurisdiction to modify custody provisions of divorce decrees. Civil Code, § 138.

[18, 19] Neilma has requested this court to enter its order in such form as to permit the children to visit Australia "so that the further function of the trial court herein shall be and become purely ministerial in character." The only authority cited to authorize the requested order is section 956a of the Code of Civil Procedure, providing that appellate courts may take "additional evidence of or concerning facts occurring at any time prior to the decision of the appeal and may give or direct the entry of any judgment or order and make such further or other order as the case may require." The purpose of section 956a is to permit an appellate court to remedy defects in the record "to the end that the judgment or order appealed from may be affirmed and further litigation terminated, and where otherwise under the old practice the judgment or order would have to be reversed." Tupman v. Haberkern, 208 Cal. 256, 266, 280 P. 970, 974; see also Johndrow v. Thomas, 31 Cal.2d 202, 207, 187 P.2d 681. But in asking this court to order the trial court to enter the Australian vacation order, Neilma is in effect seeking to obtain an order from this court modifying the final divorce decree, a question never decided by the trial court. There are no findings of fact on that issue. As pointed out in the Tupman case, section 956a "was not intended to convert the appellate tribunals of the state into triers of fact". 208 Cal. at pages 269–270, 280 P. at page 976. The motion to enter a special order under section 956a cannot be granted.

[20] Neilma argues that Vallejo will "foment other and further vexatious litigation for the purpose of unduly delaying the visit of the minor children to Australia." Her argument indicates a misconception of the scope of the decision in Gantner v. Superior Court, supra. We there held that during the pendency of the appeal the trial court was deprived of jurisdiction to enter an order allowing the children to leave the state. Code Civ.Proc. § 946. Nothing in that decision deprives the trial court of jurisdiction to enter the Australian vacation order merely because Vallejo may inaugurate new attempts in the trial court to modify the custody decree. The situation presented in Gantner v. Superior Court will recur only if the trial court should pass on any such motion for modification before it passes on the Australian order, so that Vallejo would be enabled to perfect an appeal and remove the cause from the jurisdiction of the trial court.

[21] When the writ of prohibition is discharged following termination of this appeal, the court may decide the vacation issue on the basis of the evidence previously presented and such additional evidence as may be presented by the parties regarding facts arising after issuance of the writ of prohibition, or facts that were unknown to the parties at the former proceeding and that could not have been ascertained with due diligence. Since the trial on the vacation issue has never been completed, but only suspended by the appeal from the order denying modification of the divorce decree, use of the evidence at the 1951 hearing does not come within the rule that evidence at a former trial is usually inadmissible at a second trial. See Blache v. Blache, 37 Cal.2d 531, 534–536, 233 P.2d 547.

[22] Neilma has filed a motion requesting this court to take additional evidence under section 956a to support an affirmance of the order denying modification of the final decree. Since there is sufficient evidence in the record to support the findings and the order below, no purpose would be

served by granting the motion and it will therefore be denied.

The order denying the motion to change custody is affirmed. The motions to make a special order and to take additional evidence under section 956a are denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ. concur.

39 Cal.2d 367

McMAHON v. STATE BAR.

L. A. 22062.

Supreme Court of California, in Bank.

July 31, 1952.

Rehearing Denied Aug. 28, 1952.

Petition by attorney for review of recommendation of Board of Governors of State Bar that he be suspended from practice of law for period of six months. The Supreme Court held that suspension for period of sixty days was warranted.

Suspension ordered.

Carter, J., dissented.

1. Wills 🔑73, 206

Even though the dispositive provisions of a will may be invalid, the will is operative if it merely appoints an executor, and is entitled to probate for purposes of administration of the estate.

2. Attorney and Client 🔑53(2)

In proceeding for discipline of attorney, evidence sustained determination of Board of Governors that attorney had been possessed of sufficient information concerning existence of will, to forbid allegations of intestacy from being presented to court.

3. Executors and Administrators 🔑216(2)

Attorneys for special administrators are within purview of statute providing that attorneys for executors and administrators shall be allowed out of the estate, as fees, such amounts as court may deem just and reasonable for extraordinary services. Probate Code, § 910.

4. Attorney and Client 🔑53(2)

In disciplinary proceedings against attorney, evidence was insufficient to show that attorney had acted in bad faith in accepting payment of fees from special administrator for extraordinary services performed for estate, prior to any order of court authorizing same. Code Civ.Proc. § 1963, subds. 1, 19, 33.

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John J. McMahon, in pro. per., and John F. Poole and R. Milton Smith, Los Angeles, for petitioner.

Jerold E. Weil, San Francisco, Byron O. Smith and Albert E. Wheatcroft, Los Angeles, for respondent.

PER CURIAM.

The petitioner, John J. McMahon, seeks a review of a recommendation of the Board of Governors of the State Bar that he be suspended from the practice of the law for a period of six months. The Board of Governors adopted and approved findings of fact of a Local Administrative Committee.

The facts underlying the recommendation are as follows: One Rae S. Merrill died in Arizona in April, 1944, leaving property in California. Later in April the petitioner as attorney for Fred B. Merrill, a brother of the decedent, instituted proceedings for the administration of the estate, resulting in the appointment of Fred as special administrator. The petition for special letters of administration alleged on information and belief that the decedent had died intestate. The Local Administrative Committee and the Board of Governors found that the petitioner herein, who had prepared but not signed the petition for special letters of administration, knew that a will had theretofore been executed and that he knew its contents including the identity of the beneficiaries and the executrix named therein, although he did not know it was actually in existence at the time of the decedent's death. The Board of Governors further found that the petitioner had information indicating that the allegations of intestacy on information and belief were not justified. This alleged infraction of the rules of professional conduct constitutes the basis of Count One of the charges placed against the petitioner.

Count Two charges that the petitioner had embarked upon a program of harassment consisting of a series of proceedings instituted to delay the appointment of the named executrix under the will of the decedent. Both the Local Administrative Committee and the Board of Governors found that the petitioner had not engaged in such a program, and this charge is not now urged by respondent.

Petitioner's client was removed as special administrator on October 18, 1945, and the named executrix was granted letters testamentary the following day. Count Three alleges, and the Local Administrative Committee and the Board of Governors found, that during the time that he was acting as attorney for the administrator the petitioner demanded and received payment from his client out of funds belonging to the estate sums totalling approximately $4,059.40 for extraordinary legal services and costs. The total assets of the estate amounted to the sum of $7,199.90. The findings recite that these payments were demanded and received "in bad faith" by the petitioner and without request for an order of the court or approval by the court, except as to the sum of $33.10, for which an order was obtained.

Two questions are presented: (1) Did the petitioner have sufficient information concerning the existence of a will which should forbid the allegations of intestacy which he caused to be presented to the court; and (2) did the petitioner exercise bad faith in demanding and accepting fees for extraordinary services without a prior order of the court?

If either or both of these inquiries is answered in the affirmative this disciplinary proceeding was justified. §§ 6067, 6068, 6103 and 6106 of the State Bar Act, Business and Professions Code.

The petitioner contends that he has committed no infraction of the professional rules of conduct and that the facts do not support the findings and recommendation.

There is credible evidence that prior to the time of the filing of the petition for special letters of administration the petitioner had been informed of the execution of the will "a year or so before" by the decedent; that he was informed of the name of the attorney who had prepared the will and who had a copy in his files; that he had knowledge of the general contents of the will and that he knew of the person who had been given original possession of the will. The petitioner admits knowledge of the existence of a copy of the will but asserts a belief claimed to be reasonable that the will was no longer in existence; or that if it were it could not be probated as the testator was incompetent at the time of its execution; or that in any event the will was invalid and inoperative due to the claim of a pretermitted heir who would take as sole heir.

The petitioner had no affirmative knowledge of the destruction of the will. He relied on information that the special administrator and an attorney connected with the decedent's family did not know of the existence of a will after spending two hours in a search for one. He made no effort to ascertain the existence of the original will by inquiry of the one in whose possession it had been placed. The petitioner's insistence that he did not affirmatively know of the will avoids the fact that he had actual notice that one had been executed. He asserts that the only evidence of notice on his part of the existence of the will is the testimony of the complaining witness, the special administrator, and that this witness had been impeached. However, the petitioner's own testimony reveals that he relied upon knowledge that the will did not provide for a pretermitted heir in seeking to justify his conduct and he admits that he "knew of a copy of a will." He is not charged with knowledge of a will, but that he was "possessed of such information as should have placed him on inquiry as to the existence of a will * * *." It was charged that he caused to be filed the petition for special letters in which it was alleged under oath: "That due search and inquiry had been made to ascertain if said deceased left any will and testament, but none has been found, and according to the best knowledge, information and belief of your petitioner, said deceased died intestate."

[1] The petitioner's contention that he could ignore the will due to its failure to provide for a person later determined to be a pretermitted heir, cannot be sustained. Even though the dispositive provisions of a will may be invalid the will is operative if it merely appoints an executor, and is entitled to probate for purposes of administration of the estate. In re Hickman, 101 Cal. 609, 613, 36 P. 118; Estate of Philippi, 71 Cal.App.2d 127, 161 P.2d 1006.

[2] The petitioner contends that he had no self-serving motive in withholding such knowledge as he had. His argument is, and the record reveals, that he was primarily interested in getting his client Fred Merrill appointed special administrator before Helen Hillin could obtain possession of the assets of the estate. Helen Hillin is a sister of Fred. She was also a sister of the decedent and had been named executrix in the will of which the petitioner had notice. Mrs. Hillin had gone to Arizona to attend the funeral of the decedent and was expected back shortly. It was in her possession that the will was reputed to have been placed. In prior litigation Fred had been appointed special administrator of the estate of Blanche Merrill, another sister, and had been unable to get possession of the assets of that estate due to the alleged wrongful appropriation of those assets by Helen Hillin. The petitioner contends that the prior conduct of Mrs. Hillin showed that she was an improper person to administer the estate of the decedent; that he procured the appointment of Fred Merrill as special administrator in order to protect the interests of the pretermitted heir; that the appointment of Fred facilitated proceedings in a pending action in which the petitioner was seeking to partition property jointly held by members of the Merrill family, and that it permitted Fred as administrator of the estate of the decedent to be made coplaintiff with Fred personally. Prior to this time the petitioner, who represented Fred in the partition suit against the other three then-living members of the family, had been unable to obtain service on the decedent who had been named as a defendant.

The foregoing considerations cannot serve as justification on the part of the petitioner for withholding from the court what knowledge he had concerning the existence of a will. In causing the allegation of intestacy to be alleged and presented to the court, he was, therefore, guilty of conduct denounced by the statute, and the first question must be answered in the affirmative.

[3, 4] Count Three in effect charges that the petitioner unjustifiably demanded and received from the special administrator fees for extraordinary services without a prior court order. Section 910, Probate Code, provides in part as follows:

> "Attorneys for executors and administrators shall be allowed out of the estate, as fees * * * such further amount as the court may deem just and reasonable for extraordinary services."

Attorneys for special administrators are within the purview of the statute. Estate of Kafitz, 51 Cal.App. 325, 330, 196 P. 790. The petitioner did not seek or obtain an order of court authorizing the payment of the fees to him. He urges as justification that the amounts thereof were agreed upon by the special administrator and that he had an arrangement with the pretermitted and sole heir of the decedent for such payments. It is true that a large portion of the money so paid to the petitioner was in turn paid out by him to satisfy legitimate costs incurred in the interests of the estate and the pretermitted heir. It is also true, according to the record herein, that all payments out of the estate were made with the knowledge and consent of the pretermitted heir who eventually succeeded to the entire estate. However, she later brought an action against the petitioner and the special administrator jointly for misappropriation of funds and was successful in obtaining a judgment for the return to the estate of the sum of $3,750. The petitioner was not served in that action and the judgment was satisfied by the special administrator by payment out of his own funds. Thereafter the special administrator was instrumental in causing the present disciplinary proceedings to be brought.

The petitioner is not charged with receiving exorbitant fees. Certain it is, from the record, that whatever he received for his own use was not unreasonable compensation for the great amount of legal services rendered by him in good faith on behalf of the estate in a long series of legal actions and proceedings.

The petitioner urges, as further justification, that he consulted and was advised by other attorneys that his demand and acceptance of such fees were legally proper and that if he honestly believed that he was entitled to extraordinary fees without an order of court he should not be found guilty of bad faith in obtaining them. He relies upon the Estate of Lankershim, 6 Cal.2d 568, 571, 58 P.2d 1282, 1283, as authority for the proposition that an attorney may demand and receive fees for extraordinary services with the consent of all interested parties and without an order of court. In that case the court affirmed an allowance of fees in the following language: "* * * [T]he trial court found and fixed the amount * * * of attorney's fees to be allowed Mr. MacDonald in the sum of $56,443.15, minus the sum of $10,000 which had been paid him on account of such fees prior to the filing of the accounts." No other reference is made in the opinion to the $10,000.

The petitioner says he also relied upon other authority. He cites 2 Bancroft Probate, p. 831, § 444, where it is stated: "An executor or administrator, having funds of the estate in his possession, unquestionably has the physical power to pay funds to his attorney for services rendered by the latter * * * Moreover, * * * though he has made such payment with funds of the estate and without authority of the court * * * the attorneys cannot be compelled to disgorge, the matter being wholly between the representative and the estate." He also refers to 33 C.J.S., Executors and Administrators, § 223 where it is said at page 1214 citing Ludwig v. Superior Court, 217 Cal. 499, 19 P.2d 984, as supporting authority: "A representative need not secure permission of the court before employing counsel nor need he secure judicial approval before paying counsel fees. He proceeds at his own risk, however, if he does not first obtain such approval." The petitioner urges that a sole heir may, under the law, deal with the property of an estate without administration and that the transactions, as to the heir, become final, citing Phelps v. Grady, 168 Cal. 73, 141 P. 926, and In re Welch, 110 Cal. 605, 42 P. 1089. Whether the authorities relied upon by the petitioner sustain his position need not be and is not decided. It is enough to say that all of the circumstances here presented and considered are sufficient to rebut the inference of bad faith and to sustain the inference of good faith to which the petitioner is entitled under our statute. Code of Civil Procedure, § 1963, Subsections 1, 19, 33.

It is concluded that the petitioner, as charged in Count One of the notice to show cause, and as found by the Board of Governors, had such information concerning the existence of a will of the decedent that he was not justified in representing to the court that the decedent had died intestate; that the charge of "harassment" contained in Count Two of the notice to show cause should be dismissed; that the charge of "bad faith" on the part of the petitioner in accepting the payment of fees for extraordinary services prior to an order of the court, as charged in Count Three, is not sustained by the evidence and should be dismissed. In view of the fact that Counts Two and Three should be dismissed, we conclude that the ends of justice will best be served by fixing sixty days as the time of suspension.

It is therefore ordered that Counts Two and Three of the notice to show cause be, and the same are hereby, dismissed. As to Count One it is ordered that the petitioner be suspended from the practice of law in this state for the period of sixty days after this order becomes final.

CARTER, Justice.

I dissent.

In my opinion the evidence is insufficient to show any misconduct on the part of petitioner or that he violated the rules of professional conduct of the State Bar of California in any respect, and I would, therefore, dismiss the entire proceeding against him.

Rehearing denied; CARTER, J., dissenting.

39 Cal.2d 210

AMERICAN ENTERPRISE, Inc. v. VAN WINKLE et al.

S. F. 18261.

Supreme Court of California, in Bank.
July 8, 1952.

American Enterprise, Inc., brought an action in declaratory relief against Walter S. Van Winkle, and others, to determine rights under lease providing that if rented property was taken for public use by proceeding in eminent domain, the plaintiff landlord could terminate tenancy and take possession of the premises. The Superior Court, Alameda County, A. T. Shine, J., rendered a judgment declaring the lease had terminated but that the named defendant, as lessee, was owner of and entitled to possession of fixtures and equipment, and plaintiff appealed from portion of the judgment concerning rights of the parties to personalty. The Supreme Court, Edmonds, J., held that portions of judgment which declared rights to realty and to personalty were inseparable upon issue as to whether property was taken in eminent domain proceeding and right of landlord to force sale of personalty to landlord, so that when landlord appealed only from portion of judgment concerning rights to personalty the entire judgment was reviewable.

Judgment affirmed as modified.

Prior opinion, 236 P.2d 901.

1. Appeal and Error ⚷122

There may be an appeal from a part of a judgment only if that part is severable.

2. Appeal and Error ⚷839(1)

Where portions of a judgment are truly severable, appellate court lacks jurisdiction to consider parts from which no appeal has been taken and appellate court will consider portion before it independently of other parts.

3. Appeal and Error ⚷1152, 1180(1)

Where an appeal is taken from a portion of a severable judgment, modification or reversal of portion from which appeal has been taken has no effect upon other portions.

4. Appeal and Error ⚷122

Test of whether a portion of judgment appealed from is so interwoven with its other provisions as to preclude independent examination of part challenged by appellant is whether matters or issues embraced therein are same as, or inter-dependent upon, matters or issues which have not been attacked.

5. Appeal and Error ⚷839(1)

Where lease authorized landlord to terminate lease and, for a small sum of money, to buy fixtures and personalty installed by tenant if rented premises were taken for public use by proceeding in eminent domain, and landlord conveyed premises to city because of threat by city to commence action to condemn premises, and trial court declared lease terminated but that tenant was owner of fixtures and equipment, portions of judgment which declared rights to realty and to personalty were inseparable upon issue as to whether property was taken in eminent domain proceeding and right of landlord to force sale, so that when landlord appealed only from portion of judgment concerning rights to personalty the entire judgment was reviewable upon appeal.

6. Appeal and Error ⚷839(1)

When appeal is taken from portion of judgment which cannot be separated from remainder of judgment, appeal brings before reviewing court all non-severable portions.

7. Appeal and Error ⚷805

Where several persons are affected by a judgment, reviewing court will make no determination detrimental to rights of those who have not been brought into appeal, and as to such persons, appeal will be dismissed.

8. Judgment ⚷564(1)

Ordinarily doctrine of res judicata is applicable to issues which have been determined by final judgment in another action, and it is not effective when there has been as yet no final judgment on all issues between parties.

9. Declaratory Judgment ⚷385

In action for declaratory relief, proper function of court is to make a full and complete declaration, disposing of all questions of rights, status or other legal relations encountered in construing instrument before it. Code Civ.Proc. § 1060.

10. Appeal and Error ⚷1129, 1146, 1176(1)

Constitutional and statutory provisions which empower Supreme Court to affirm, modify or direct entry of a final judgment are to be liberally construed toward end that a cause may be disposed of on a single appeal. Code Civ.Proc. §§ 53, 956a; Const. art. 6, § 4¾.

11. Deeds ⚷109

In absence of some exception, limitation or reservation, a grant deed is presumed to convey grantor's entire interest. Civ.Code, § 1105.

12. Appeal and Error ⚷1172(1)

Where only a portion of judgment rendered in declaratory judgment action was appealed from by plaintiff, but such portion was not severable from remaining portion of judgment, so that entire judgment was reviewable upon appeal, portion of judgment appealed from would not be disturbed where, under circumstances, it did not clearly appear that reversal of such portion of judgment was necessary to do justice.

◆

Donahue, Richards, Rowell & Gallagher and George E. Thomas, Oakland, for appellant.

Mancuso, Herron & Winn, and John Wayne Herron, San Francisco, for respondents.

EDMONDS, Justice.

American Enterprise, Inc., brought an action in declaratory relief to determine its rights, and also those of Walter S. Van Winkle, under a lease. By certain provisions of the lease, in the event the property was taken for public use by a proceeding in eminent domain, the lessor might terminate the tenancy and take possession of the premises. Under such circumstances, the lessor was given the right to purchase for $10 certain fixtures and equipment. The judgment declares that the lease has been terminated but that Van Winkle, the lessee, is the owner of and entitled to possession of the fixtures and equipment. The appeal of American Enterprise is from that portion of the judgment which concerns the rights of the parties to the personal property.

There is no conflict in the evidence. In 1939, American Enterprise leased to M. J. Russell real property for use as a bowling alley. The term of the tenancy was about 11 years. With the written consent of the lessor, Russell assigned his interest to Van Winkle.

The lease required the lessee to purchase, under a conditional sale contract, equipment for the operation of the bowling alley. He agreed to give the lessor a chattel mortgage on this equipment as security for the payment of rent. If the lease were terminated prior to its expiration, provided he were not in default, he might remove all trade fixtures. Also, under such circumstances, the lessor promised to pay to the lessee $750 and to release the chattel mortgage.

The lease made elaborate provision for disposing of the parties' interest in the leasehold in case the demised premises were taken for public use by right of eminent domain. If there were an "actual taking, under eminent domain proceedings, of the whole * * * of the property of which the demised premises are a part", the lessee covenanted to deliver possession of the premises to the lessor or its successor within 30 days after receipt of written notice. The lessee, in return, was to receive a sum equal to $3,000 per year for each unexpired year of the term of the lease. In such event, the lessee further covenanted to sell to the lessor for $10 all of the bowling alley equipment and furnishings installed in or upon the premises.

In 1946, American Enterprise, by grant deed, conveyed the property to Sam Neider, its president. In the following year, the City of Oakland authorized condemnation of the property and threatened to commence an action for that purpose. By reason of such threat, but without an action having been instituted, Neider conveyed the property to the city.

One month later, American Enterprise served upon Van Winkle a notice to surrender possession. It notified him that the entire property had been taken in an eminent domain proceeding, demanded delivery of possession of the premises to American Enterprise and the execution of a bill of sale of the personal property.

The present action was commenced by American Enterprise more than two and one-half years after its deed to Neider. The complaint alleged that the City of Oakland had acquired the property by right of eminent domain, that American Enterprise had terminated the lease in accordance with the conditions contained therein, and that Van Winkle, wilfully and wrongfully refused to abide by the terms of the notice.

In his answer, Van Winkle denied that the property had been taken in an eminent domain proceeding. As an affirmative defense, he alleged that American Enterprise "has divested itself voluntarily of all right, title and interest in said Lease and the terms, conditions and covenants thereof, and that said complaint does not state facts sufficient to constitute a cause of action against Defendant."

Upon trial, the court made findings of fact in accordance with the foregoing evidence. As conclusions of law, it determined that the sale of the property to the city, made under threat of condemnation, was within the contemplation of the parties in giving the lessor the right to terminate the lease. Other conclusions were that the notice served upon Van Winkle effectually terminated his tenancy and that he "is the owner of and entitled to the possession of" the personal property and equipment in the premises.

The judgment subsequently entered declares that Van Winkle's tenancy was terminated by the notice of American Enterprise and since that date it has been entitled to the possession of the premises. Another provision states that "Walter S. Van Winkle is the owner of and entitled to the possession of the bowling alley equipment, furniture and fixtures, and all of the personal property in and about said premises."

The appeal of American Enterprise is from only that portion of the judgment declaring Van Winkle to be entitled to possession of the personal property and equipment. Van Winkle did not appeal.

The determination that Van Winkle "is the owner of and entitled to the possession" of the personal property is challenged by the lessor as failing to adjudicate the rights of the parties under the sale provision of the lease. For the purposes of argument, the appellant reads the judgment as holding that Van Winkle is not required to sell the equipment to it. This, it contends, is erroneous. The lease provision, it is said, constitutes an enforceable contract to sell and, in no sense, is a provision for forfeiture.

Van Winkle takes the position that the judgment correctly denies American Enterprise the right to purchase the personal property. To support this conclusion, he asserts that the appellant is without standing to prosecute this action because it conveyed all of its interest in the real property. His second point is that a sale of the real property under threat of condemnation does not amount to a taking of it in an eminent domain proceeding within the contemplation of the lease. Finally, he argues that, because the current market value of the fixtures and equipment is nearly $40,000, to require him to sell them for $10 would be to compel a forfeiture.

In reply, American Enterprise argues that its right to maintain this action as the lessor, and the question as to whether or not there has been a taking of the real property by a proceeding in eminent domain, are issues necessarily determined in that part of the judgment declaring its right to possession of the demised premises. Because Van Winkle has taken no appeal it says, the adjudication of those issues has become final.

[1-3] If this contention is correct, those issues may not be considered by the reviewing court. The basic question, therefore, is the scope of review upon a partial appeal. The answer lies in a determination as to whether that portion specified in the notice of appeal is severable from the remainder of it. The well recognized rule

is that there may be an appeal from a part of a judgment only if that part is severable. Bancroft, Code Practice and Remedies, 8326, § 6267; State ex rel. Mueller v. Todd, 117 Mont. 80, 158 P.2d 299, 300; Evans v. De Spain, Tex.Civ.App., 37 S.W.2d 231, 233; Cottier v. Sullivan, 47 Wyo. 72, 31 P.2d 675, 678; Stearns v. Strom, 68 Idaho 392, 195 P.2d 337; 4 C.J.S., Appeal and Error, § 109, p. 204. Where portions of a judgment are truly severable, the appellate court is without jurisdiction to consider the parts from which no appeal has been taken. In re Burdick, 112 Cal. 387, 391, 44 P. 734; G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 667, 143 P. 1025. And the appellate court will consider the portion before it independently of the other parts. Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224, 231, 39 P. 758; In re Yoder, 199 Cal. 699, 704, 251 P. 205; Denman v. Smith, 14 Cal.2d 752, 755, 97 P.2d 451; Arp v. Blake and Cohn, 63 Cal.App. 362, 370, 218 P. 773; Swall v. Anderson, 60 Cal.App.2d 825, 827, 141 P.2d 912. Modification or reversal of the portion of the judgment from which the appeal has been taken has no effect upon the other portions. Pacific Mutual Life Ins. Co. v. Fisher, supra, 106 Cal. at page 232, 39 P. 758; Lake v. Superior Court, 187 Cal. 116, 119, 200 P. 1041; Smith v. Anglo-California Trust Co., 205 Cal. 496, 505, 271 P. 898; Neill v. Five C. Refining Co., 79 Cal.App.2d 191, 194, 179 P.2d 818.

[4] The test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters or issues embraced therein are the same as, or inter-dependent upon, the matters or issues which have not been attacked. Blache v. Blache, 37 Cal.2d 531, 538, 233 P.2d 547; Cottier v. Sullivan, supra, 31 P.2d at page 678; Warren Mercantile Co. v. Myers, 48 Wyo. 232, 45 P.2d 5, 6; Stout v. Oliviera, Tex.Civ.App., 153 S.W.2d 590, 594. "[I]n order to be severable, and therefore appealable, any determination of the issues so settled by the judgment * * * must not affect the determination of the remaining issues whether such judgment on appeal is reversed or affirmed * * *. Perhaps another way of saying it would be that the judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be made as the result of an appeal cannot affect the determination of the remaining issues of the suit * * *." Attorney General v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 1294, 114 A.L.R. 726.

Measured by this rule, the portions of the judgment in the present case which declare the rights of the parties to the realty and to the personalty are inseparable upon the issue as to whether there was a taking of the property in an eminent domain proceeding and the right of American Enterprise to bring this action. Clearly, if there was no taking of the property within the meaning of the lease, or if American Enterprise cannot enforce the lessor's rights under the lease, then it is not entitled either to the realty or to enforce a sale of the personalty. These issues permeate both portions of the judgment.

[5-7] In some states, when an appeal is taken from a portion of a judgment which cannot be separated from the remainder of it, the court will decline to hear the appeal and will dismiss it. Cottier v. Sullivan, supra, 31 P.2d at page 678; Warren Mercantile Co. v. Myers, supra, 45 P.2d at page 7; Maxham v. Berne, 88 Wash. 158, 152 P. 673. However, in California, such an appeal brings before the reviewing court all of the nonseverable portions. Blache v. Blache, supra, 37 Cal.2d at page 538, 233 P.2d 547; Rediker v. Rediker, 35 Cal.2d 796, 798, 221 P.2d 1, 20 A.L.R.2d 1152; In re Estate of Murphey, 7 Cal.2d 712, 717, 62 P.2d 374; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 131, 138, 17 P.2d 712; Milo v. Prior, 210 Cal. 569, 571, 292 P. 647; Halsted v. First Savings Bank, 173 Cal. 605, 609, 160 P. 1075; Lucich v. Lucich, 75 Cal.App.2d 890, 897–898, 172 P.2d 73; Bailey v. Bailey, 60 Cal.App.2d 291, 293, 140 P.2d 693; cf. Brydon v. City of Hermosa Beach, 93

Cal.App. 615, 621, 270 P. 255. Of course, where several persons are affected by a judgment, the reviewing court will make no determination detrimental to the rights of those who have not been brought into the appeal. As to such persons, the appeal will be dismissed. Pacific Mutual Life Ins. Co. v. Fisher, supra, 106 Cal. at pages 230–231, 39 P. 758; Miller v. Thomas, 71 Cal. 406, 407, 12 P. 432.

[8] The appellant relies upon the rule of res judicata. "Ordinarily, that doctrine is applicable to issues which have been determined by final judgment in another action. It is not effective when there has been as yet no final judgment on all the issues between the parties." Pillsbury v. Superior Court, 8 Cal.2d 469, 472, 66 P.2d 149, 150. Implicit in any holding that a portion of a judgment by its finality controls the disposition of another portion upon appeal is the conclusion that the same issues permeate both portions and that they are not severable. To give that part of the judgment not specified by American Enterprise's notice of appeal the effect which it seeks would be to disregard the settled rule of the many cases which hold that an appeal from a non-severable portion of a judgment brings to the appellate court for review *all* of the interwoven parts.

Contrary to the contention of the appellant, there is no inconsistency in this conclusion and the holding in Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772. There, an action was brought by Moore to declare his rights and those of Wood under a mining contract. By their agreement, Moore was to bear all expenses necessary to put the mine into production. His development of the mine was interrupted by an order of the War Production Board which prevented him from acquiring essential materials. A subsequent order prohibited all mining operations. The judgment of the trial court declared Moore to be liable for the expense of maintaining the mine prior to the latter order, but declared that such expense, after that date, should be divided between Moore and Wood.

Wood's appeal was from only that portion of the judgment which declared a division of liability after the shutdown order. Neither during the trial, nor on appeal, did Moore challenge the declaration that the expense of maintaining the mine prior to the shutdown order was to be included among his liabilities for "expenses necessary to put the mine into production". Instead, he attempted to distinguish between the effects of the two orders, claiming the one shutting down the mine was a prohibition which excused his performance under the doctrine of impossibility. Thus, Moore did not challenge the correctness of the determination of the issue of his liability for maintenance expense prior to the shutdown order, and no question was raised concerning its binding effect upon the portion of the judgment from which the appeal was taken. Any language to the contrary necessarily is dictum.

[9–11] The appellant correctly contends that the trial court erroneously failed to determine all of the rights between the parties under the lease. The judgment does not declare their rights under the provision which permits the lessor to purchase for $10 all of the bowling alley equipment in the event the lease is terminated by a taking of the realty in an eminent domain proceeding. In an action for declaratory relief, the proper function of the court is to make a full and complete declaration, disposing of all questions of rights, status or other legal relations encountered in construing the instrument before it. Anderson, Declaratory Judgments, pp. 175–176, 492; Code Civ.Proc. § 1060; see also Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, 339, 208 P.2d 1009. Here the issue concerning the rights of the parties in regard to the personal property was raised by the pleadings and should have been determined by the trial court in construing the lease. The failure to do so was error. However, in view of the uncontradicted evidence presented by the record, it is not necessary to reverse the judgment. The constitutional and statutory provisions which empower this court to affirm, modify or direct the entry of a final judgment are to be liberally construed toward the end that a cause may be disposed of on a single appeal. Cal.Const., art. VI, § 4¾; Code Civ.Proc. §§ 53, 956a; Tupman v. Haberkern, 208 Cal. 256, 265, 280 P. 970; Gudger v. Manton, 21 Cal.2d 537, 547, 134 P.2d 217; Culjak v. Better Built Homes, 58 Cal.App. 2d 720, 725, 137 P.2d 492. The judgment should be modified to state clearly the rights of the parties under the sale provision of the lease. The evidence shows that American Enterprise, by grant deed conveyed its interest in the property to Sam Neider, its president, who in turn conveyed the property to the City of Oakland. In the absence of some exception, limitation or reservation, a grant deed is presumed to convey the grantor's entire interest. Civil Code § 1105; Taylor v. Avila, 175 Cal. 203, 206, 165 P. 533; Winchester v. Winchester, 175 Cal. 391, 394, 165 P. 965; Resh v. Pillsbury, 12 Cal.App. 2d 226, 228, 55 P.2d 264. The rule which forbids a lessee from disputing his lessor's title (Code Civ.Proc. § 1962(4)) has no application to the situation shown by the present record. Here the lessor's ownership was terminated by its act done after the landlord-tenant relationship commenced, and the lessor, by bringing the action, placed its title in issue. Collier v. Johnson, 79 Cal.App. 322, 325, 249 P. 217; Hancock Oil Co. of California v. Independent Distributing Co., 24 Cal.2d 497, 507, 150 P.2d 463; Childress v. Smith, 227 Ala. 435, 150 So. 334, 335; Backey v. Grow, 38 Ga.App. 154, 142 S.E. 913; Melchor v. Casey, 173 Miss. 67, 161 So. 692, 696; Warner Bros. Theatres v. Proffitt, 329 Pa. 316, 198 A. 56, 58; 51 C.J.S., Landlord and Tenant, § 276, p. 927. Having conveyed its interest in the real property, American Enterprise may not enforce any of the rights of the lessor under the lease. Accordingly, a proper determination of the rights of the parties should include a declaration that American Enterprise is not entitled to enforce a sale of the personal property.

[12] Because, for the reasons which have been stated, the entire judgment is reviewable upon this appeal, there must also be considered the disposition to be made of the provision which declares that American Enterprise is entitled to possession of the real property. That determination should be disturbed only if, upon an examination of all the circumstances, it clearly appears that a reversal is necessary to do justice. Blache v. Blache, supra, 37 Cal.2d at page 538, 233 P.2d 547.

Among the considerations which might justify a reversal of the judgment, insofar as it concerns the real property, is that the determination in that regard is inconsistent with the denial to American Enterprise of the right to purchase the personal property. For, if American Enterprise is to be denied one right because it is not the lessor, it should also be denied other rights which are exclusively those of the lessor. Also, it might be unjust to Van Winkle that, as between him and American Enterprise, he is denied possession of the premises.

On the other hand is the very important consideration that the rights of third persons may have intervened. As counsel have stated in oral argument, others have changed their positions in reliance upon the apparent finality of that part of the judgment.

Also, Van Winkle's failure to appeal indicates his acquiescence in the judgment. Clearly, there devolves upon a litigant the duty to appeal from a judgment with which he has serious dissatisfaction. In each of the cases cited by the respondent, the reversal of the part of the judgment not challenged by the appellant was concurrent with a reversal of the interwoven portions included in his notice of appeal. Blache v. Blache, supra; In re Estate of Murphey, supra. But there is a sound distinction between those cases and the present one, because the failure to take an appeal demonstrates only satisfaction with the judgment *as is*, not as changed by a partial reversal. One may elect to stand upon a judgment which, he believes, although largely in his favor, does not give him all of the benefits to which he is entitled. To avoid the time and expense of further litigation, he may be persuaded to permit the unfavorable portions to stand in reliance upon the benefits received in the other parts. In such instance, to do justice a reversal of the portion from which the appeal was taken might require a reversal of other provisions.

In the present case, however, no such situation is presented. Upon an affirmance of the provision of the judgment declaring the rights of the parties to the realty, respondent's position will be no worse than at the time the judgment was given. Moreover, Van Winkle has continually disclaimed any desire to change that portion of the judgment. These circumstances compel the conclusion that, in the interests of justice this part of the judgment should be affirmed. But for the reasons which have been stated, the portion of the judgment which declares the rights of the parties to the personal property is modified to read as follows:

> "2. That defendant Walter S. Van Winkle is the owner of and entitled to the possession of the bowling alley equipment, furniture and fixtures, and all of the personal property in and about said premises; and that plaintiff American Enterprise, Inc., is without right to enforce a sale thereof."

These conclusions make it unnecessary to discuss the other contentions raised by the parties.

As so modified, the judgment is affirmed, the respondent to recover costs on appeal.

GIBSON, C. J., and SCHAUER, TRAYNOR and SPENCE, JJ., concur.

SHENK, J., concurs in the judgment.

CARTER, Justice.

I concur in the conclusion reached but not in the reasoning in the majority opinion. I agree that the parts of the judgment dealing with the real property and personal property are not severable, and that it is necessary to decide the question of severability even though the judgment is modified rather than reversed, because otherwise we are met with the contention that the real property part, from which no appeal has been taken, is res judicata on the question of whether American Enterprise had standing to sue, inasmuch as it conveyed the land which carried the lease with it before suit. If the judgment is not severable then it would not be res judicata because that very doctrine is refuted by the cases holding that a non-appealed part of a judgment is reversible when an appeal is taken from another part where the parts are inseparable. Where they are separable then the non-appealed part is res judicata. Thus in the instant case one of the matters determined, and necessarily so, related to the non-appealed real property part, that is, whether American Enterprise had a standing to sue since it had transferred the property. This would be res judicata as to the right to sue as to the personal property because the transfer also stripped American Enterprise of the right to sue with regard to the personal property, unless it is held that the judgment is not severable. In that connection the foregoing reason (non-severability) is a proper one for not applying res judicata, but it is not proper to say further, as does the majority, quoting from Pillsbury v. Superior Court, 8 Cal.2d 469, 472, 66 P.2d 149, that res judicata is applicable only to issues determined in another action but not to a part of the issues in the same action. Furthermore, it is not necessary to the opinion to decide, that even though not severable, the non-appealed part will not be reversed because "justice" does not require it. I say it is not necessary, for the majority opinion gives other specific reasons for not reversing the non-appealed part, namely, that neither party is objecting to nor injured by the non-appealed part and the rights of third parties have intervened in reliance upon it.

Those same reasons are sufficient justification for the modification of the judgment as to the personal property in spite of the fact that it is inconsistent with the real property part and non-severable from it. The trial court found that the defendant was the owner of the personal property. The majority opinion merely adds by way of modification that plaintiff does not have a right to buy it because it transferred the real property and its rights under the lease before the action was commenced. Hence the case is no different than if the trial court had placed that added provision in its judgment. The judgment reads that plaintiff is entitled to the possession of the real property although it had transferred legal title to it before suit, but that it has not the right to buy the personal property because it had transferred that right. Plaintiff appeals from the latter part, claiming correctly, that it is inconsistent with the former part and the former is res judicata and hence it is entitled to a reversal. We could not reverse the latter part without also reversing the first part unless the judgment is severable. We should either affirm or reverse the judgment as a whole if it is not severable, because defendant could properly complain that he should have the first part reversed also if the second is reversed. We may affirm, however, for the reasons heretofore mentioned that neither party is claiming injury from the real property part.

Therefore, since it is unnecessary to reverse any part of the judgment, the discussion as to the effect of an appeal from a portion of a severable judgment is dictum. The judgment being not severable, it must be reviewed as a whole on the appeal from a non-severable portion thereof.

112 Cal.App.2d 435

M. H. GOLDEN CONST. CO. v. EL CENTRO PROPERTIES, Inc.

Civ. 4296.

District Court of Appeal,
Fourth District, California.
July 25, 1952.

Rehearing Denied Aug. 15, 1952.

M. H. Golden Construction Company, a corporation, brought an action against El Centro Properties, Inc., to recover money allegedly due under contract in which plaintiff agreed to construct buildings, and for declaratory relief, and defendant filed a cross-complaint. The Superior Court of San Diego County, C. M. Monroe, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed and the defendant moved to dismiss the appeal. The District Court of Appeal, Mussell, J., held that judgment appealed from, and another judgment, considered as being but one judgment, was not severable within rule that there may be an appeal from a part of judgment only if that part is severable.

Appeal dismissed.

1. Appeal and Error 🔑161

Voluntary acceptance of benefit of a judgment or order is a bar to prosecution of an appeal therefrom.

2. Appeal and Error 🔑161

Rule that voluntary acceptance of benefit of a judgment or order is a bar to prosecution of an appeal therefrom is not applicable where benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put into jeopardy by appeal.

3. Judgment 🔑714(1)

A judgment or decree necessarily affirming existence of a fact is conclusive upon parties or their privies whenever existence of that fact is again in issue between them, not only when subject matter is same, but when point comes incidentally in question in relation to a different matter in same or any other court.

4. Appeal and Error 🔑122

Where relief sought by complaint was to recover money allegedly due under construction contract, and judgment was rendered on trial of second cause of action to effect that proceedings of defendant corporation, purportedly exercised by holders of a proxy acting as directors, were a nullity because of revocation of proxy, with result that action of defendant's directors in acknowledging amount due was not binding, and judgment in plaintiff's favor for amount less than such acknowledged amount was rendered following subsequent trial on other causes of action, considering judgments as being but one judgment, first recited judgment was not severable from last recited judgment within rule that there may be an appeal from a part of a judgment only if that part is severable.

5. Appeal and Error 🔑781(1)

Where only abstract questions were presented by appeal, appeal was moot and would be dismissed.

H. G. Sloane and H. M. Fisher, San Diego, for appellant.

Sanner, Fleming & Irwin, Bundy Colwell and Thomas J. Madden, Los Angeles, for respondent.

MUSSELL, Justice.

Plaintiff appeals from a judgment rendered upon the issues raised in the second cause of action in a complaint to recover money allegedly due plaintiff under the terms of contracts in which plaintiff agreed to construct certain buildings on real property in El Centro and to build and complete sewers, roads, curbs and paving in connection therewith.

It was alleged in the first cause of action that on January 9, 1948, plaintiff and defendant entered into a written agreement by the terms of which plaintiff agreed to build 62 single units, 30 double bungalows and build and complete sewers, roads and paving; that defendant promised and agreed to pay plaintiff the over-all cost of the 60 single units, together with one-third of the net profits to be derived from the sale thereof and the over-all cost of the 30 double bungalows, together with ten per cent of such cost; that all of the units and bungalows were completed and accepted by defendant on or before November 1, 1949; that after deducting payments made by defendant, there was an unpaid balance due plaintiff of $104,939.92, which said sum defendant refused to pay. All of the allegations of the first cause of action were incorporated in the third, fourth, fifth and sixth causes of action, which were added to the complaint by amendment. In the third cause of action a submitted statement of accounts was alleged showing the amount payable by defendant. In the fourth cause of action an agreed balance of the account was pleaded and in the fifth cause of action it was alleged that plaintiff submitted to defendant its written statement of account; that plaintiff accepted the amount stated therein, which amount had not been paid. In the sixth cause of action it was alleged that all of the 62 single unit houses had been sold and that defendant refused to make settlement of the net profits from such sales; that a balance of $10,000 remained due and unpaid thereon.

The second cause of action was for declaratory relief. It incorporated the basic allegations of the first cause of action and set up by reference exhibits consisting of instruments in writing, copies of minutes of defendant's directors meetings and of its annual meetings of stockholders, which, it was alleged, amounted to an account stated between the parties.

Plaintiff's prayer for relief was that the court declare the rights and duties of plaintiff and defendant under and by virtue of a proxy agreement, the account stated and the corporate accounts of defendant; that judgment be rendered in favor of plaintiff for the sum of $104,939.92; that the court confirm the authority of certain directors and officers to sell the corporate assets of defendant and to apply the proceeds to the payment of said sum to plaintiff and that an injunction be issued restraining the defendant from the exercise of all corporate acts except through certain officers and directors.

Defendant answered and filed a cross-complaint alleging unsatisfactory construction of the buildings and unnecessary expense due to the fault of plaintiff. Damages against the plaintiff were prayed for in the sum of $240,000.

The trial court granted a motion by plaintiff to withdraw from jury trial all issues presented by the second cause of action. It was then ordered that the action proceed to trial first on the issues presented by the second cause of action and that any remaining issues be submitted to a jury. Trial was had without a jury on the issues raised in the second cause of action and judgment was rendered thereon on August 17, 1951. It was ordered, adjudged and decreed therein that the proxy agreement attached to the complaint was revokable and that the same was duly revoked on or about March 28, 1950, and thereafter had no further force or effect; that all corporate proceedings purportedly exercised by the holders of said proxy acting on behalf of the stockholders and as directors of defendant corporation subsequent to March 28, 1950, are a nullity and are of no force or effect; and that plaintiff is entitled to no recovery by its second cause of action.

On July 9, 1951, a jury was empaneled and a trial was had on the issues raised by the first, third, fourth, fifth and sixth causes of action and defendant's cross-complaint, resulting in a verdict in favor of the plaintiff and against the defendant in the sum of $61,250. Judgment was entered thereon on July 25, 1951 and on September 5, 1951, plaintiff caused execution to be issued and collected the full amount of such judgment with interest and costs. On November 20, 1951, plaintiff filed satisfaction of said judgment and no appeal has been taken therefrom.

The defendant, El Centro Properties Inc., a corporation, now moves to dismiss the appeal taken from the judgment rendered on the second cause of action on the grounds that the appeal is moot; that it appears from the settled statement on appeal and from appellant's opening brief that appellant has by virtue of the satisfaction of its judgment entered in the court below, pursuant to the verdict of a jury, been repaid in full for all sums of money described in the proxy agreement, the interpretation of which is the subject matter of this appeal; that the verdict of the jury determined the exact amount of the undetermined sum of money mentioned in said proxy agreement, which, when paid, would terminate the proxy; that the satisfaction of the judgment entered upon said verdict terminated the proxy agreement ipso facto regardless of whether or not the prior and express revocation of said proxy was legally effective.

[1, 2] It is a settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. The rule has no application where the benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put in jeopardy by the appeal. Schubert v. Reich, 36 Cal.2d 298, 223 P.2d 242; Stein v. Simpson, 37 Cal.2d 79, 87, 230 P.2d 816. Plaintiff claims to be within this exception to the general rule and argues that the acceptance of the amount found due by the jury does not bar an appeal from the judgment entered on the issues presented in count two of the complaint. In support of this argument, plaintiff cites Clarke v. Angelus Memorial Ass'n, 14 Cal.App.2d 750, 58 P.2d 974; Harrold v. Harrold, 100 Cal.App.2d 601, 604, 224 P.2d 66; and Cohen v. Cohen, 102 Cal.App.2d 624, 228 P.2d 54, which state the general rule that a voluntary acceptance of the benefits of a judgment is a bar to the prosecution of an appeal therefrom and that the rule has no application where the benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put in jeopardy by the appeal. However, in the instant case the defendant did not admit that plaintiff was entitled to the amount awarded by the jury and the judgment and plaintiff is not appealing from the judgment which determined the amount of money plaintiff was entitled to under the building contracts involved. We are not here concerned with the question whether plaintiff is barred from an appeal from that judgment.

Plaintiff takes the position that there is one judgment—two parts of the same controversy—and that plaintiff has appealed from the portion of the judgment which denies plaintiff full recovery of the amount acknowledged to be due plaintiff by the directors of the defendant corporation.

Defendant contends that the acts of the board of directors in acknowledging the amount of the indebtedness due were void by reason of the revocation of a proxy agreement dated January 18, 1949. In this writing the El Centro Properties, Inc. agreed that it was indebted to the Golden Construction Company for moneys advanced for subdivision improvements and construction work; that the Golden Construction Company was authorized to designate a majority of the board of directors of El Centro Properties, Inc. until such time as said obligation was retired and that the proxy should be effective until Golden Construction Company was repaid in full for moneys advanced.

The trial court found that an actual controversy existed relative to the legal rights and duties of the parties under and by virtue of the proxy agreement and that the action insofar as it affected said issues was a proper action for declaratory relief; that any and all allegations remaining in the second cause of action relative to the existence of an account stated between plaintiff and defendant constituted legal issues to be tried before a jury; and for that reason no findings were made relative thereto. Judgment was then entered on the second cause of action decreeing that the proxy agreement was revokable and was revoked on or about March 28, 1950, and that all corporate proceedings thereafter exercised by the proxy holders were of no force and effect.

[3, 4] It is apparent from the record before us that a plaintiff in its complaint sought recovery of money allegedly due it under the terms and conditions of the construction contracts and that the determination of the amount due to the plaintiff was specifically reserved for consideration by a jury. Plaintiff having accepted the amount found due by the jury under the terms of the contracts, issued an execution therefor, collected the money and did not appeal from the judgment entered pursuant to the verdict. The question now is whether the appeal taken from the judgment rendered on the second cause of action is moot. If we accept the position taken by the plaintiff that there is but one judgment (two parts of the same controversy) it then becomes necessary to consider the effect of the appeal from a portion of the judgment. This question was passed upon in American Enterprise, Inc., v. Van Winkle, 39 Cal.2d 210, 246 P.2d 935 wherein it is stated that the well recognized rule is that there may be an appeal from a part of a judgment only if that part is severable; that the test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters or issues embraced therein are the same as, or interdependent upon, the matters or issues which have not been attacked; (Citing cases.) that in order to be severable, and therefore appealable, any determination of the issues so settled by the judgment must not affect the determination of the remaining issues whether such judgment or appeal is reversed or affirmed. Applying this rule to the situation presented by the record before us, we conclude that the part of the judgment appealed from is not severable from the judgment or portion thereof which became final. Plaintiff was bound by the verdict of the jury and judgment determining the amount due it under the terms of the contracts. This issue was submitted by plaintiff to the jury and its decision was accepted by plaintiff by collecting the judgment and failing to appeal therefrom. Plaintiff's cause of action is the obligation sought to be enforced under the terms of the construction contracts. Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242. The validity and binding effect of those contracts, as well as the amount due plaintiff under the terms thereof, were litigated and determined in a trial before a jury. Judgment entered in that proceeding is binding on plaintiff. As was said by this court in Denio v. City of Huntington Beach, 74 Cal.App.2d 424, 431, 168 P.2d 785, 788:

> " 'It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes *incidentially* in question in relation to a *different* matter in the same or any other court. Freeman on Judgments, §§ 249 and 253; Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am.St.Rep. 66; Reed v. Cross, 116 Cal. 473, 484, 48 P. 491; Atchison T. & S. F. Ry. v. Nelson, 9 Cir., 220 F. 53, 135 C.C.A. 621. That is to say, "a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate

> or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed." Bigelow on Estoppel, pp. 110, 111, 112; Rauer v. Rynd, 27 Cal.App. 556, 150 P. 780.'"

[5] Since only abstract questions are presented by the appeal from the judgment entered in the second cause of action, the appeal therefrom has become moot and the proper course is to dismiss the appeal. Childress v. L. Dinkelspiel Co., Inc., 203 Cal. 262, 263, 263 P. 801; Bertino v. Sanborn, 136 Cal.App. 247, 28 P.2d 689.

The appeal is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

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39 Cal.2d 429

D. L. GODBEY & SONS CONST. CO. v. DEANE et al.

L. A. 22258.

Supreme Court of California, in Bank.

Aug. 5, 1952.

Rehearing Denied Sept. 4, 1952.

Action by D. L. Godbey & Sons Construction Company against Ben C. Deane and others, doing business as, B. C. Deane and Gunther and Shirley Company for payment alleged due under building contract. The Superior Court, Los Angeles County, Julius V. Patrosso, J., sustained defendants' demurrer to the complaint without leave to amend, and plaintiff appealed. The Supreme Court, Traynor, J., held that plaintiff had alleged adequate consideration for oral modification of written contract and had alleged full performance of the modification agreement.

Reversed.

Schauer, J., dissented.

Prior opinion, 238 P.2d 676.

1. Contracts 🔑237(2)

Modification of a written contract by written agreement made before performance is started, by substituting new reciprocal rights between the parties, is adequate consideration for the relinquishment of reciprocal rights of the parties under original contract. Civ.Code, § 1698.

2. Contracts 🔑238(2)

Statutory provision that written contract may be altered only by contract in writing or by executed oral agreement invalidates oral contracts of modification that are unexecuted and validates executed agreements that might otherwise have failed for lack of consideration. Civ.Code, §§ 1661, 1698.

3. Contracts 🔑238(2)

In determining whether an oral agreement modifying a written contract is valid when there is consideration for the oral agreement, the question is whether the execution of the modification agreement by one party is sufficient to allow him to enforce the modification agreement against the other. Civ.Code, § 1698.

4. Contracts 🔑333(6)

Complaint, alleging that cement contractor and defendant modified written building contract before performance thereof by oral agreement in which basis of payment was to be determined by calculation of the amount of cubic yards of concrete actually poured rather than by measurement of concrete forms, and that cement contractor had fully completed cement work on basis of modification agreement, recited adequate consideration for modification agreement and recited full performance thereof and stated a cause of action. Civ.Code, §§ 1661, 1698.

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Lewis M. Andrews, Los Angeles, for appellant.

Edmond Gattone, Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiff has appealed from a judgment for defendants entered after a demurrer to its fourth amended complaint was sustained without leave to amend.

Plaintiff alleged that it entered into a written contract to perform the cement work for a building that defendants were erecting. Under the terms of the written contract the cement work for the foundation walls and retaining walls was to be paid for at the rate of $0.76 per cubic foot, and the basis of the payment was to be determined by the actual measurement of forms. Plaintiff further alleged, "That thereafter, and prior to the commencement of the performance of said work, a conference was held between plaintiff and the defendants, at which it was orally agreed and mutually stated, each to the other, that the phrase, '(3) Terms of Payment: Basis of payment to be determined by actual measurement of forms' was ambiguous and, furthermore, that it did not provide for the method of computing cubic concrete work not contained within the forms, and the defendants then and there, in exchange for their mutual covenants and agreements in that respect, and for the purpose of eliminating possible future dispute between the parties to said contract, and in order to provide for that portion of the concrete that under the plans was required to be poured outside of forms (and which ultimately was actually poured outside of forms) orally expanded and clarified said written agreement by entering into an understanding that, in order to properly arrive at the amount of cubic concrete work in foundation and retaining walls and footings upon said jobsite, whether poured within or outside of forms, the parties to said contract would calculate the amount of cubic yards of concrete actually poured, whether within forms or outside of forms, and, with respect to such classes of work only (to-wit: cubic concrete work in foundations and retaining walls and footings), at the contract price of 76¢ per cubic foot, or $20.52 per cubic yard, less a deduction therefrom of the usual and customary allowance for normal shrinkage and wastage [of 3½%], and that, in order to implement said agreement and understanding, the plaintiff would furnish to the defendants each day during the performance of said contract, copies of delivery tickets, a copy of each delivery ticket to accompany the delivery of each consignment of concrete delivered on the jobsite, such delivery tickets to show the actual cubic yards of concrete poured on the jobsite each day and until the full performance of the contract."

Plaintiff also alleged that it had performed the contract as modified and supplied the required daily reports of deliveries and that under the terms of the contract as modified there remained due and owing the sum of $12,182.99 out of a total of $86,830.93.

Defendants contend that the alleged modification of the written contract is invalid because of lack of consideration and because it was not in writing, and that accordingly, the complaint is fatally defective in failing to allege that any sum is due and unpaid under the terms of the written contract.

[1] It is unnecessary to pass upon the conflicting contentions of the parties as to whether the alleged resolution of an ambiguity in the terms of the written contract would constitute sufficient consideration for the oral agreement in this case. Under the terms of the modification the method of computing the quantity of concrete was changed, and the amount actually poured on the jobsite was substituted for an amount to be determined by the measurement of the forms. If this modification had been made in writing, it is clear that it would have been a valid contract supported by adequate consideration. Since the modification was made before performance was started, the substitution of the new rights and duties based upon the new method of measurement was adequate consideration for the relinquishment of the reciprocal rights of the parties under the old. Fleming v. Law, 163 Cal. 227, 233, 124 P. 1018; Gottlieb v. Tait's Incorporated, 97 Cal.App. 235, 237–238, 275 P. 446; Sass v. Hank, 108 Cal.App.2d 207, 238 P.2d 652. Moreover, plaintiff promised to provide daily reports, and both parties were relieved of the necessity of computing the volume of the forms from linear measurements.

[2] Section 1698 of the Civil Code provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Section 1661 provides: "An executed contract is one, the object of which is fully performed. All others are executory." Defendants contend that under these provisions the oral modification was invalid because it was not executed. Plaintiff contends, on the other hand, that in the case of building contracts an oral modification is fully executed when the work has been completed in accordance with its terms whether or not the agreed price has been paid.

Section 1698 has a dual operation. On the one hand it invalidates oral contracts of modification that are unexecuted, and on the other hand, it validates executed agreements that might otherwise fail for lack of consideration. Julian v. Gold, 214 Cal. 74, 76, 3 P.2d 1009. Typical of the latter category are agreements to accept less than is due under the terms of a written contract, Julian v. Gold, supra [reduced rent]; Sinnige v. Oswald, 170 Cal. 55, 57, 148 P. 203 [same]; Taylor v. Taylor, 39 Cal.App.2d 518, 522, 103 P.2d 575 [reduced monthly payments under a property settlement agreement], or to accept performance at a later date than that provided in the writing. Harloe v. Lambie, 132 Cal. 133, 136, 64 P. 88; Henehan v. Hart, 127 Cal. 656, 657–658, 60 P. 426. Since in such cases the modification agreement requires no additional act or forbearance on the part of the obligor, it can only be executed to the extent that the obligee accepts performance in accordance with its terms. Accordingly, in the absence of a valid waiver of a condition, Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 62–64, 73 P. 740; Panno v. Russo, 82 Cal.App.2d 408, 412, 186 P.2d 452; Bardeen v. Commander Oil Co., 40 Cal.App.2d 341, 347, 104 P.2d 875, or facts establishing an estoppel to rely upon section 1698, Wilson v. Bailey, 8 Cal.2d 416, 421–422, 65 P.2d 770; Panno v. Russo, supra, the section may only be satisfied by execution on the part of the obligee by accepting less than his due. Stoltenberg v. Harveston, 1 Cal.2d 264, 266, 34 P.2d 472; Henehan v. Hart, 127 Cal. 656, 657–658, 60 P. 426; Stafford v. Clinard, 87 Cal.App.2d 480, 481, 197 P.2d 84; Battaglia v. Winchester Dried Fruit Co., 32 Cal.App.2d 436, 437, 92 P.2d 111; Harvey v. DeGarmo, 129 Cal.App. 487, 492–493, 18 P.2d 971; Middlecamp v. Zumwalt, 100 Cal.App. 715, 722–725, 280 P. 1003.

[3, 4] The situation is different, however, where there is consideration for the oral modification agreement. In such cases the rights and duties of both parties to the written contract are affected, and by performing the contract as modified each party will be in a position to execute the oral agreement on his side. It is necessary to determine, therefore, whether in such cases execution by one party is sufficient to allow him to enforce the modification against the other. The language of the cases is in conflict. It has been stated that an oral agreement to be executed within the meaning of section 1698 must be fully performed on both sides. Pearsall v. Henry, 153 Cal. 314, 325, 95 P. 154, 159; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 330, 290 P. 613; Walther v. Occidental Life Ins. Co., 40 Cal.App.2d 160, 166, 104 P.2d 551; Keeler v. Murphy, 117 Cal.App. 386, 390, 3 P.2d 950; Stoltenberg v. Harveston, 1 Cal.2d 264, 266, 34 P.2d 472; Harvey v. DeGarmo, 129 Cal.App. 487, 492–493, 18 P.2d 971. In the Pearsall and Klein Norton cases it was held, however, that there had been a valid oral abrogation of the written contract followed by a substitution of an enforceable oral contract. In the Keeler and Walther cases it was held that plaintiff had not performed the alleged oral agreement, and in the Stoltenberg and Harvey cases there was no consideration for the modification. On the other hand, in cases in which there was adequate consideration for the oral modification, and in which the party relying thereon had fully performed, the contract has been enforced as modified whether or not the other party had performed on his part. Wood v. Nelson, 220 Cal. 139, 141, 29 P.2d 854; Katz v. Bedford, 77 Cal. 319, 323, 19 P. 523, 1 L.R.A. 826; Roberts v. Wachter, 104 Cal.App.2d 271, 280, 231 P.2d 534; Nuttman v. Chais, 101

Cal.App.2d 476, 478, 225 P.2d 660; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal.App.2d 568, 578, 126 P.2d 644; Oatman v. Eddy, 4 Cal.App. 58, 60, 87 P. 210; see also, Anderson v. Johnston, 120 Cal. 657, 659, 53 P. 264; Stockton etc. Works v. Glens etc. Ins. Co., 121 Cal. 167, 175, 53 P. 565; State Finance Co. v. Hershel California Fruit Products Co., 8 Cal.App.2d 524, 529, 47 P.2d 821. Since plaintiff has alleged an adequate consideration for the oral modification and full performance on its part under the terms thereof, it has stated a cause of action.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS and CARTER, JJ., concur.

SCHAUER, Justice.

I dissent. The majority of this court, by a process disguised as statutory construction, strike the word "executed" from section 1698 of the Civil Code and invite fraudulent minded persons to perpetrate, and be rewarded for, fraudulent schemes unhampered longer by rules which for centuries the accumulated wisdom of mankind had deemed desirable.

The majority opinion is one further step in the court-erosion of salutary code provisions of this state which embody longstanding rules of Anglo-American law designed to prevent successful fraud and perjury. Provisions which have this purpose include the present rule (Civ.Code, § 1698), the statute of frauds (Civ.Code, §§ 1624, 1624a, 1724), and the aspect of the parol evidence rule (Civ.Code, § 1625) which would exclude extrinsic evidence of negotiations which preceded or accompanied execution of an integrated writing to vary the terms of that writing. The latter rule was refused application by the majority of this court in Simmons v. Cal. Institute of Technology (1949), 34 Cal.2d 264, 274, 209 P.2d 581 (see dissenting opinion, pp. 290–292).

Now the majority turn their attention to section 1698 and, instead of accepting the clear import of the language (and the frequently stated holding) that "an executed oral agreement" means one which has been fully performed (see cases cited p. 6 of majority opinion [246 P.2d 948]; Fuller v. Mann (1932), 119 Cal.App. 568, 573, 6 P.2d 999; Taylor v. Taylor (1940), 39 Cal.App.2d 518, 522, 103 P.2d 575), they announce that a written agreement can be modified by an oral agreement which has been performed only by the party who seeks enforcement of the modifying agreement. The two decisions of this court which the majority cite (p. 7 of majority opinion [246 P.2d 948] as permitting such enforcement do so without discussion of the reason for the rule, and without mention of section 1698 (Katz v. Bedford (1888), 77 Cal. 319, 323, 19 P.2d 523, 1 L.R.A. 826; Wood v. Nelson (1934), 220 Cal. 139, 141, 29 P.2d 854). The cases cited by the majority which characterize an agreement performed by plaintiff alone as "executed" ignore plain statutory language. Section 1661 of the Civil Code provides that "An executed contract is one, the object of which is fully performed." The object of an oral modifying agreement is to modify the prior agreement, and this object is not fully performed until the modifying agreement has been performed on both sides.

Writers upon the subject of parol modification of written contracts have recognized that in California by statute such modification can be accomplished only by a parol agreement fully performed on both sides (see 17 C.J.S., Contracts, § 377, p. 866; 4 Cal.Jur. Ten-Year Supp. (1943 Rev.), Contracts, § 226, p. 162; 2 Rest., Contracts, § 407, Cal.Annotations (1933)). That this has been the California rule has been recognized even by writers who assume to characterize section 1698 as "bad" (6 Corbin, Contracts (1951), § 1316, p. 233) or "unfortunate" (6 Williston, Contracts (Rev. Ed.), § 1828, p. 5179).

As I have already indicated, in accord with the great weight of authority, reflecting the accumulated wisdom of centuries of striving for justice under law, I do not believe that the statute, aptly designed to prevent fraud, is "bad" or "unfortunate." The reason for rules such as that of section 1698, and of the statute of frauds and the parol evidence rule, was well stated at least as long ago as 1604, in The Countess of Rutland's Case (Trin. 2 Jac. 1) 5 Co. Rep. 25b, 26a–26b, 77 Eng.Rep. 89, 90: "[I]t would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted." The reason is applicable here. A party to a written agreement should not be able, by rendering either a different performance from, or as here precisely the same as, that called for by the agreement and averring that such performance was rendered pursuant to an oral modification of the agreement, to require of the other party a performance different from that which the latter promised in writing.

The precise holding of the majority here can be graphically illustrated by applying it to these more simple, but legally exactly parallel, facts: Seller agrees in writing to sell and deliver, and Buyer likewise agrees to accept and purchase, 1,000 short tons of steel a month for 12 months for a price of $110 a ton. Twelve thousand tons of steel are delivered. By today's decision, at the end of the year the door is wide open, and the court invites, fraudulent minded Mr. Seller to sue and recover twice the agreed selling price through the simple expedient of alleging that there was an oral modifying agreement, made subsequent to the signing and delivery of the written contract but before delivery of the steel, that solely for purposes of computing the price to be paid a ton should be considered as consisting of 1,000 pounds; this court, consistently with its majority decision today, must uphold Seller in his argument that the oral agreement is executed in that Seller has fully performed by delivering the steel as agreed.

In compliance with long-established law the judgment should be affirmed.

Rehearing denied; SCHAUER and SPENCE, JJ., dissenting.

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112 Cal.App.2d 482

PEOPLE v. CARVALHO.

Cr. 4806.

District Court of Appeal, Second District, Division 1, California.

July 31, 1952.

Rehearing Denied Aug. 13, 1952.

Hearing Denied Aug. 28, 1952.

Prosecution for kidnapping while armed with an automatic pistol. From a judgment of conviction in the Superior Court of Los Angeles County, Ellsworth Meyer, J., defendant appealed. The District Court of Appeal, White, P. J., held that the evidence did not reasonably justify the jury's conclusion that prosecutrix was transported by defendant's use of force and held in captivity by him through fear on her part.

Judgment reversed and cause remanded with directions.

1. Criminal Law ⚷553

Testimony, to be inherently improbable on its face or unbelievable per se, must involve claim that something was done which it would not seem possible could be done under circumstances shown.

2. Criminal Law ⚷1159(2)

On appeal from judgment on a jury's verdict of conviction, function of District Court of Appeal is not to determine weight of evidence, but to decide whether, on face of evidence, jury could not have found sufficient facts to warrant inference of defendant's guilt.

3. Criminal Law ⚷1159(2)

To warrant reversal of judgment on jury's verdict of conviction, defendant must clearly show that there was no sufficient substantial evidence to support verdict on any hypothesis whatever.

4. Criminal Law ⚷1144(13)

The appellate court must assume, in favor of jury's verdict of conviction, existence of every fact which jury could have reasonably deduced from evidence and then determine whether such facts are sufficient to support verdict.

5. Criminal Law ⚷552(3)

To sustain jury's verdict of conviction, circumstances in evidence must reasonably justify verdict.

6. Kidnapping ⚷5

In prosecution for kidnapping defendant's estranged wife while he was armed with automatic pistol, evidence did not reasonably justify jury's conclusion that prosecutrix was transported by defendant's use of force and held in captivity by him through fear on her part. Pen.Code, § 207.

7. Criminal Law ⚷369(1)

An accused can be tried only for offense charged against him in indictment or information, and evidence of collateral independent crimes is generally inadmissible.

8. Criminal Law ⚷365(1), 370, 371(1, 12), 372(1)

Evidence of other crimes committed by accused than that charged against him may be admitted when it tends directly to establish crime charged by proving a material fact, as part of res gestae, or helps to disclose motive, intent, premeditation, guilty knowledge, malice, or common plan or scheme.

9. Criminal Law ⚷369(2)

Proof of accused's commission of other crimes than that charged must be received with extreme caution, and doubt as to its connection with crime charged must be resolved in accused's favor.

10. Criminal Law ⚷369(1), 1169(11)

In prosecution for kidnapping defendant's estranged wife while he was armed with automatic pistol, testimony as to assault on prosecutrix by defendant about a month before alleged kidnapping was inadmissible to show prosecutrix' fear of defendant, as it did not tend directly to establish crime charged by proving a material fact constituting part of res gestae nor disclose motive, intent, premeditation, guilty knowledge, malice, or common plan or scheme, but tended only to prove defendant's inclination toward crime, and admission of such testimony was error prejudicial to defendant. Pen.Code, § 207.

◆

Wilbur W. McCray, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Dep. Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of kidnapping his estranged wife Zelda, while he was armed with an automatic pistol.

Following the entry of a plea of not guilty, trial by jury resulted in a verdict finding defendant guilty as charged in the information and also finding that at the time of the commission of the offense charged he was armed. His motion for a new trial was denied, and he was sentenced to State Prison for the term prescribed by law. From the judgment of conviction defendant prosecutes this appeal.

Concerning the factual background surrounding this prosecution, the complaining witness, Zelda Carvalho, testified that she and appellant were married on January 14, 1951. That she separated from him in June of the same year and had filed an action for divorce. At the time of the alleged offense on July 14, 1951, she and her 14-year-old son by a former marriage resided together in the City of Los Angeles. That during the month of June, 1951, defendant had accosted her in her home, threatened her and attempted to choke her with an electric cord. That because of this assault she was in fear of him.

On July 14, 1951, at about 12:30 or 1 p.m., the complaining witness entered her automobile, which was parked in front of her house, intending to drive to a nearby market, cash a check and then to keep an appointment with a lady friend. After she had driven about three blocks she discovered that defendant had been hiding in the rear of the club coupe when he raised up and started to climb onto the front seat. Defendant directed her to turn to the left, but she continued on her route and parked on a lot adjoining the market. Defendant had nothing in his hands at this time, but the complaining witness, according to her testimony, honked the horn of her car in an attempt to attract the attention of some guards whose armored car was also on the lot. The guards ignored her and thereupon she told defendant that she had an appointment at 2 p.m. He countered with the statement that his coat was at a tailor shop and requested her to drive him there. She stated to him that she had to cash a check in the market, but according to her testimony defendant refused to permit her to get out of the vehicle. This conversation lasted about five minutes and finally Mrs. Carvalho started to drive down Sunset Boulevard, and defendant soon directed her to make a turn on Stoddard Street. The prosecutrix told the defendant that there was no tailor shop on Stoddard Street but he insisted on that route, stating that his coat was hidden in some bushes near a house. At this juncture, the complainant drove into a filling station at Sunset and Silver Lake Boulevards at which time defendant told her that he desired to talk with her. She informed him that she had nothing to say and again reminded him of her appointment. Defendant requested that she drive him home and she stated that she would if he would let her pick up her friend. She turned left on Sunset at Silver Lake and drove to Alvarado Street where she made a right turn. Before they reached Beverly Boulevard, a few blocks distant, defendant told her to pull over to the side of the street because he felt sick. Here they conversed for a while, and the complaining witness asked him if he felt better. At this time, according to her testimony, she noticed that defendant was "squirming", and she asked what he had. He then produced a small automatic pistol which had been secreted under his leg and according to her testimony he said, "I will kill you; I don't care what happens, I will kill us both." Concerning her reaction, the complaining witness testified, "* * * I was scared too death." She thereupon asked defendant what he wanted, to which the latter replied, "If you don't start any trouble or cause any trouble you will be all right." He told her that the gun was an automatic; that if he shot her no one would know it because the weapon was equipped with a silencer; that he had no compunction about killing her because he would also kill himself. He then showed her that the weapon was loaded and pointed it in her direction. Defendant asked her if her son was at home, to which she replied she did not believe he was; thereupon defendant stated he wanted to be sure the boy was not home because if he were defendant would kill him also. Still flourishing the gun, defendant ordered his estranged wife to drive to her home.

Upon arrival at the home of the complaining witness defendant took his wife's jacket, which had been on the seat of the car, and covered his hand and the weapon with it. Again he warned her not to cause any trouble and to proceed into the house. The prosecutrix opened the door and they both entered. They were in the house approximately one hour during which time defendant washed and ate a meal prepared by the complainant. Finally, defendant asked her again to take him to his room in Huntington Park. She drove the defendant to Huntington Park but testified her action in so doing was involuntary. That her compliance with this demand was accomplished against her will and without her consent; that she made the trip only because of her fear of defendant's actions, statements and his exhibition of the gun.

When they left the prosecutrix' home, according to her testimony, he had the gun in his hand. As they made their exit, the door to the house slammed and locked. The prosecutrix told defendant that she had to get the door open so that her son could get into the house, but he at first suggested it remain locked because her son could get in through the window. Upon her stating that this was not possible, defendant entered the house through a window and unlocked the door. Complainant made no effort to leave the premises while he was doing this.

In the automobile they continued conversation and the complaining witness testified that the defendant said the same thing "over and over again" and while he did not threaten her with bodily injury he kept the gun in sight at all times.

When they arrived at the defendant's abode, which was a room in a private residence, the complaining witness testified that she tried to "get him to give me the gun" but while he would not relinquish it to her he did consent to put it in a drawer. At this time defendant asked the complaining witness to consider reconciliation. According to her testimony, he continued his protestations that if they were reconciled he would "get a job", and "promised to be good".

Defendant then took a bath, and following this an act of sexual intercourse took place between them. At the trial the complainant did not remember where the gun was at this time, but believed it was either in the drawer or on the dresser.

Thereafter, they talked about getting something to eat, and left the premises at about 7 p.m. They drove in her car to a service station where she alighted from the vehicle, went into a phone booth and called her son. According to her testimony, her husband had told her not to advise her son that they were together. From here they went to a drive-in where they had supper. The gun was now in the glove compartment. While there were automobiles on each side of them at the drive-in, the complaining witness made no effort to apprise anyone of her claimed predicament, nor did she say anything to the waitress who served them.

When the complaining witness told defendant that she must return home he asked her to stay with him. A conversation ensued in which they discussed going to the home of a woman friend of the defendant, but he stated that she was not at home and told the complaining witness to park at a place off Sunset Boulevard. It was then about 8 o'clock. They remained there until approximately 10:30 p.m. According to the testimony of the complaining witness during this period, defendant removed the gun from the glove compartment, and, while he said nothing of a threatening nature, he toyed with the firearm, pointed it in her direction "playfully", and told her he would not hurt her.

The complaining witness ultimately parted company with defendant at about midnight. She made no complaint to the police until a month later, but she testified her brother did register such a complaint on the day of the occurrence.

Throughout her experiences on that day and evening the complaining witness testified she was afraid of defendant and when she drove him to his home she was also activated by the fear induced by his assault upon her one month previously.

Upon cross-examination of the prosecutrix, she testified:

> "Q. Did you make stops for stop lights? A. Yes.
>
> "Q. Was there traffic on the street at that time? A. Yes.
>
> "Q. Did you make any effort at any time during the time we have already covered to notify anyone that you were being kidnapped? A. No.
>
> "Q. During that time you had seen several people, had you not? A. Yes."

With reference to what happened while she and defendant were in his room at Huntington Park, the complaining witness, on cross-examination, further testified:

> "Q. During this time, was there any show of affection between you and the defendant while you were in his home? A. Yes.
>
> "Q. During this time did an act of sexual intercourse take place in that room? A. Yes.
>
> "Q. Where was the gun during that time? A. I don't remember.
>
> "Q. Was it still in the drawer? A. It was either in the drawer or on the dresser."

There was further testimony by the complaining witness as follows:

> "Q. Well, during the time you were in the bathroom, the defendant got into the bathtub, did he not? A. Yes.
>
> "Q. Isn't it true during that time that there was no force or threats which were holding you in the bathroom? A. No.
>
> "Q. During that time you washed his back, did you not? A. Yes."

Testifying as a witness in his own behalf, defendant stated that he hid himself in the automobile of the complaining witness in order to see her because she did not want him to come to the house for the reason that her son was continually running away from the defendant and going to the home of the former's father. Defendant testified that when his wife first approached the car he called her name and told her he wanted to talk to her. Concerning the occurrences on the day here in question, defendant testified to substantially the same facts as the prosecuting witness except that he denied he exhibited a gun or that he threatened her in any way. He admitted owning a gun similar to that described by the complaining witness and testified that he had owned it for about a week. That he kept the gun at his place of abode and that it was there on the day here in question.

In recounting the various happenings on July 14, defendant testified he felt ill; that at no time did he threaten his wife; that whatever she did was done freely and voluntarily. He further testified that while at his room he laid down on the bed, telling her he "was not feeling well * * * please go home and leave me alone". That his wife thereupon said, "Tony, you are sick and I am going to stay and help you". That they then "made love"; that she urged him to shave, "and you will feel better". That he complied. That the complaining witness "drew the water for my bath, she went in and told me she would wash my neck, my back and my arms", which she did. That his wife said, "Why don't you dress up and we will go and have something to eat and you will feel better". That he acquiesced, whereupon they proceeded to a drive-in where they remained for over an hour, during which time his wife freely conversed with the waitress.

On cross-examination defendant persisted in his claim that he did not see a weapon at all on the day in question. He recalled a conversation with a police officer but denied that he was questioned about the happenings of July 14, 1951. He denied that he told the officer that at the time he and the complaining witness were in the car together he showed her a gun.

In rebuttal, the prosecution produced a police officer who testified that on August 14, 1951 he had a conversation with defendant; that while conversing with the latter, the officer, "referred to a date a month prior to the date on which I was talking to him". That defendant said, "We were in the car together and I showed her a gun". However, on cross-examination the witness was asked, "Now, on that evening were you questioning him about some other crime that had been committed?" to which the police officer replied, "Yes, I was questioning him regarding some other matters".

As his first ground for reversal, appellant contends that the evidence is totally insufficient to support the verdict. In so far as applicable to the case at bar, section 207 of the Penal Code reads: "Every person who *forcibly* steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county * * * is guilty of kidnapping." (Emphasis added.)

If the testimony of the complaining witness is to be believed, no reasonable person could doubt that she was forcibly abducted and transported to various places in the county of Los Angeles against her will and without her consent. But appellant earnestly urges that her testimony is inherently improbable on its face.

[1–5] In that regard it must be borne in mind that testimony to bear upon its face the brand of inherent improbability, or which may be said to be unbelievable *per se* must involve a claim that something has been done which it would not seem possible could be done under the circumstances described. People v. Haydon, 18 Cal.App. 543, 555, 123 P. 1102, 1114. Our function is not to determine the weight of the evidence but to decide whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. As was said by our Supreme Court in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, " 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below' "; and as further stated in the case just cited, 15 Cal. 2d at page 681, 104 P.2d at page 780, " 'We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' " But, as pointed out in the Newland case, 15 Cal.2d at page 681, 104 P.2d at page 780, supra, "*the circumstances*" must "*reasonably*" justify the verdict of the jury.

[6] As we view the cause now engaging our attention, the question squarely presented is whether the verdict rendered therein is "reasonably" justified by the facts and circumstances disclosed by the evidence. In determining that question, while we may not weigh the evidence we must of necessity consider it.

That the testimony of the prosecutrix is fantastic is putting it mildly. We are not unmindful of the announced rule that evidence which discloses circumstances that are unusual cannot always be said to be inherently improbable, but in the instant case, the circumstances testified to by the complainant are more than unusual. They do violence to reason, challenge credulity, and in the light of human experience, emasculate every known propensity and passion of people under the conditions testified to by the prosecutrix. They are totally at variance with the usual and ordinary conduct of one who is the victim of kidnapping. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings.

True, the prosecutrix testified she was in fear of appellant, but if ever there was a case for the application of the trite saying, "Actions speak louder than words", this is one. Neither during the time the complainant was with appellant nor in the month thereafter did her actions and conduct reflect any fear of him. While she and appellant were at the former's home the latter crawled through a window of the house to unlock a door from the inside so that the son of the complaining witness could get into the house when he returned home. While appellant was inside the house the complaining witness remained outside with every opportunity to enter her automobile, drive away and escape. Instead, she waited for him to come out. According to her testimony, when she arrived at appellant's room in Huntington Park, the gun was not exhibited but was placed on the dresser or in a drawer thereof. She and appellant while there commenced "making love", which was consummated by an act of sexual intercourse between them. While in appellant's room he went down the hall to the bathroom while the prosecutrix remained in the bedroom where the weapon was allegedly reposing on the dresser or in a drawer, and she waited for him to return. Appellant then shaved, removed his clothing and proceeded to take a bath. With all this opportunity to leave she proceeded into the bathroom and washed his back, neck and arms for him. While in a busy drive-in cafe she made no effort to obtain assistance or to escape. While enroute to dinner she stopped her automobile, alighted therefrom, went into a public telephone booth and called her son. She did not advise her son of her claimed predicament, nor did she telephone the police.

When appellant finally left her, saying he would take a streetcar to his home, she made no complaint to the police. As the district attorney stated during the cross-examination, "She said she talked to the police about a month later; at no time did she say she ever filed a report". Concerning her attitude toward appellant during the month following the escapade of July 14, 1951, the prosecutrix testified as follows:

> "Q. Now, had you seen the defendant any time after August 14th until the date that you reported this incident? A. Yes.
>
> "Q. Had he been over to your house? A. Yes.
>
> "Q. Had he been over to eat dinner with you? A. Once.
>
> "Q. Had you met him during that period of time? A. Yes.
>
> "Q. During the period of time I just referred to did you take a pot of stew down to the car and stay with him while he ate it because you knew he liked the stew? A. Yes."

The foregoing recital completely negatives the argument of respondent that, "It is apparent that complaining witness chose a commendable and tactful approach to the dilemma confronting her, for clearly, if she could mollify the appellant and eventually return to her home safely, she possibly could avoid a recurrence. If, however, she attempted to escape, it was foreseeable that appellant, in his then present frame of mind, would intercept her, either before she got away, or would follow her to her house where even more drastic measures might have been attempted, with the added danger that her son might also be present there."

The foregoing circumstances do not in our opinion reasonably justify the conclusion reached in the court below that the prosecutrix was transported by the use of force and held in captivity through fear on her part.

The corroborative evidence of the police officer, offered by the prosecution in rebuttal that appellant had stated to the witness that, "We were in the car together and I showed her a gun" was considerably weakened if not dissipated by the testimony of the officer on cross-examination that on the occasion of the conversation he "was questioning him (appellant) regarding some other matters".

Appellant contends it was error to admit over his objection testimony concerning an assault allegedly committed on the prosecutrix about a month prior to the alleged kidnapping. In this regard the record reflects the following testimony given by the complaining witness:

> "Q. By Mr. Finnerty (Deputy District Attorney): Something had happened in the past that had made you afraid of the defendant? A. That is right.
>
> "Q. When was the first time that something happened that caused you to be afraid of the defendant? A. In May, the early part of May; it was in May.
>
> "Q. That was approximately two months before this occasion? A. No, it was later than May, I am sorry. It was probably June. June.
>
> "Q. That was after you had separated from the defendant or before? A. Yes, after.
>
> "Q. After? A. Yes.
>
> "Q. Was it after you filed for your divorce or before you filed for divorce? A. After.
>
> "Q. Where did this happen? A. At my house.
>
> "Q. Who was present at the time it happened? A. Just myself and Mr. Carvalho.
>
> "Q. What time of the day or night did it happen? A. It was morning.
>
> "Q. And this event, then, is only one of the reasons why you were afraid of the defendant when you saw him coming over the seat? A. Yes.
>
> "Q. What happened at that time? A. He put an electric cord around my neck and was choking me."

[7, 8] It is a cardinal and universally recognized rule that in a criminal prosecution an accused can be tried only for the offense which is charged against him in the indictment or information, and that evidence of collateral independent crimes is not admissible. The equally well recognized exceptions to this rule are clearly defined. "Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme, 20 Am.Jur., sec. 310 et seq., p. 289 et seq.; 22 C.J.S., Criminal Law, § 683 et seq., p. 1089 et seq.; Wigmore on Evidence, vol. II, ch. XIII, p. 191 et seq.; Wharton Criminal Evidence, sec. 345 et seq., p. 487 et seq.; 8 Cal.Jur., sec. 168 et seq., p. 60 et seq.; 13 Cal.Jur., sec. 84 et seq., p. 703 et seq.

[9] "The trial court, however, should be guided by the rule that such proof is to be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt is to be

resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt. People v. Lane, 1893, 100 Cal. 379, 387–390, 34 P. 856; 13 Cal.Jur., sec. 84, p. 707; 8 Cal.Jur., sec. 168, p. 61." People v. Albertson, 23 Cal.2d 550, 576, 577, 145 P.2d 7, 20.

[10] The record reflects that the only purpose of the testimony of the prior offense was to show the state of mind of the prosecutrix. The testimony was manifestly inadmissible. It did not tend directly to establish the crime charged by proving a material fact which was part of the *res gestae,* because it was remote by some thirty days. Neither did the state of mind of the prosecutrix tend to disclose motive, intent, premeditation, guilty knowledge, malice or a common plan or scheme. The testimony tended only to prove appellant's inclination toward crime, that is, to render more probable his guilt of the charge upon which he was on trial. This is an absolute violation of the rule which permits evidence of other offenses. People v. Albertson, supra, 23 Cal.2d at page 577, 145 P.2d 7. Who can say that the jurors, not possessing that trained and disciplined mind which enables them either closely or judicially to discriminate between that which they are permitted to consider and that which they are not. People v. Albertson, supra, 23 Cal.2d at page 577, 145 P.2d 7, might not have been entirely influenced in arriving at a verdict in this case by the irrelevant and prejudicial matters which came to their knowledge through the reception of the foregoing evidence of an offense against which the accused was not permitted to defend himself, and of which, if fairly tried, he might be able to acquit himself. The challenged testimony did not come within the foregoing recognized exceptions to the general rule that an accused may not be tried for any offense other than that with which he is charged, and the testimony was therefore inadmissible. People v. Albertson, supra, 23 Cal.2d at pages 576, 577, 145 P.2d 7; People v. Argentos, 156 Cal. 720, 725, 106 P. 65. That the admission of this testimony was prejudicially erroneous is evident.

The foregoing conclusions at which we have arrived render it unnecessary to discuss or consider appellant's final contention that the court erred in limiting the cross-examination of the complaining witness. However, we are constrained to say that under the facts and circumstances present in this case, appellant's claim is not entirely without merit.

From a consideration of the record in this case we are persuaded that no man's liberty should be taken from him on a charge of kidnapping upon such a flimsy showing as characterized the evidentiary features of this case, aggravated by the error committed in permitting the introduction of evidence concerning another offense to which we have hereinbefore adverted.

For the foregoing reasons, the judgment appealed from is reversed and the cause remanded with directions to the court below to dismiss the information.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

112 Cal.App.2d 621

ROTH et ux. v. COTTRELL et al.

Civ. 8141.

District Court of Appeal, Third District, California.

Aug. 8, 1952.

Action by Lee J. Roth and his wife, owners of dominant estate, against Everett M. Cottrell and others for damages for obstruction of roadway leading to plaintiffs' property. The Superior Court, Humboldt County, Carl L. Christensen, Jr., J., sustained defendants' demurrer to amended complaint, and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held, inter alia, that the complaint was not demurrable on ground that the action was barred by the statute of limitations.

Reversed with instructions.

1. Pleading 🔑8(11)

Allegations that plaintiff is "the owner of a described right of way or other easement over defendant's land, and that such easement is appurtenant to plaintiff's land" was a statement of "ultimate facts" rather than a "conclusion".

See publication Words and Phrases, for other judicial constructions and definitions of "Ultimate Facts" and "Conclusion".

2. Easements 🔑68

Where owners of dominant estate were seeking damages for obstruction and hindrance in use of easement which gave access to dominant estate, rather than relying upon wrongful exclusion from way of necessity, allegation that obstruction prevented use of dominant estate, if proved, would support claimants' damages, and therefore allegations that there were no other means of ingress or egress were not necessary.

3. Easements 🔑68

In action by owners of dominant estate for damages for obstruction of right-of-way, allegations that owners of dominant estate had right to drive automobiles or trucks upon right-of-way were not necessary, in view of facts that it was alleged that the easement was a right-of-way for use by automobile and truck, and the wrong complained of was the rendering of the way impassable.

4. Easements 🔑68

In action by owners of dominant estate for damages for obstruction of right-of-way, use which owners of dominant estate made of their real property was a probative matter and went only to the extent and measure of damages, and allegations of such use were not necessary.

5. Pleading 🔑38½

The function of a complaint is to present and define issues, to form foundation of, and to limit proof to be submitted, and to advise court and adverse party as to what is relied on as a cause of action.

6. Limitation of Actions 🔑183(1)

That action for damages for obstruction of right-of-way was barred by provisions of statute of limitations of State of California was a sufficient plea of the statute on demurrer. Code Civ.Proc. § 338, subd. 2.

7. Limitation of Actions 🔑55(5)

Cause of action for prevention of use of dominant estate by obstruction of easement which gave access to such estate arose when easement was obstructed. Code Civ. Proc. § 338, subd. 2.

8. Limitation of Actions 🔑32(1)

Action for damages for prevention of use of dominant estate by obstruction of easement giving access to such estate was governed by statute of limitations relating to actions for injury to real property. Code Civ.Proc. § 338, subd. 2.

9. Limitation of Actions 🔑127(8)

Pleading 🔑252(1)

Allegations of various invasions resulting in impassability of right-of-way stated a cause of action as to each invasion, and amended complaint which dropped allegations contained in original complaint relating to violations which occurred more than three years prior to commencement of action was authorized, and rule that when verified pleading contains allegation which renders complaint vulnerable, the defect cannot be cured by omitting such allegation without explanation in the latter pleading was inapplicable. Code Civ.Proc. § 338, subd. 2.

* * *

Collis P. Mahan, Fortuna, for appellant.

Huber & Goodwin, and Michael McHugh, of Eureka, for respondent.

VAN DYKE, Justice.

Plaintiffs appeal from a judgment entered after demurrers had been sustained to their fourth amended complaint. Apparently convinced that a cause of action had been stated and that the special demurrers interposed were not well taken, their counsel, during the argument when the demurrers were heard, suggested to the trial court that if the demurrers were sustained again no leave to amend further should be granted. This suggestion was followed.

The complaint alleges that at all times material to the action appellants were the owners, and in possession, of certain described real property; that appurtenant to this real property was a right of way for road purposes; that this easement was over lands owned by respondents Cottrell who, along with the other defendants-respondents, used the roadway for logging purposes for a period of about one year before July 1, 1947. It was not alleged that this use was in and of itself any violation of appellants' easement rights except as it resulted in interference with the use by appellants of their right of way. The complaint further sets out that this use of the right of way by respondents ceased on July 1, 1947; that during the year respondents had altered the road along the right of way by constructing a dirt and gravel fill over a creek; that they maintained the fill in passable condition until June 1, 1947; that during that month the respondents so carelessly and negligently operated their trucks and logging equipment over the fill that it became soft, full of deep ruts and impassable for appellants' use; that as a consequence thereof appellants had been deprived of ingress to and egress from their real property to which the alleged easement was appurtenant, to their damage from loss of use of their real property, which use was alleged to have been of the reasonable value of $1,200 per year.

[1, 2] Respondents argue that appellants' allegations that the easement they claimed was appurtenant to their land was a conclusion and so to be ignored in testing the sufficiency of the complaint to state a cause of action. In this the respondents are in error, for allegations that a plaintiff "is the owner of a described right of way or other easement over defendant's land, and that such easement is appurtenant to plaintiff's land" should be regarded as a sufficient statement of the ultimate facts to be established. Corea v. Higuera, 153 Cal. 451, 455, 95 P. 882, 17 L.R.A.,N.S., 1018. Next, it is argued that there are no allegations that there are no other means of ingress to or egress from appellants' real property. But appellants are not relying upon wrongful exclusion from a way of necessity, but upon obstruction, and hindrance in the use, of an easement which gives access to their property. They alleged that this obstruction prevented their use of their real property, an allegation of fact which, if proved, would support a claim of damages. Hence an allegation that there were no other means of ingress or egress was not necessary.

[3, 4] It is next argued that the complaint contains no allegations that the appellants had any right to drive cars or trucks upon the described right of way. No such allegations were necessary. It was sufficiently alleged that the easement was a right of way for use by automobile and truck and that the wrong complained of was the rendering of the way impassable. It is equally immaterial that there are no allegations as to the precise use which plaintiffs made of their real property for those are probative matters and go only to the extent and measure of damages. There are other assignments of insufficiency, uncertainty and ambiguity in the demurrers not especially stressed in the briefs, all of which we have examined, and all of which we hold constituted no ground of objection to the pleading.

[5] So far as the form and substance of the complaint, therefore, be concerned, we hold that although it is inartificial and is far from a model pleading, nevertheless it is sufficient to fulfill the function of a complaint, which is to present and define

the issues, to form the foundation of, and to limit, the proof to be submitted; and to advise the court and the adverse party as to what is relied on as a cause of action. 71 C.J.S., Pleading, § 1, pp. 17–18.

[6–8] Respondents further demurred upon the ground that the action was "barred by the provisions of the Statute of Limitations of the State of California." This, on demurrer, was a sufficient plea of the statute. See Bainbridge v. Stoner, 16 Cal.2d 423, 430–431, 106 P.2d 423. We think this plea cannot be sustained. The first complaint was filed within three years after the date which the complaint alleges marked the obstruction of the right of way which obstruction is the gravamen of appellants' action. When that occurred the cause of action arose. The case is governed by Code of Civil Procedure, section 338, subdivision 2, which applies to actions for injury to real property.

The word "injury" generally means in law invasion or violation of a legally protected interest or property right of another. Luellen v. City of Aberdeen, 20 Wash.2d 594, 148 P.2d 849, 855, citing 21 Words and Phrases, p. 437; Ballentine Law Dictionary, pp. 650–652. Such meaning of the word is also adopted in Restatement of the Law of Torts, section 7, wherein the text reads: "The word 'injury' is used throughout the Restatement of this Subject to denote the invasion of any legally protected interest of another." It is alleged that plaintiffs, as appurtenant to their own real property, own an easement for road purposes over the adjoining land and that by the tortious acts complained of their right to the use of this easement was invaded, with consequential damage to them, for which they seek recovery. An easement appurtenant to real property has been declared to be real property, Corea v. Higuera, supra, 153 Cal. at page 454, 95 P. 882, and an interest in real property. Imperial Water Co. No. 1 v. Wores, 29 Cal.App. 253, 260, 155 P. 124. It has been said that an easement may be a freehold or a chattel real according to its duration, but that it is in either case an interest in real property. Crowell v. City of Riverside, 26 Cal.App.2d 566, 579, 80 P.2d 120. Such an easement has been referred to as an incorporeal hereditament in the servient estate. Westlake v. Silva, 49 Cal.App.2d 476, 121 P.2d 872. And in Balestra v. Button, 54 Cal.App.2d 192, 128 P.2d 816, it was held that the right to cross the land of another with poles and wires and to maintain a telephone line thereon was real property. We think it clear that this case is governed by the three-year limitation set forth in Code of Civil Procedure, section 338, subdivision 2, and since the complaint was filed within three years of the alleged tortious invasion of the plaintiffs' rights the action was filed in time.

[9] It is also contended by respondents in connection with the plea of the statute that the original complaint which was filed May 31, 1950 contained allegations of tortious invasion of plaintiffs' rights originating as early as 1946 and consisting of unauthorized changes in the location of the roadway and damage to the road in that year by heavy and unjustifiable use of the roadway for hauling logs. Respondents' argument is that but one cause of action was stated and that it must be considered as having arisen when the first violations occurred in 1946. Therefore, they say that when by the fourth amended complaint all reference to any violations which occurred prior to June 1, 1947 was eliminated and the cause of action based solely on violations occurring in that month the case is one subject to the rule expressed in Wennerholm v. Stanford Univ. School of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358, that when a verified pleading contains an allegation which renders a complaint vulnerable the defect cannot be cured by omitting the allegation without explanation in the latter pleading. We think the rule has no application. The various invasions of plaintiffs' rights which were complained of constituted statements of a cause of action as to each invasion so far as recovery of damages be concerned, which is the purpose of this action. Being met by demurrer based upon the statute, and apparently realizing that the demurrer was good as to the earlier violations, the plaintiffs dropped these matters from the fourth amended complaint and confined their pleading to separate violations of their

rights occurring within three years of the commencement of their action. This it was their right to do and the complaint as amended is not subject to the plea of the statute.

No further contentions in support of the judgment being urged, the judgment is reversed with instructions to the trial court to permit defendants to answer over to the merits.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

112 Cal.App.2d 555

ZIMBEROFF et al. v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASS'N.

Civ. 18911.

District Court of Appeal, Second District, Division 3, California.
Aug. 6, 1952.

Suit by Sam A. Zimberoff and others against Bank of America National Trust and Savings Association to quiet title to real estate which was conveyed by Zimberoff and wife, after beginning of suit, to third parties who were then made co-plaintiffs. The Superior Court, Los Angeles County, C. A. Paulsen, Judge, assigned, entered decree in favor of defendant, and Zimberoff and wife appealed. The District Court of Appeal, Shinn, P. J., held that Zimberoff and wife could not represent the interest of their grantees and that judgment would be affirmed as to grantees, who did not appeal, and as to original plaintiffs, who were not aggrieved.

Judgment affirmed.

1. Appeal and Error 🔑151(2)

Where husband and wife, who claimed undivided interest in realty as homestead, began suit to quiet title and thereafter conveyed their full interest in realty to third parties who they joined as plaintiffs, original plaintiffs could not thereafter represent interest of their grantees and judgment would be affirmed as to grantees, who did not appeal, and as to original plaintiffs, who were not aggrieved. Code Civ.Proc. § 385.

2. Homestead 🔑66

An undivided interest in realty, for which its owners, husband and wife, had filed declaration of homestead, was subject to attachment to the extent of any excess of value above the homestead exemption.

3. Judgment 🔑21

Where money judgment pursuant to an attachment gave judgment creditor lien upon all of judgment debtors' undivided interest in realty as of date of attachment when, in fact, as of such date judgment debtors had on file a declaration of homestead, judgment was uncertain to the extent that it gave lien on whole interest, instead of on interest in excess of homestead exemption.

4. Appeal and Error 🔑330(1)

Although judgment was uncertain to the extent that it gave judgment creditor lien upon total interest of judgment debtor in realty when, in fact, debtor had right to homestead exemption, such judgment would not be modified or clarified on appeal by judgment debtor who had, in the meantime, disposed of his interest in the realty.

◆

Sam A. Zimberoff, in propria persona.

Samuel B. Stewart, Jr., Hugo A. Steinmeyer, San Francisco, and Alfred T. Twigg, Los Angeles, for respondent.

SHINN, Presiding Justice.

On November 3, 1947, Sam and Harriet Zimberoff, being the owners of an undivided interest in real property, executed and filed of record a declaration of homestead; July 6, 1948, the defendant bank caused to be levied on the property an attachment in an action against Zimberoff and wife; November 29, 1950, Zimberoff and wife brought the present action to quiet title; December 27, 1950, they sold and conveyed by grant deed to plaintiffs David M. Hertz and Reba S. Hertz, their half interest in the property for $7,625. At the time of trial the bank held a judgment against Harriet Zimberoff in the attachment action in the amount of $1,327 and interest; an abstract of judgment had been recorded prior to the deed to Hertz but the action in which judgment had been obtained was still pending and undetermined against Sam Zimberoff. Execution had been issued and levied but no sale had been made. Hertz and wife were joined as plaintiffs after they purchased the property.

The decree read as set out below.[1] Plaintiffs Zimberoff appeal from the judgment; Hertz and wife do not appeal.

The bank filed an amended answer alleging the property had been conveyed to Hertz and wife and that the homestead was thereby abandoned. Thereafter on motion of Zimberoff and wife they, with Hertz and wife, were substituted as plaintiffs instead of the Zimberoffs alone.

[1] After the conveyance to Hertz and wife they could have been substituted as plaintiffs or the action could have been maintained in the names of Zimberoff and wife. (Code Civ.Proc. § 385.) If there had been no substitution the Zimberoffs would have maintained the action, including proceedings on appeal, for the benefit of their grantees. Knobloch v. Associated Oil Co., 170 Cal. 144, 148 P. 938. Since the Zimberoffs remained as parties plaintiff they would have had a right to prove they had not conveyed the property, or that they retained some interest in it. The record contains no such evidence, but, upon the contrary, establishes that they have parted with all interest in the property. After the substitution was made the Zimberoffs were representing themselves alone. As to the plaintiffs Hertz the judgment is final and must be affirmed. Upon the record that is before us it appears that the Zimberoffs are not aggrieved by the judgment and that it should be affirmed as to them also.

[2–4] The bank, by its amended answer, prayed that its lien be declared superior to any claim to a homestead exemption. The judgment does not so declare. The property was subject to attachment to the extent of any excess of value above the homestead exemption. Marelli v. Keating, 208 Cal. 528, 282 P. 793; Southern Pacific Milling Co. v. Milligan, 15 Cal.2d 729, 104 P.2d 654. The judgment is uncertain in that it specifies as subject to the lien the interests that the Zimberoffs had as of the date the attachment was levied, at which time there was a right to a homestead exemption, and only the excess of value was

[1] "Now, Therefore, it is ordered, adjudged and decreed that Plaintiffs take nothing by virtue of their complaint.

"It Is Further Ordered, Adjudged and Decreed that Bank of America National Trust and Savings Association, a national banking association, has to the extent of the interest of said Plaintiff, Sam A. Zimberoff, in the real property hereinafter described, as of July 6, 1948, or subsequently acquired by said Plaintiff, Sam A. Zimberoff, and to the extent of the interest of said Plaintiffs, David M. Hertz and Reba S. Hertz, as successors to the interest of said Plaintiff, Sam A. Zimberoff, and to the extent of the interest of any other successor in interest thereof, a valid and effective lien thereon by virtue of an attachment of said real property hereinafter described, in that certain action in the Municipal Court in the City of Los Angeles, County of Los Angeles, State of California, entitled, 'Bank of America National Trust & Savings Association, a national banking association, Plaintiff, v. Sam A. Zimberoff and Harriet L. Zimberoff, Defendants,' being Action No. 874,565, said lien being for the amount prayed for in the complaint in said action, namely, $1,327.50, plus interest at 1% per month from September 15, 1949, and the costs of suit therein; and also has to the extent of the interest of Plaintiff Harriet L. Zimberoff, in the real property hereinafter described, as of July 6, 1948 or subsequently acquired, and to the extent of the interest of said Plaintiff David M. Hertz and Plaintiff Reba S. Hertz, as successors to the interest of said Plaintiff, Harriet L. Zimberoff, and to the extent of the interest of any other successor in interest thereof, a valid and effective lien thereon by virtue of an attachment of said real property hereinafter described in connection with said action, and a Writ of Execution levied on said real property hereinafter described under and by virtue of a valid and effective judgment entered therein in said action against said Harriet L. Zimberoff for the amount of $1,387.63, plus interest thereon at 7% per annum from December 14, 1949. [Description.]"

subject to attachment. However, upon the appeal of the Zimberoffs, the decree must stand as it is, without clarification or modification.

The judgment is affirmed.

VALLÉE, J., concurs.

PARKER WOOD, J., being disqualified, did not participate.

112 Cal.App.2d 530

PIKE v. RHINEHART et al.

Civ. 18873.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1952.

Rehearing Denied Aug. 28, 1952.

Hearing Denied Oct. 2, 1952.

Action by Dulcie Pike against Patricia Rhinehart, also known as Patricia Reinhart, and Seaboard Finance Company, for damages resulting from repossession by finance company of automobile sold to plaintiff by defendant Rhinehart, but as to which plaintiff had not procured transfer by endorsement of seller on certificate of ownership and registration card. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, held that evidence sustained finding that finance company did not have notice, actual or constructive of buyer's ownership at time it acquired mortgage lien for value.

Judgment affirmed.

Automobiles 🔑19

In action against seller and finance company for damages resulting from repossession of automobiles, wherein it appeared that buyer had not procured transfer from seller by endorsement on certificate of ownership and registration card, and seller had pledged vehicle to finance company for loan, evidence sustained finding that finance company did not have notice, actual or constructive, of buyer's ownership at time it extended loan. Vehicle Code § 183.

William K. Young, Los Angeles, for appellant.

Bromley, Ritter & Lindersmith, Los Angeles, for respondent.

DRAPEAU, Justice.

Back in 1945 plaintiff, Mrs. Dulcie Pike, owned a Ford automobile. Defendant, Patricia Rhinehart, owned a Buick. Mrs. Pike lived in Los Angeles; Mrs. Rhinehart lived in San Francisco.

While Mrs. Rhinehart, her husband, and her son were visiting in Los Angeles the Buick was wrecked. It was in a garage to be repaired, but was not in shape to be driven. The Rhineharts needed immediate transportation to get home to San Francisco. So they traded their Buick for Mrs. Pike's Ford, and in a day or two went home. In a short time the Buick was repaired and delivered to Mrs. Pike.

Now, let's go on with this modern tale of two cities. There was a chattel mortgage on the Buick; Mrs. Pike's title to her Ford was clear. So Mrs. Pike transferred title to the Ford by endorsing her certificate of ownership and registration card. But, unfortunately for her, she did not insist on a like transfer of the Buick to her. She just took Mrs. Rhinehart's word that four or five payments were still due on the Buick, two or three hundred dollars, and Mrs. Rhinehart's promise to make these payments. Had Mrs. Pike followed the plain provisions of the Motor Vehicle Code she would have been spared the trouble and loss which befell her.

Instead of keeping her promise and clearing title to the Buick, Mrs. Rhinehart thereafter on two occasions pledged it, with other assets, to defendant Seaboard Finance Company; first to secure a loan of $5,000 to her and her husband, and, later, when she and her husband separated, for $2,458.94 of the $5,000, which she assumed and agreed to pay.

When the $5,000 loan was made the balance due on the chattel mortgage on the Buick when it was traded was paid.

In all these transactions the pink slip followed the obligation,—from American Trust Company, who had it when the Buick was delivered to Mrs. Pike, to Seaboard, as partial security for the last two mentioned obligations. Eventually Mrs. Rhinehart defaulted on the last loan, and Seaboard took the Buick away from Mrs. Pike.

Then Mrs. Pike brought this action against Mrs. Rhinehart and Seaboard. It was adjudged in the Superior Court that she recover $1,000 damages from Mrs. Rhinehart, and that she was the owner of, and entitled to possession of the Buick upon paying to Seaboard $1,085, the balance found by the trial court to be due at the time of Seaboard's repossession.

Mrs. Rhinehart did not appeal from the judgment; Mrs. Pike and Seaboard did. The judgment was reversed by this Court, Pike v. Rhinehart, 96 Cal.App.2d 645, 647, 216 P.2d 101 for the reason, as stated in the opinion, that the determinative question as between Mrs. Pike and Seaboard was whether Seaboard acquired its mortgage lien for value and without notice, actual or constructive, of plaintiff's ownership; and that, as to this fact, the findings were insufficient and in conflict with the judgment.

The case was retried in the Superior Court on this issue. The trial court found that Seaboard had no notice, and adjudged that Seaboard owned the Buick and that Mrs. Pike had no interest in it.

From this judgment Mrs. Pike appeals.

[1] A review of the record shows that the evidence sustains the findings and the judgment. In this respect plaintiff seriously argues that Seaboard must have been on notice, because in order to secure the transfer of the certificate of ownership, the white slip, by the Motor Vehicle Department from American Trust Company to Seaboard, Seaboard furnished the Department a forged application for transfer of the white slip.

Transfer of legal title to motor vehicles is, as it necessarily must be, regulated under our law. Old rules respecting transfer of personal property give way to those set forth in the Vehicle Code. Parke v. Franciscus, 194 Cal. 284, 228 P. 435. Concededly American Trust Company was the legal owner of the Buick. It held the pink slip. Concededly Mrs. Rhinehart was the registered owner. She held the white slip, and Mrs. Pike did nothing to change it. The record is not clear as to whether the white slip remained in the Buick or was delivered to Mrs. Pike when the trade was made.

Section 183 of the Vehicle Code provides that the legal owner may assign his title or interest in or to a vehicle without the consent of, and without affecting the interest of the registered owner. When the first Seaboard loan was made, an application for a duplicate registration card was sent to the Motor Vehicle Department along with the other transfer papers. This was done by Seaboard.

Mrs. Rhinehart testified that the name signed to the application for a duplicate registration card was not her signature. But her testimony is not of much weight. First she said Seaboard had been notified of Mrs. Pike's interest in the Buick, and then she said it had not. Her name did appear upon the request to the department for a duplicate registration card. Evidently the trial court did not believe her when she said it was not her signature. This was, of course, logical, for the request for a duplicate white slip followed the pattern set by Mrs. Rhinehart herself when she pledged her friend's car to secure her own loan.

Mrs. Pike further contends: (1) that the trial court failed to find specifically that Seaboard knew or should have known that Mrs. Rhinehart did not have and was not entitled to possession of the Buick, and did not have any right, title, or interest in it; and (2) that the finding that Seaboard was not estopped was wrong.

Mrs. Pike's contention as to the court's failure to specifically find is untenable, for the reason that the judgment is sufficiently supported by other findings. Her contention as to estoppel is also untenable, for there is evidence which supports the court's finding in this respect. The existence of estoppel is a question of fact for the determination of the trial court. Parke v. Franciscus, 194 Cal. 284, 228 P. 435; Hammond Lumber Co. v. Weeks, 105 Cal.App. 315, 287 P. 573.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

112 Cal.App.2d 441

ABALIAN et al. v. TOWNSEND SOCIAL CENTER, Inc. et al.

Civ. 18765.

District Court of Appeal, Second District, Division 1, California.

July 28, 1952.

Rehearing Denied Aug. 18, 1952.

Hearing Denied Sept. 25, 1952.

Zabelle Abalian and others brought suit seeking dissolution of Townsend Social Center, Inc., a non-profit membership corporation. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., entered judgment ordering dissolution, and the defendants appealed. The District Court of Appeal, Doran, J., held, inter alia, that the evidence sustained the trial court's finding that the winding up of the Center was reasonably necessary to protect the interests of all members.

Affirmed.

1. Courts 🔑23

Parties cannot confer jurisdiction on trial court by stipulation.

2. Evidence 🔑42

It is matter of common knowledge that, for purpose of expediting trial and avoiding necessity of tedious examination, stipulations, as to matters susceptible of proof, are frequently made use of in the respect to matters of evidence.

3. Courts 🔑24

In suit for dissolution of non-profit membership corporation, where it was stipulated, on issue as to whether complaint had been brought by persons holding not less than one-third of outstanding shares, as required by law, that there had been no more than 196 valid memberships ever issued and that complaint was brought by 68 members, it could not be said that parties had thereby conferred jurisdiction on trial court by stipulation, since all that the parties did was to stipulate as to facts of membership, a matter susceptible of proof. Corporations Code, § 4650(b).

4. Evidence 🔑314(1)

In suit for dissolution of non-profit membership corporation, where parties had stipulated to fact that there was sufficient number of members involved as plaintiffs to comply with law, affidavits of certain of the named plaintiffs to effect that they were not now willing to be parties to suit were inadmissible as hearsay. Corporations Code, § 4650(b).

5. Appeal and Error 🔑1056(3)
Stipulations 🔑18(1)

In suit for dissolution of non-profit membership corporation, where parties had stipulated to fact that there was sufficient number of members involved as plaintiffs to comply with law, fact that many of plaintiffs desired to withdraw after suit had been filed would have no bearing on whether or not Court acquired jurisdiction at time suit was brought, and therefore it was not prejudicial error to reject affidavits and testimony by which defendants sought to destroy legal effect of stipulation. Corporations Code, § 4650(b); Code Civ.Proc. § 581, subd. 4.

6. Parties 🔑66

Notwithstanding statute requiring that action be brought by persons holding not less than one-third of number of outstanding shares, there was no reversible error in entitling fourth amended complaint, in suit to dissolve non-profit membership corporation, in name of only one plaintiff without repeating all of names which were set out in full in original complaint, where no one was misled by such procedure. Code Civ.Proc. § 1963, subds. 5, 6.

7. Corporations 🔑614(5)

In suit for dissolution of non-profit membership corporation, where parties had stipulated to fact that there was sufficient number of members involved as plaintiffs to comply with law, court was not required, as matter of law, to draw, from failure of plaintiffs to bring in their certificates after notice, presumption that plaintiffs did not have requisite one-third of number of outstanding shares. Corporations Code, § 4650(b); Code Civ.Proc. § 1963, subds. 5, 6.

8. Appeal and Error 🔑1010(1)

Findings and judgment of trial court will not be disturbed where there is substantial evidence in support thereof.

9. Corporations 🔑614(4)

In suit for dissolution of non-profit membership corporation, such facts were stated in complaint as to make out cause of action for dissolution on ground that winding up of corporation was reasonably necessary to protect the interests of all members, and record sustained trial court's conclusion that cause of action had been proved. Corporations Code, §§ 4650, 4651.

10. Corporations ⚷614(1)

In suit for dissolution of non-profit membership corporation, where it was evident from articles of incorporation and application for permission to issue memberships that the purpose of corporation was to acquire club building for convenience of its members and other persons interested in Old-Age Pension movement, it could not be said that trial court's finding, that winding-up of corporation was reasonably necessary to protect interests of all members, was based on evidence admitted in violation of parol evidence rule, notwithstanding defendants' contention that promise to build could not be found in articles.

11. Corporations ⚷614(1)

In suit for dissolution of non-profit membership corporation organized for purpose of acquiring club building for convenience of its members and other persons interested in Old Age Pension movement, contention that assets of corporation were charged with public trust could not be sustained. Corporations Code, §§ 9505, 9801.

12. New Trial ⚷153

Error could not be predicated upon failure of trial judge to file counter-affidavit to affidavits filed in support of defendants' motion for new trial, where no written statement objecting to hearing of such matter had been filed five days before hearing, as required by Code. Code Civ.Proc. § 170.

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Martin Korstad, Joan H. Martin, Los Angeles, for appellants.

Arthur C. Fisher, John C. Packard, Newell Barrett, Los Angeles, for respondents.

Edmund G. Brown, Atty. Gen., Edward Sumner, Dep. Atty. Gen., amicus curiae, for State.

DORAN, Justice.

The judgment herein ordered dissolution of the Los Angeles Social Center, Inc., formerly known as the Townsend Social Center, Inc., a non-profit membership corporation. Incorporated in 1945, the Articles of Incorporation recite as purposes of incorporation, the "mutual improvement of its members for social and educational purposes;" and to "acquire and maintain a clubhouse or clubrooms and to take, receive, hold and convey real and personal estate necessary for these purposes". Also enumerated as purposes are the study of "sound old age pensions", and the dissemination of information "concerning the economic, social and pension views of Dr. Townsend".

A permit, which expired in 1947, authorized the issuance of memberships at a price of $100 each. In this manner some $25,000 was raised, the money being used to pay the balance due on the purchase of three lots located on the northeast corner of Sixth Street and Bonnie Brae, in Los Angeles. The total assets of the Center, approximately $27,797.25 at the time of commencement of the action, consist of said lots, furniture and fixtures valued at $1,924, and cash on hand of approximately $800.

The Center was, according to appellants' brief, "roughly analogous to an embryonic combined Young Men and Women's Association for old people". The majority of the members are persons over 65 years of age. Accommodations for members have been provided in the Embassy Building, 517 W. Ninth Street, Los Angeles, at a rental cost of $500–550 per month.

At the oral argument on this appeal the Attorney General appeared for the State of California and as a friend of the Court, and stated: "But we reiterate we are not taking sides but are merely putting the court on notice of the provisions in the Corporations Code, secs. 9505 and 9801, specifically referring to public trusts", calling attention to the fact that "the Attorney

General is charged with the duty of supervising nonprofit organizations who hold assets charged with a public trust. It appears in this instance that the likelihood of such a trust exists". The Attorney General further stated that "under the *cy pres* doctrine, if the court finds reasons for dissolution, it may be a particular trust which for the moment goes out of existence but the trust remains. We urge the court to keep in mind under the *cy pres* doctrine we are obligated to see to it that a new trustee is appointed".

In the Fourth Amended Complaint, and supplemental Complaint, plaintiffs allege that the named plaintiffs "constitute more than one-third of the members of said corporation", and pray for the "involuntary winding up and dissolution" of the Center. As reasons for dissolution it is alleged that the directors "have been guilty of persistent mismanagement"; that "They have for a period of over three years", represented to prospective members that a height limit building "was presently to be erected" on the property owned by the Center, but that in four years no such building has been erected, and that "as a consequence the investment of these plaintiffs and other members will be lost".

It is further alleged that the directors have "adopted by-laws in conflict with the provisions of the Articles of Incorporation. Article VIII provides that "Said certificates of membership shall not be assignable or transferrable", whereas defendants have adopted a by-law, Section 4 of Article V, providing that a member "may cause his certificate of membership to be issued in the joint names of himself and his spouse or anyone of his children, or, upon the payment of a transfer fee of $5 he may cause said membership certificate to be transferred into the name of his spouse or child as the case may be". Also charged, is that the directors had issued 29 membership certificates to various Townsend Clubs and organizations in violation of the by-laws which provide that "No one shall become a member of this corporation who is not a citizen of the United States". Other violations are likewise alleged.

Liquidation of the corporation is declared "reasonably necessary to protect the rights and interest of the members", because "All interest in said certificates ceases on the death of a member"; that at least 20 members have already lost their interests by reason of death, and that since the majority are over 65 years of age, such members "are in danger of losing their interest * * * by reason of their death". It is also alleged that "The proposal plan to erect a building * * * has no chance for success", since the cost thereof is estimated at $1,000,000, and no method of financing has been proposed other than by securing gifts from the public. The complaint asks for the dissolution of the Center and that after payment of debts and obligations, "the remaining assets be divided among the members". The trial court found in favor of the plaintiffs and ordered dissolution, retaining "jurisdiction to make such further orders in connection with the winding up and dissolution of the corporation as justice and equity require".

[1–3] It is appellants' contention that the trial court did not have jurisdiction "because the requirement of California Corporations Code Section 4650(b) that an action for involuntary winding up or dissolution * * * must be brought by the holders for a period of not less than six months and who hold not less than 33⅓ per cent of the number of outstanding shares was never met". In this connection it is claimed that the trial court had determined that memberships issued to various Townsend Clubs were void, and after a "cursory examination of the books", had subtracted 20 of such memberships from an original membership of 216, and that "In subtracting these 20 memberships the Court did not go into the question of whether any of the voting members held their certificates outright, or whether the certificates were actually purchased by the club that the voting representative purported to represent".

The record discloses that, after considerable discussion between the trial judge and the attorneys in reference to memberships in the Center, and whether the complaint was brought by persons holding not less than "33⅓ percent of the number of outstanding shares", as required by California Corporations Code, Section 4650(b), hereinbefore referred to, a stipulation was entered into "that there were not more than 196 valid memberships ever issued", and "that there were in the complaint 68 valid names who were members of the organization that are on the complaint". This number was more than 33⅓% of the total memberships. The trial court then held that the burden was on the appellants "to show that they were not bonafide members".

It is appellants' contention that "Parties cannot confer jurisdiction on a trial court by stipulation", citing Adolph M. Schwartz, Inc. v. Burnett Pharmacy, 112 Cal.App. Supp. 781, 295 P. 508 and other cases. That such is the general rule in reference to jurisdiction of the subject matter cannot be doubted. However, there appears to have been no violation of this rule in the instant case. As pointed out by respondents, all that the parties did was to stipulate as to facts of membership, a matter susceptible of proof. This was done for the purpose of expediting the trial and avoiding the necessity of a tedious examination of each and every alleged membership. That such stipulations are frequently made use of in respect to matters of evidence, is common knowledge.

The correct rule, applicable to the present controversy, is found in Lewis v. Shaw, 77 Cal.App. 99, 102, 246 P. 86, 87, where the Court says: "A stipulation of facts which would state a cause of action, of course, could be made, but jurisdiction of the subject-matter of an action cannot be conferred by stipulation merely in so many words admitting jurisdiction. It would require a statement of facts, sufficient within themselves, stripped of any conclusion of law".

The trial court obviously had jurisdiction to hear a controversy of the present nature. The subject matter involved was the dissolution of the Center. Whether the alleged memberships were valid or invalid were questions of fact, and no more reason exists for the discountenancing of a stipulation relating thereto, than in the case of any other factual and evidentiary matter. Appellants, who must be deemed to have had a full and complete understanding of the corporate books and membership facts of the Center, were under no compulsion to make such a stipulation, and the trial court was justified in relying thereon. There is no merit in this contention of the appellants.

Appellants further contend that "The Court should have admitted the affidavits of 24 of the parties listed upon the complaint as plaintiffs to the effect that they had never knowingly become plaintiffs and deducted them from the total number of plaintiffs, and should have permitted the three alleged plaintiffs present in court to withdraw". After the making of the stipulation hereinbefore referred to, appellants offered the above affidavits of named plaintiffs to the effect that affiants "did not understand that an action was to be instituted to liquidate" the Center, and are "not now willing to be a party".

It is explained in appellants' brief that "The reason that these *dissals* were put in affidavit form was because, respondents' attorneys would never have consented to their being filed as regular dismissals". Relying on Section 581(4) of the Code of Civil Procedure, providing that a party may at any time, before final submission of a cause, dismiss the same, appellants urge that the trial court's failure to entertain the affidavits and to hear the three affiants who were in court, constitutes "a serious abuse of judicial discretion as well as an absolute infringement" of plaintiffs' rights, and that the "policy of the law is to discourage litigation".

[4, 5] As stated in respondents' brief, "the affidavits were clearly inadmissible as hearsay". Furthermore, "the fact that these 24 plaintiffs desired to withdraw after suit was filed has no bearing whatever on whether or not the Court acquired jurisdiction at the time suit was brought". Testimony of certain affiants present in court, to the effect that such affiants did not desire to be plaintiffs, etc., and did not knowingly hire respondents' attorneys to file the action, objected to "as not within the issues of the case here, and I think the matter is cov-

ered by the stipulation", was excluded by the trial court. Having stipulated to the fact that there were sufficient valid plaintiffs named in the complaint, appellants were apparently seeking to destroy the legal effect of such stipulation. Appellants have cited no authority for the filing of such affidavits or the giving of such testimony, and no prejudicial error is apparent.

[6] Appellants' complaint that "The failure to name 89 of the 90 plaintiffs on the original complaint in the Fourth Amended Complaint worked a voluntary dismissal as to those 89 plaintiffs", is specious rather than real, and presents no reversible error. The Fourth Amended Complaint is entitled "Zabelle Abalian, v. Townsend Social Center, Inc.", (italics added,) without repeating all the names which were set out in full in the original complaint. Certainly no one was misled by this procedure.

[7] It is further argued by appellants that "The court should have drawn the presumption as a matter of law that as plaintiffs failed to bring in their certificates after notice, they did not have the requisite one-third". Again, this contention seeks to escape the consequences of the stipulation that the complaint contained "68 valid names" out of a total membership of 196. Appellants can hardly complain of respondents' failure to produce membership certificates since the Center must have had full knowledge of its own membership. There was no showing of any "wilful suppression" of these certificates by the respondents, the basis of the presumption mentioned in Sec. 1963(5, 6), C.C.P., which appellants seek to employ. Appellants' notice to produce such original certificates gave the Center the right, if desired, to produce secondary evidence in respect thereto.

[8, 9] The appellants' complaint that "The evidence did not support the judgment", is not sustained by the record. The well known and fundamental rule of appellate review, that findings and judgment of a trial court will not be disturbed where there is substantial evidence in support thereof, must govern in the instant case. That there is conflicting evidence in favor of appellants' position in no manner changes the above rule. As in practically all actions, the trial court was confronted with the divergent views of the contending parties and evidence offered in support thereof.

Other points in appellants' brief are that "A cause of action was never stated"; that the findings of fact "were based on evidence admitted in violation of the parole evidence rule"; that the Center "is a charitable corporation and its assets are charged with a public trust"; and that the trial court "admitted prejudice and bias by failing to file counter-affidavits in reply to the affidavits in support of defendant's motion for a new trial and his order denying the motion was therefore void".

These contentions are untenable and present no cause for reversal. Such facts are stated in the complaint as to make out a cause of action for dissolution of the corporation under Sections 4650 and 4651 of the Corporations Code, on the ground that the winding up of the Center was reasonably necessary to protect the interests of all members. And, as hereinbefore pointed out, the record discloses substantial evidence to support the trial court's conclusion that this cause of action has been proven.

[10, 11] As stated in respondents' brief, it is evident from Article III(b) and (c) of the Articles of Incorporation, and the application for permission to issue memberships, that the purpose of the corporation was to acquire "a club building for the convenience of its members and other persons interested in the Old Age Pension movement". Appellants' inquiry as to "where can a promise, express or implied, to build a $500,000.00 building be found in the Social Center Articles", and the conclusion apparently drawn from that query, that the findings were "based on evidence admitted in violation of the parole evidence rule", is without merit. From the statement of the purposes of incorporation and the evidence disclosed by the record, it is to be observed that the Center was a non-profit corporation for the benefit of its members. There is nothing to indicate that the situation at hand involves anything in the nature of a public trust.

[12] In reference to the failure of the trial judge to file a counter-affidavit to the affidavits filed in support of appellants' motion for a new trial, alleging prejudice, it appears, as pointed out in respondents' brief, that "no written statement objecting to the hearing of such matter", was filed five days before the hearing, as required by Section 170 of the Code of Civil Procedure. Consequently the trial judge was under no obligation to file the counter-affidavit mentioned in said section.

No prejudicial error has been made manifest, and the findings and judgment find substantial support in the record.

The judgment is affirmed, and the attempted appeal from the order denying a new trial, is dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

WEST KEY NUMBER SYSTEM

TALLEY et al. v. NORTHERN SAN DIEGO COUNTY HOSPITAL DIST. *

Civ. 4289.

District Court of Appeal, Fourth District, California.

July 25, 1952.

Rehearing Denied Aug. 15, 1952.

Hearing Granted Sept. 18, 1952.

Action by Naomi S. Talley and Clay F. Talley against Northern San Diego County Hospital District, a corporation for damages to Naomi S. Talley as result of burns suffered while under anaesthetic administered by employees of defendant. The Trial Court, John A. Hewicker, J., entered judgment for defendant after sustaining demurrer to amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that hospital operated by district which was organized under provision of health and safety code requiring that hospital should be operated according to best interest of public health and authorizing director to fix rates to make hospital self supporting, but also authorizing borrowing of money in anticipation of estimated tax revenue and other income, was operated as governmental function in furtherance of public welfare, and was not subject to liability for negligence of its employees.

Judgment affirmed.

1. Counties 🔑208

The general rule is that a county, acting in a governmental capacity, cannot be sued.

2. States 🔑191(1.5)

The doctrine of sovereign immunity is that the state may not be sued without its consent.

3. Hospitals 🔑7

Hospital district, authorized and organized by state law, if engaged in operation of hospital in governmental activity was not liable for negligence of employees towards patients therein, but if hospital was conducted for profit, it was liable for misfeasance and nonfeasance of officers and employees within scope of their employment.

4. Hospitals 🔑8

Where patient of hospital conducted for profit, upon regaining consciousness after administering of anaesthetic, discovers injuries which were not present at time of taking anaesthetic, doctrine of res ipsa loquitur is applicable, so that proof of injury carries with it presumption of negligence, and such is the rule whether liability of hospital is ascribed to carelessness of experienced nurses or to negligence in selecting nurses who are not competent.

5. Hospitals 🔑7

The operation of a hospital is not one so traditionally regarded as commercial in nature as to compel conclusion that operation of hospital by state agency is proprietary and not governmental in character.

6. Hospitals 🔑7

Mere acceptance of fees by public hospital operated by district authorized and organized by state law, does not constitute such operation a proprietary and not governmental function. Health and Safety Code, §§ 32001, 32125.

7. Hospitals 🔑7

Hospital district, authorized and organized by virtue of provisions of state health and safety code, which directed that district should operate hospital in best interest of public health, but that it might prescribe terms upon which patients might be admitted, and should fix rates, insofar as possible, as would permit hospital to operate upon a self-supporting basis, and that district might borrow money in anticipation of estimated tax revenue and other income, was engaged in governmental function in promotion of public welfare, and was not liable for negligence of its agents which resulted in burns to patient while she was under anaesthetic. Health and Safety Code, §§ 32001, 32125.

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* Subsequent opinion 257 P.2d 22.

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David S. Casey, San Diego, for appellants.

Gray, Cary, Ames & Frye, Ward W. Waddell, Jr., San Diego, for respondent.

GRIFFIN, Justice.

A demurrer to the original complaint was sustained with leave to amend. The amended complaint follows the general allegations of the original complaint and alleges that respondent Northern San Diego County Hospital District, a corporation (hereinafter referred to as the District) was and now is a corporation organized, existing and operating under sec. 32000 et seq. of the Health and Safety Code, and under the name of Palomar Memorial Hospital; that it accepts paying patients; that appellant Naomi S. Talley was under the care of defendant Dr. L. E. Adams; that under his advice she entered the hospital as a paying patient on August 7, 1950; that while she was reduced to a state of unconsciousness by the use of an anaesthetic, respondent District, its named defendant agents, nurses, employees, and doctors, while acting within the scope of their authority, negligently allowed her body and legs to become burned by placing and allowing hot water bottles or hot material to remain against those parts; that as a result of defendants' negligence she had to submit to painful skin grafts proximately resulting in her permanent injury, damaging her to the extent of $75,000. Additional claim is made for special damages. There is no allegation that the district was operating in a proprietary capacity or that it accepted only paying patients. Respondent District appeared separately, and by general demurrer alleged that the amended complaint did not state a cause of action against it. It was sustained without leave to amend. Judgment in its favor followed, from which judgment plaintiffs appealed. Defendant Dr. Adams and the remaining defendants answered and denied generally the allegations of the complaint.

Apparently, it was and is respondent's position, as well as the court's conclusion, that respondent District is an agency of the State, exercising governmental functions under its laws, and not acting in a proprietary capacity, and as such is immune from a suit for personal injuries. Such cases as Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523; Latham v. Santa Clara County Hospital, 104 Cal.App.2d 336, 231 P.2d 513; and Davie v. Board of Regents, etc., 66 Cal.App. 693, 227 P. 243, are cited in support of the argument.

It is appellants' position that an organization acting under a grant of power from the State Legislature is not, *per se*, a State agency; that it cannot be presumed that its activities are solely governmental acts entitling it to immunity; that whenever any governmental entity acts in a proprietary field, it is liable for its acts of negligence; that the operation of a local hospital district falls within that proprietary field and is clearly distinguishable from a county hospital organized and operating under sec. 200 et seq. of the Welfare and Institutions Code. In support of these contentions they cite Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53; Yolo v. Modesto Irrigation District, 216 Cal. 274, 13 P.2d 908; Muses v. Housing Authority, 83 Cal.App.2d 489, 189 P.2d 305; People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1; Beard v. City & County of San Francisco, 79 Cal.App.2d 753, 180 P.2d 744; Henderson v. Twin Falls County, 56 Idaho 124, 50 P.2d 597, 101 A.L.R. 1151; Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510; and Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523.

[1, 2] Apparently this question has not been decided insofar as it applies to a hos-

pital district organized under sec. 32000 et seq., Health and Safety Code. The general rule that a county, acting in a governmental capacity, cannot be sued, originated in the fiction that the King can do no wrong. It arose from the practical necessity of enabling the State to exercise its governmental functions unhampered by the demands on the exchequer resulting from the carelessness or mistakes of its officers or agents in the discharge of their official duties. This doctrine has been deemed to prevail except where it has been departed from by constitutional and statutory laws, as interpreted and applied by the courts. The doctrine of sovereign immunity is that the State may not be sued without its consent. See, People v. Superior Court, 29 Cal.2d 754, 756, 178 P.2d 1, as to the history and discussion of this general question and the authorities cited.

In Green v. State, 73 Cal. 29, 11 P. 602, 14 P. 610 it was held that when the state authorizes itself to be sued, and there is no statutory or constitutional provision fixing a different liability, its measure of responsibility is to be determined by the same rule which determines the liability of one of its own citizens. But the court pointed out that the application of that measure was not to be deemed an admission of liability where the state was acting in a sovereign capacity, that is, where it was engaged in a public work for the common good, or as it might be said, in a governmental activity, as distinguished from a nonsovereign or commercial enterprise. In that case a levee commission was empowered to construct the channel of the American River for the protection of the City of Sacramento, under a legislative act which authorized the plaintiffs and others to institute actions against the State for damages occasioned by the construction. In that action it was held that the work involved was public work for the common good; that the language of the act giving consent to be sued clearly reserved any legal defense; and that a good defense then existed.

[3, 4] The primary question here is whether, in the performance of the duties under consideration, the District was exercising a business function in it proprietary capacity, as distinguished from the discharge of a governmental duty. In the case of People v. Superior Court, supra, after discussing Denning v. State, 123 Cal. 316, 55 P. 1000; Chapman v. State, 104 Cal. 690, 38 P. 457; and Melvin v. State, 121 Cal. 16, 53 P. 416, the court distinguished between governmental and nongovernmental functions and said [29 Cal.2d 754, 178 P.2d 5]:

> "* * * the decisions in this state do not foreclose, but seem to favor the proposition that sovereign liability exists for negligence in the state operation of an industrial or business enterprise"; and concluded "that the business of transportation for hire is usually undertaken by private individuals or corporations and not by government, support the conclusion that the operation of the railroad is not in the exercise of a governmental function, but constitutes a commercial or business enterprise in the negligent operation of which the state may be held liable." In that case it was alleged that the state was "acting in a proprietary capacity".

In Griffin v. County of Colusa, 44 Cal. App.2d 915, 113 P.2d 270, it was held that the operation of a county hospital is a governmental activity and the county is not liable for negligence of employees towards patients therein; that counties are state agencies and in the absence of specific statute imposing liability upon them they are no more liable than the state itself.

In Sherbourne v. Yuba County, 21 Cal. 113, it was held that private corporations and municipal corporations may be liable for the acts of their employees of whom they have the appointment and supervision, and when the duty to be performed is for the benefit of the corporation.

13 Cal.Jur. p. 772, sec. 9, states that "a charitable institution, whether public or private, is not liable to persons under its care for injuries caused by the negligence of its servants in administering the charity, if the institution has used due care in the selection of the servants." It was said that this rule was based upon the implied contract by which a person who accepts the

benefits of a charity exempts his benefactor from liability. "But where the corporation is conducted for profit, whether private or municipal, it is liable for the misfeasance and nonfeasance of its officers and employees within the scope of their employment"; that "where a patient, upon regaining conciousness after administration of an anaesthetic, discovers injuries of which he was free at the time of taking the anaesthetic, the doctrine of res ipsa loquitur applies so that proof of the injury carries with it the presumption of negligence. This is the rule whether the liability of the hospital is ascribed to the carelessness of experienced nurses or to negligence in selecting nurses who are not competent."

In Paso Robles, etc., Hospital District v. Negley, 29 Cal.2d 203, 173 P.2d 813, it was held that the legislature may authorize a public corporation to build and operate a hospital as a business and such hospital serves a "public use"; that the tax imposed for such use is a tax for a public purpose; and that a levy made for building and maintaining the hospital in that district is a general tax on all the property in the district and not a special assessment.

In Beard v. City and County of San Francisco, 79 Cal.App.2d 753, 180 P.2d 744, an action against a consolidated city and county, it was held that an allegation in the complaint that a child was received as a paying patient in a city and county hospital, was a sufficient statement that the hospital was not operated for indigent patients alone under the general state law.

In Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510, this court held that a county hospital may admit patients who may pay the cost or a proportionate share of the cost (without profit) when they are not financially able to secure hospitalization in a private institution; that under such circumstances the care of such patient promotes the public health and welfare of the community in which he lives; that the promotion of the public health and general welfare of the citizens of the county falls within the police powers granted for counties within sec. 11, Article XI of the California Constitution. But the admission to and treatment in a county hospital of patients who, either themselves or through legally responsible relatives, can provide themselves with equally efficient care and treatment in private institutions does not promote the health and general welfare of the citizens of the county and is not a proper exercise of the police power of that county, but results in the use of public money for private purposes.

Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523, held that where there is no private general hospital in the vicinity of a county general hospital, it is proper for the county to furnish service, insofar as its facilities permit, to persons who may otherwise be unable to get hospitalization without what may be fatal inconvenience or delay, even though they are able to pay full rates, and while a county is not authorized to operate such a hospital for profit, such persons should be compelled to pay as much of the actual cost of hospitalization as they can; and the admission of such persons to a county hospital under such circumstances and upon such terms promotes the health and general welfare of the citizens and is within the police powers of the board of supervisors, and such powers, so exercised, are *governmental* in their character.

Can it here be said that the District was conducted for the sole purpose of making a profit, was not charitable in character, was not organized for the promotion of the public health and general welfare of the citizens of the District, and did not possess the attributes essentially necessary to bring it within the classification of a governmental function? We think not.

In Davie v. Board of Regents, etc., 66 Cal.App. 693, 227 P. 243, 245, it was held that the maintenance by the Board of Regents of the University of California of an infirmary for the sole purpose of safeguarding and protecting the health of the student body constitutes the exercise of a duty involving governmental functions in the highest degree and, it being in no sense an organization for profit, the imposition upon each student of a small infirmary fee did not convert such governmental function into a proprietary one so as to render the Board of Regents liable in damages for the negligent acts of its agents and servants in the operation of the infirmary. In that case it was contended by appellant, as it is here, that the corporation had a dual character—governmental and also proprietary and private—and while acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations, and he endeavored to invoke the application in his favor of the rule established by the decisions of this state, that a municipal corporation is liable for torts of its agents committed in the performance of activities or functions purely private or proprietary in their nature. There, respondent contended that the pleadings show, on their face, that the infirmary was maintained as a part of the University of California, operated only in connection with the educational functions thereof, and this being so, it was not liable for the torts of its agents committed in connection therewith. It was further contended there, as here, as a matter of law, that the distinction in actions of this character between governmental and proprietary functions is limited in its application to municipal corporations, and does not extend to state agencies, such as counties, school districts, road districts, and The Regents of the University of California, and that this distinction between torts committed in the course of the exercise of public and governmental functions on the one hand, and of private and proprietary activities on the other, has never been applied to any but municipal corporations; for which reason it claims that the rule involved has no application to the instant case. After discussing the first proposition the court said:

> "In its governmental or public character the corporation is made by the state one of its instruments or the local depositary of certain limited and prescribed political powers, to be exercised for the public good. But in its proprietary or private character the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but rather for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers and to property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded as private in character."

The court then discusses the question of the maintenance of a hospital by a municipality and concluded:

> "* * * that in the absence of statutory provision to the contrary a hospital created and existing for purely governmental purposes and under the control of the municipality or state is not liable for injuries to a patient caused by the negligence or misconduct of its employees, although a statute, as here, may declare it to be a corporation which may sue and be sued. The maintenance of such hospitals is held to be *for the public welfare and the advancement of public health,* and in the operation thereof municipalities or the state exercise governmental or political functions." (Italics ours.)

The court then cites with approval Browder v. City of Henderson, 182 Ky. 771, 207 S.W. 479 where it is said that the power or even the duty on the part of a municipal corporation to make provision for the public health and for the care of the sick appertains to it in its governmental or public capacity, and that no element of safety is more important than those pertaining to public health; and accordingly it is there held that where a city establishes a hospital it is not responsible to persons injured by reason of the misconduct of its agents or employees. It further stated that a review of the authorities of other states generally showed they held that the maintenance of a hospital by a municipality is a governmental function, and that in the conduct thereof the municipality is not liable for the tortious acts of its employees. It then held that from the complaint in that action it affirmatively appeared that the infirmary in question was conducted by the defendant corporation for the exclusive use of the students, and that it was so conducted by it for the sole purpose of safeguarding and protecting the health of the student body;

that this being so, it in no sense was an organization for profit, and the imposition of the small fee did not convert this governmental function into a proprietary one; and that "the promotion and welfare of the students in this respect must be held to be the exercise of a duty involving governmental functions in the highest degree."

[5] In all the principal California cases relied upon by appellant, except the Beard case, the activity in question was inherently of a business and commercial nature. They involved situations in which the state, through its agency, was encroaching upon fields that have always and traditionally been regarded as commercial in nature. The operation of a hospital it not necessarily such a field. An irrigation district, insofar as it conducts only the business ordinarily proper to an irrigation district, even though it charges for the water, is a state agency and operates and owns its property in a governmental capacity. It is true that if it engages in the business as a public utility, particularly if it does so outside of its own boundaries and in competition with other public utilities, it does so in a proprietary capacity and becomes, as to matters relating to such business, liable for personal injuries resulting from torts of its employees. Yolo v. Modesto Irrigation District, 216 Cal. 274, 13 P.2d 908.

[6] Since 1947, county hospitals have been specifically authorized by statute to charge fees. Welfare and Institutions, Code sec. 203.5. It has been held that the imposition of a charge for service is not inconsistent with the exercise of a governmental function and that this does not, in itself, constitute any engagement in the hospital business on a proprietary basis. Latham v. Santa Clara County Hospital, 104 Cal.App.2d 336, 231 P.2d 513. Hence, any argument from the mere fact that local hospital districts are also authorized to charge fees is not necessarily controlling. By the terms of the act, added by Stats. of 1945, chap. 932, provision is made for the formation of a "local hospital district". The real purpose of the act was to make provision in a territory of a county or portion of the state where other hospital facilities were not accessible to the people in the district, for adequate hospitalization for the general welfare and health of the people in that vicinity. The method of formation of the district and election of officers to conduct its affairs are similar to that of an irrigation district, and it has been uniformly held that an irrigation district is a governmental agency, within the meaning of the rule that such agencies are not liable for tort, so long as it operates only as an irrigation district. Nissen v. Cordua Irrigation District, 204 Cal. 542, 269 P. 171; Whiteman v. Anderson-Cottonwood Irr. Dist., 60 Cal.App. 234, 212 P. 706.

[7] Section 32125 of the Health and Safety Code provides that the hospital shall be operated according to the best interests of the "public health" and the directors "may prescribe the terms upon which patients may be admitted thereto" and shall fix such rates, insofar as possible, as will permit the hospital to be operated upon a self-supporting basis and may borrow money in anticipation of the estimated tax revenue and other income.

The operation of a public hospital, by a district authorized and organized by state law, involving as it does the public health, necessarily and traditionally stands on a different footing from activities that have been traditionally commercial in their nature. It is apparent that the statute does not authorize or contemplate operation at a profit but to the contrary directs that the district shall operate it in the best interests of the public health, merely attempting to keep its losses as low as it can. The primary purpose of the statute is obviously to fulfill the function of protecting the health of the citizens of California by furnishing hospital services in areas where hospital facilities are for some reason not adequate, especially in those rural districts where hospitals cannot be maintained without extraordinary governmental support. It is apparent that this act was a "welfare act". There is no indication that the formation of such a district was for the purpose of competing with industry or labor or with any other hospital. We think it is clear from the statutes regulating local hospital districts that it was intended that such hospitals be operated only in a governmental capacity.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

GROVES v. CITY OF LOS ANGELES et al. *

Civ. 18761.

District Court of Appeal, Second District, Division 3, California.

Aug. 8, 1952.

Hearing Granted Oct. 7, 1952.

Action by Ralph H. Groves against the City of Los Angeles, etc., and others, to enjoin enforcement of municipal code provision imposing on occupational license tax on bail bondsmen. The Superior Court of Los Angeles County, John Gee Clark, J., rendered judgment granting an injunction, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that such occupational license tax was a tax on insurance companies in violation of Constitution, article 13, section 14⅘.

Judgment affirmed.

Insurance ⚷4

Occupational license tax imposed by city upon bail bondsmen and measured by their gross receipts, less amount paid by them to insurance companies they represent, is a tax on insurance companies in violation of constitutional provision that state tax on insurance companies based upon income from business done within the state shall be in lieu of all other taxes and licenses upon such insurers and their property, though bail agents, having agreed to pay insurer specified per cent of face amount of each bond sold plus one per cent thereof for a reserve fund and to indemnity insurer in event of any loss or forfeiture, may sell bonds for any price less than 10 per cent of face amount thereof. Insurance Code, §§ 1800, 1802; Const. art. 13, § 14⅘.

Ray L. Chesebro, City Atty., John L. Flynn, Asst. City Atty., W. L. Weber, Deputy City Atty., Los Angeles, for appellants.

G. Reveile Harrison, Los Angeles, and Thomas B. Sawyer, San Pedro, for respondent.

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., for John R. Maloney, Insurance Commissioner of the State of California, as Amicus Curiae in support of respondent.

Latham & Watkins, Los Angeles, for National Automobile and Casualty Company and others as Amici Curiae.

SHINN, Presiding Justice.

Defendants appeal from a judgment permanently enjoining them from enforcing § 21.80 of the Los Angeles Municipal Code which imposes an occupational tax on bail bondsmen. The case was before us upon an appeal by plaintiff from a judgment after demurrer sustained without leave to amend. 93 Cal.App.2d 17, 208 P.2d 254. In our former opinion the allegations of the complaint and the pertinent constitutional and legislative enactments were fully stated. The injunction issued after trial on the theory that the Municipal Code section was in violation of Art. XIII, § 14⅘ of the Constitution which provides that the state tax on insurance companies, based upon all income from business done in this state (with certain exceptions) "* * * is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property * * *." The trial court was guided by the decision in Hughes v. Los Angeles, 168 Cal. 764, 145 P. 94, which held that a city license tax imposed upon insurance company agents was a tax on the right of the companies to do business in the state and was barred by the above constitutional provision.

The question presented by this appeal is whether a license tax levied upon bail bondsmen and measured by their gross receipts less the amount paid by them to the insurance companies they represent, is a tax on the insurance companies.

Plaintiff Groves is a bail agent employed by the Associated Bond & Insurance Agency. Associated has an agreement with the National Automobile Casualty & Insurance Company providing for sale of bail bonds by National Auto to the Associated at an agreed percent of face value for the purpose of resale to the public. The agreement between National Auto and Associated also provides for the deposit of collateral by Associated and that Associated is to indemnify National Auto in the event a loss or forfeiture occurs. Plaintiff's agreement with Associated provides for the deposit with Associated of a fixed amount in addition to the price of the bond with each purchase of a bond which sum is to be held by Associated to protect itself against losses, and the agreement further provides that plaintiff shall indemnify Associated for any and all losses. Plaintiff was allowed to sell the bonds for any price he desired less than a maximum of ten percent of the face amount of the bond. When a bond is issued plaintiff pays 1.6 percent of the face amount of the bond to Associated which, in turn, remits .5 percent to National Auto. In addition, plaintiff pays to Associated for a reserve fund 1 percent of the face amount of each bond sold. The remainder of the bond fee charged is retained by plaintiff. Plaintiff was licensed as a bail agent by the State Insurance Commissioner.

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* Subsequent opinion 256 P.2d 309.

The city says that in issuing a bond the plaintiff acts in a "bifurcated capacity," and that as to the portion of each charge for a bond that is due the insurance company he is its agent, and that as to the remainder he is in an "independent business." The license tax, it is said, is upon this independent business and not against the company, within the meaning of the constitutional limitation. The substance of the argument appears to be that the excess of the charge to the customer above the amount due the company is for the service of the agent, based largely upon his responsibility for losses, and that the transaction in this respect is no part of the business of the company. The argument ignores the fact that the methods of representation of the insurer in the issuance of bonds are mere incidents in the carrying on of the company's business, which are appropriate, if not necessary to a successful operation.

Section 1800 of the Insurance Code provides: "An insurer shall not execute an undertaking of bail except by and through a person holding a bail license * * *. A person shall not in this State solicit or negotiate in respect to execution or delivery of an undertaking of bail or bail bond by an insurer, or execute or deliver such an undertaking of bail or bail bond unless licensed * * *." Section 1802 of the Insurance Code provides: "A bail agent's license by its terms permits the licensee to solicit, negotiate, and effect undertakings of bail on behalf of the insurer therein designated while there is in effect an unrevoked document filed pursuant to subdivision (b). Such license shall not be issued unless and until there is filed with the commissioner: (a) A document executed by the insurer, stating that upon the issue of the license the licensee therein named is authorized to execute undertakings of bail in the county therein designated, and to solicit, and negotiate such undertakings on its behalf, until it files with the commissioner a notice of revocation of the agent's authority. (b) A bond having an admitted surety insurer as surety thereon in the penal sum of $1,000, conditioned upon the proper application and disposal of all moneys collected or received by the bail agent, his solicitors licensed pursuant to his appointment, and his employees, in favor of the people of the State of California."

Due to the peculiar and hazardous nature of the bail bond business the practice has grown up of requiring general agents and subagents to guarantee the undertakings of the insured, fortified by the deposit of collateral. The liability on the bond is that of the insurer. It is all an integral part of the business of the company and the nature of it is not altered by calling the issuance of a bond a sale to the agent or subagent or by saying that the agent is an independent contractor in his dealings with his customer. The city ordinance purports to exact a license from the agent, as such. It is immaterial that the agent and not the company is required to pay the tax or that it is not based in part upon the sums that are payable to the company by the agent.

We think the court correctly applied the reasoning and conclusions of the court in Hughes v. Los Angeles, 168 Cal. 764, 765, 145 P. 94, 95, where it is said: "The distinction sought to be drawn in this case is that this particular license fee is not imposed upon the companies but upon the agents of the companies. This is true, but upon the other hand it is equally true that every insurance corporation must act through agents and can act only through agents, and that, therefore, in a direct and immediate sense a tax upon such agents for the right to do business is a tax upon the corporation's right to do business. The agents of corporations are the means whereby the corporations live and in opposition to a tax upon their agents the corporations may well be heard to voice Shylock's expostulation: 'You take my house when you do take the prop That doth sustain my house; you take my life When you do take the means whereby I live.' * * * It follows, therefore, that the imposition of this occupation tax upon the agents of insurance corporations does violation to article 13, section 14, of the Constitution of this state, and may not be enforced."

It is asserted in the opening brief of the city that the court made a finding that the total amount collected by the agent from his customer constitutes the premium charged by the company, and that if this were true the license tax would be invalid. It is then argued at length that this was an incorrect finding. As a consequence of this argument an amicus brief has been filed by the Insurance Commissioner in which he refutes the argument of the city. Another brief has been filed on behalf of several insurance companies in reply to the contentions of the Insurance Commissioner, wherein it is stated that the questions discussed by the city and the Insurance Commissioner are in issue in other pending cases.

The fact is that the court made no such finding. It appears from plaintiffs' brief that the court stated in a memorandum decision that it considered the entire amounts collected from the customers to be premiums charged by the company, but that in a conference prior to the signing of findings the court held that the question was not in issue. This statement in plaintiffs' brief is not questioned. The theory advanced by the Insurance Commissioner is foreign to the issues tried and determined in the court below. The question as to what constitutes premiums or income to the insurer is not before us and is irrelevant to the point we have decided, namely, that the tax, although not upon tangible property of the insurer, is upon its right to do business, and that the ordinance, in that respect, and the tax are void.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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112 Cal.App.2d 648

PEOPLE v. PAYTON.

Cr. 4786.

District Court of Appeal, Second District,
Division 1, California.
Aug. 11, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Edwin L. Jefferson, J., of issuing checks without sufficient funds, and he appealed. The District Court of Appeal, Doran, J., held that the evidence sustained the conviction.

Affirmed.

1. False Pretenses ⇨5

The intent to defraud is the gist of the offense of issuing checks without sufficient funds.

2. False Pretenses ⇨49(3)

Evidence sustained conviction for issuing checks without sufficient funds.

◆

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment. Defendant was charged by information in two counts with issuing checks without sufficient funds. It was also alleged that defendant had been convicted twice before of a similar offense and had served a term therefor in the state prison.

The trial was by the court without a jury. The issue was by stipulation submitted on the preliminary examination transcript. The defendant admitted the two priors and the confinement in the state prison. Defendant was adjudged guilty as charged.

The witness Gloria Moore, a cosmetic buyer for a drug company, cashed one of the checks. The witness testified,

> "A. I questioned the check before I cashed it because I couldn't read the signature.
>
> "Q. You didn't believe the check was any good, is that right? A. No, I didn't think so.
>
> "Q. You didn't believe it was any good? A. No, I didn't."

The other witness, Fay Henderson, a clerk in a retail store, testified with regard to the other check.

> "A. I don't remember as it was put through the bank because I spoke to the manager who O. K.'d it. I refused to cash the check myself. I sent him to the manager.
>
> "Q. And he O. K.'d it? A. After the manager O. K.'d it, I have nothing to do but do as he says.
>
> "Q. And you cashed it? A. I cashed it."

It is contended on appeal that "the evidence is insufficient to sustain the judgment". It is argued in support thereof that the element of fraud is lacking. That, "Fraud implies a promise on a material matter relied upon by the person who is being defrauded and who has a right to rely upon the misrepresentation. In the present case there was reliance by the persons defrauded but obviously they had no right to rely upon the implied representation that the check was good."

[1, 2] Appellant's contention and argument lack support in the record and in the law. As pointed out by respondent, "The intent to defraud, which admittedly is the gist of the offense, must in most cases if not in all cases, be proven by the circumstances surrounding the transaction in question. From the evidence adduced by the People, the trial court was justified in drawing the inference that the appellant intended to defraud the witness Moore and witness Henderson when he drew his checks on the dates in question and gave them to the two women with knowledge that he did not have sufficient funds in the bank."

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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112 Cal.App.2d 616

PEOPLE v. FOREMAN.

Cr. 4821.

District Court of Appeal, Second District,
Division 3, California.
Aug. 8, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Ellsworth Meyer, J., of keeping or occupying a place with paraphernalia to record or register a bet and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to sustain conviction.

Reversed for a new trial.

1. Criminal Law 🔑317

Where no attempt was made by the prosecution to show effect of evidence which would have allegedly established defendant's guilt, it must be presumed that the evidence on that point would have been adverse to the claim.

2. Criminal Law 🔑1159(2)

Where insufficiency of evidence is the only ground advanced for reversal of conviction contention is sustainable only, if record shows that on no hypothesis, is there evidence sufficient to support the judgment.

3. Criminal Law ⚷562

To sustain a conviction there must be some rational connection between the evidence and the inference of guilt.

4. Gaming ⚷75(1)

To sustain a conviction under a subsection penalizing the keeping or occupying a place with papers for the purpose of recording a bet, person charged must keep or occupy the room, the room must contain specified paraphernalia, and the occupancy and paraphernalia must be for the purpose of recording or registering bets. Pen.Code, § 337a, subd. 2.

5. Gaming ⚷75(1)

Where though evidence was sufficient to establish that room was occupied to record bets, evidence that defendant so occupied it was lacking, evidence was insufficient to sustain conviction for violation of a subsection penalizing the keeping or occupying a place with paraphernalia to record or register bets. Pen.Code, § 337a, subd. 2.

6. Criminal Law ⚷560

Conviction cannot be rested on evidence which merely creates a suspicion of defendant's guilt.

◆

John J. Bradley and Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Dep. Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was charged by information with violation of subsections 1, 2, 3 and 4 of Penal Code, § 337a. Before trial, on motion of defendant, the counts as to subsection 1 (bookmaking) and 3 (receiving, holding, or forwarding money or memoranda referring to money bet) were dismissed on motion for insufficiency of evidence under section 995, Penal Code. The cause was submitted on the transcript of the preliminary hearing, neither party offering witnesses. Defendant was found not guilty of violation of subsection 4 (recording or registering a bet) but was found guilty of violating subsection 2 (keeping or occupying a place with papers or paraphernalia for the purpose of recording or registering a bet). Probation was granted and defendant appeals from the order denying his motion for a new trial.

Stating the evidence most strongly in favor of the judgment of conviction the record shows: Defendant was arrested June 13, 1951, by Deputy Sheriff Lelong at the Paddock Cafe on Florence Avenue in Los Angeles. At the time of arrest defendant was at the bar in the main room of the cafe. The building contains a rear room separated by a locked door from the main room. Search of defendant's person by the deputy disclosed four slips of paper bearing names and numerals in decimal form opposite each name, a blank scratch pad of the same kind of paper, two pencils and three jackets for nickels, dimes and pennies. When asked for a key to the back room defendant denied he had one but further search revealed two sets of keys and a key on one set opened the door to the back room. Defendant stated that the key belonged to the janitor, he had only borrowed it to go to the back room to telephone his wife. There was a telephone in the main room. Lelong and defendant entered the back room and there the deputy took a sheaf of 31 slips of paper from a cardboard box. These slips were betting markers, having recorded thereon initials or nicknames of bettors, names or symbols for horses, and figures indicating bets for win, place and show. None of the horses listed was running June 13, 1951. Deputy Lelong asked defendant if any of the slips were in his handwriting and defendant replied in the negative.

Albert Leacock was also a witness at the preliminary hearing but testified to nothing that happened on June 13th nor to anything connected with a violation of section 337a (2). Furthermore, Leacock's testimony was so equivocal as to result in the dismissal of the charges under subsections 337a(1) and (3). Leacock had sworn out a complaint stating he had once given defendant a $2 bet but while testifying repeatedly stated he made a bet with another person who looked like defendant. After persistent pressure by the deputy district attorney Leacock said he placed a $2 losing bet with defendant sometime in 1951.

[1] No attempt was made at the trial to show similarity of handwriting between that of defendant and that on the betting markers found in the back room. It must therefore be presumed that evidence on that point would have been adverse to a claim of identity or similarity.

[2–3] Insufficiency of the evidence is the only ground advanced for reversal, which is sustainable only if the record shows that on no hypothesis is there evidence sufficient to support the judgment. People v. Gutierrez, 35 Cal.2d 721, 727, 221 P.2d 22. However, there must be some rational connection between the evidence presented and the inference of guilt. In considering the record of this case, a salient factor is the acquittal of the charge of recording bets and the dismissal for lack of evidence of the charges of bookmaking and receiving, holding or forwarding money or memoranda. The legislature has carved § 337a, Penal Code, into many subsections and has with great specificity set out the acts constituting a violation of the various subsections. The case of the People must stand or fall on the evidence pertaining only to the acts specified in subsection 2.

[4] Violation of section 337a(2) is committed by "[E]very person, * * * 2. Who * * * keeps or occupies * * * any room * * * of any kind, or any part thereof with a book or books, paper or papers, apparatus, devise or paraphernalia, for the purpose of recording or registering any bet or bets * * *." even though the act denounced occurs only once. It is essential that the person charged (1) keep or occupy the room, (2) that the room contain specified paraphernalia, (3) and that the occupancy and paraphernalia are for the purpose of recording or registering bets. People v. Woods, 35 Cal.2d 504, 508, 218 P.2d 981.

In People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707, a judgment of conviction under 337a(2) was reversed where the evidence showed the room was kept by defendant and betting paraphernalia was present but there was no admissible evidence to connect defendant with the paraphernalia and thus show the third element—the purpose of the occupancy.

In People v. Simon, 66 Cal.App.2d 860, 153 P.2d 420, a judgment of conviction under 337a(2) was reversed where there was proof that defendant occupied the room and that there was paraphernalia there, but once again no proof that defendant's occupancy had anything to do with the paraphernalia.

[5] Although it is readily apparent that the evidence in this case is sufficient to establish that the room was occupied for the purpose of recording bets, the evidence that defendant so occupied it is lacking. True, defendant did have a key and that would clearly indicate that he intended at some time to enter the room. But evidence that defendant occupied the room for purposes of recording bets, the necessary element which was missing in the Rabalete and Simon cases, is conspicuous here by its absence. The only items in defendant's possession connected with betting paraphernalia were the "owe" sheets which are commonly used to pay bets or make collections but not to "record or register bets." The betting markers in the room were not in defendant's handwriting and were not for races run on June 13th. As we view the evidence it shows only that the back room had been occupied by someone at some time prior to the date of arrest for the purpose of recording bets. It does not show the room was so occupied that day. It does not show that defendant had ever been in the room, that he had any belongings in it, or that any writing in the room was his. He was not guilty of bookmaking or receiving a bet. He was acquitted of registering bets and therefore was acquitted of acts which would have aided and abetted the person or persons who had registered bets upon the markers that were found in the room. And as to these there was no evidence as to when or where they had been registered.

In all the cases cited by the People to uphold the judgment there was evidence of paraphernalia for recording bets on races run or to be run the day of the arrest. In all of such cases the defendant was either in the room, or was seen coming out of the only exit to the room and had a key to it. These elements were present even in People v. Rabalete, supra, 28 Cal.App.2d 480, 82 P.2d 707 and People v. Simon, supra, 66 Cal.App.2d 860, 153 P.2d 420. It is clear that there was insufficient evidence on which to base a conviction of "occupying a room with betting paraphernalia for the purpose of recording bets." The reasonable inference that defendant had something to do with bookmaking as evidenced by his possession of "owe" sheets does not supply the many missing evidentiary links to make out a violation of 337a(2). The legislature has not seen fit to make possession of "owe" sheets a crime.

[6] The laws are the same for persons accused of bookmaking as for those accused of other offenses. The fact that bookmaking is a prevalent evil does not justify the conviction of an alleged bookmaker upon evidence which, if addressed to some other charge, would arouse only suspicion.

The order denying a new trial is reversed for a new trial.

PARKER WOOD and VALLÉE, JJ., concur.

* * *

112 Cal.App.2d 626

Ex parte ROBINSON.

Cr. 2360.

District Court of Appeal, Third District, California.

Aug. 8, 1952.

Hearing Denied Sept. 4, 1952.

Habeas corpus proceeding to require warden of state prison to allow petitioner to forward to District Court of Appeal a petition for writ of mandate. The District Court of Appeal, Schottky, J. pro tem., held that petitioner had right to present such petition to court and that interference with that right unlawfully restrained his liberty and entitled him to writ of habeas corpus.

Writ granted.

1. Criminal Law ⚷997

A motion to vacate judgment in a criminal case upon grounds which make such motion equivalent of proceeding in nature of writ of error coram nobis must be regarded as part of proceedings in the criminal case, and not a civil proceeding.

2. Convicts ⚷6

Although state may suspend civil rights of prisoner in state prison insofar as concerns right to file ordinary civil action, it may not deny prisoner the right to file petition relating to judgment of conviction under which he is imprisoned. Pen.Code, § 2600.

3. Convicts ⚷6

Whether prisoner's petition for writ of mandate addressed to District Court of Appeal entitled him to relief sought, or whether he was entitled to seek it, were questions to be decided by the court alone, and not by any prison official or by the adult authority.

4. Habeas Corpus ⚷25(1)

A person may be unlawfully restrained of liberty so as to be entitled to writ of habeas corpus, when, though lawfully in custody, he is denied some right to which, even in confinement, he is entitled, deprivation of which makes imprisonment more onerous, or curtails his freedom to greater extent, than law allows.

5. Habeas Corpus ⚷25(1)

Warden's refusal to allow prisoner to forward to District Court of Appeal petition for writ of mandate relating to judgment of conviction under which he was imprisoned, unlawfully restrained prisoner's liberty and entitled him to writ of habeas corpus.

George W. Robinson, in pro. per.

Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

George W. Robinson, an inmate of Folsom State Prison, has filed in this Court a petition for the issuance of a writ of habeas corpus, alleging that he is illegally restrained of his liberty by the warden of said prison in that the said warden refuses to allow him to forward for filing a petition for a writ of mandate addressed to the District Court of Appeal for the First Appellate District, but instead has referred said petition for writ of mandate to the Adult Authority of the State of California for a determination as to whether the petitioner's civil rights should first be restored.

Respondent has filed an answer and return, and it appears from the record that petitioner has been convicted of and is serving sentences on five counts of forgery. The conviction was in the Superior Court of Alameda County and the judgments were affirmed in People v. Robinson, 102 Cal. App.2d 800, 228 P.2d 583. In the petition which he entitled "Petition for Writ of Mandate" petitioner seeks to have the District Court of Appeal of the First District direct the Judge of the Superior Court to forward the original checks used as evidence against him in the criminal case to the United States Identification Bureau for examination as to handwriting. The Adult Authority refused to restore petitioner's civil rights and refused to allow him to forward his so-called petition for writ of mandate to the District Court of Appeal for filing.

Respondent contends that his action was not an infringement of petitioner's rights because: 1. The petition for habeas corpus does not lie in such a case; and, 2. Section 2600 of the Penal Code suspends the civil rights of felons.

Respondent argues that the demand of the right of access to a court in a civil action or controversy does not render a prisoner's detention under a valid judgment and commitment illegal and that neither he as Warden "nor the authorities of the State of California have deprived petitioner of some right" to which he is "lawfully entitled under the Constitution or laws of this State or of the United States, the deprivation of which serves to make his imprisonment more onerous than the law allows."

[1] The gist of respondent's argument is that the petition for a writ of mandate which petitioner sought to file was a civil action, and that, because his civil rights had been suspended by reason of section 2600 of the Penal Code, he was not entitled to file same. However the designation by the petitioner of his petition addressed to the First District Court of Appeal as a petition for writ of mandate is not the determining factor in deciding whether he was entitled to file same. Said petition must be judged by its contents rather than its caption and in it petitioner was seeking some action or relief relating to his conviction of the offense for which he was imprisoned. In In re Paiva, 31 Cal.2d 503, at page 510, 190 P.2d 604, at page 609, our Supreme Court said:

> "It follows that in California, whatever be the character of the proceeding when regarded as an entity in itself, and regardless of its character insofar as concerns the burden of proof and rules of procedure generally, a motion to vacate a judgment in a criminal case upon grounds which make such motion the equivalent of a proceeding in the nature of a writ of error coram nobis, must be regarded as a part of the proceedings in the criminal case; * * *."

In Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034, it was held that a regulation made by a warden of a state's prison that all legal documents in habeas corpus proceedings by inmates must first be submitted to the Institutional Welfare Office and, if favorably acted upon there, referred to the legal investigator for the Parole Board who, if deeming the documents submitted to be properly drawn, will direct them to the court designated, or, otherwise, will refer them back to the inmate, is invalid in so far as it abridges the right of an inmate of the prison to apply to a Federal court for a writ of habeas corpus. The United States Supreme Court said 312 U.S. 546, 61 S.Ct. 642, 85 L.Ed. at page 1036,

> "The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that

> court alone to determine. [Citing cases.]”

[2, 3] We believe that the reasoning of the Hull case is applicable to the instant proceeding and that where, as here, a prisoner addresses a petition relating to the judgment of conviction under which he is imprisoned to a court, he is entitled to have that petition filed in said court, and any regulation which is interpreted to prevent such filing is invalid. The determination of the character of the petition, the relief, if any, to be granted, and the right of the prisoner to file it, are questions for the court alone to decide.

While the State may, pursuant to Section 2600 of the Penal Code, suspend the civil rights of a prisoner imprisoned in a state prison insofar as the right to file ordinary civil actions is concerned, yet the State has no power to deny a person the right to file in any court a petition or other document which purports to seek some remedy or relief relating to the offense for which he was imprisoned. The question of whether or not the prisoner is entitled to the relief sought, or even whether he is entitled to seek it, are questions which cannot be decided by any prison official or by the Adult Authority, but can and must be decided by the court alone.

[4] In In re Rider, 50 Cal.App. 797, at page 801, 195 P. 965, at page 966, the court said:

> “We think that a person may be said to be unlawfully ‘restrained of his liberty,’ so as to be entitled to the writ of habeas corpus, when, though lawfully in custody, he is deprived of some right to which, even in his confinement, he is lawfully entitled under the Constitution or laws of this state or the United States, the deprivation whereof serves to make his imprisonment more onerous than the law allows, or curtails, to a greater extent than the law permits even in his confinement, his freedom to go when and where he likes. In Commonwealth v. Ridgway, 2 Ashm. (Pa.) 247, it was said that, whenever a person is deprived of the privilege of going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint be illegal and wrongful, and that whether it be exercised by a jailer, constable, or private individual.”

[5] We conclude, therefore, that the petitioner had the right to have his so-called Petition for Writ of Mandate forwarded to the District Court of Appeal for filing and that any interference with that right to that extent unlawfully restrained him of his liberty and entitles him to the writ of habeas corpus.

Let the writ issue requiring the Warden of Folsom State Prison to permit petitioner to forward his said Petition for a Writ of Mandate to the District Court of Appeal for the First Appellate District.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

112 Cal.App.2d 631

Ex parte MALONE.

Cr. 2363.

District Court of Appeal, Third District, California.

Aug. 8, 1952.

Hearing Denied Sept. 4, 1952.

Proceeding for a writ of habeas corpus to require the Warden of Folsom State Prison, of which petitioner was an inmate, to allow him to forward to the District Court of Appeal for filing a writ of quo warranto to have the state Adult Authority's action in revoking petitioner's parole and returning him to prison declared void as in excess of jurisdiction. On respondent's motion to dismiss an order to show cause, the District Court of Appeal, Schottky, J. pro tem., held that petitioner's transfer to another state institution in another appellate district after filing of the petition did not require dismissal thereof.

Writ of habeas corpus granted.

1. Habeas Corpus 🔑48

The fact that state prison inmate under prison warden's control at time of filing petition for writ of habeas corpus to require warden to allow petitioner to forward to

District Court of Appeal a petition for writ of quo warranto to have state Adult Authority's action revoking petitioner's parole and returning him to prison declared void was transferred to another state institution outside such court's appellate district after filing of petition did not require dismissal thereof. Pen.Code, § 5080.

2. Habeas Corpus ⚷48

The presence of person illegally restrained within jurisdiction of District Court of Appeal is not essential to such court's issuance of writ of habeas corpus on his petition to person restraining him.

3. Habeas Corpus ⚷25(1)

A state prison inmate had right to have his petition for writ of quo warranto to have State Adult Authority's action revoking his parole and returning him to prison declared void forwarded to District Court of Appeal for filing, and any interference with such right by prison warden unlawfully restrained inmate of his liberty, so as to entitle him to writ of habeas corpus to compel warden to allow forwarding of petition.

Edward Donald Malone, in pro. per.

Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Edward Donald Malone, an inmate of Folsom State Prison, has filed in this Court a petition for the issuance of a writ of habeas corpus, alleging that he is illegally restrained of his rights and liberty by the Warden of said prison in that said Warden refuses to allow him to forward for filing a Petition for a Writ of Quo Warranto addressed to this Court, but instead has referred said petition to the Adult Authority of the State of California for a determination as to whether the petitioner's civil rights should first be restored. The Adult Authority refused to restore petitioner's civil rights and refused to allow him to forward his so-called "Petition for a Writ of Quo Warranto" to the District Court of Appeal for filing.

Respondent has filed an answer and return to the order to show cause and a motion to dismiss said order to show cause. It appears from the record that petitioner was convicted after a jury trial in the Superior Court of the State of California, in and for the County of Stanislaus, of the crime of grand theft, a felony, on or about the 18th day of November, 1948, and sentenced to the state prison for the term prescribed by law. No appeal was taken from this judgment, but on June 15, 1949, he filed a petition for writ of error coram nobis in the Superior Court of the State of California, in and for the County of Stanislaus, which was denied. On appeal from the order denying this petition, this Court on February 28, 1950, dismissed the appeal in the case of People v. Malone, 96 Cal.App. 2d 270, 215 P.2d 109. On November 7, 1949, petitioner's term of imprisonment was fixed by the Adult Authority at three years, the last eighteen months on parole, subject to hold. On or about May 22, 1950, petitioner was paroled. Thereafter, on or about October 17, 1951, his parole was suspended and his term refixed at the maximum, 10 years, Penal Code sec. 489. On January 15, 1952, after hearing, petitioner's parole as well as his credits earned or to be earned were revoked by action of the Adult Authority. On January 31, 1952, the Adult Authority, pursuant to the provisions of section 5080 of the Penal Code, ordered the custody of petitioner transferred from the Warden of Folsom State Prison to the Superintendent of the California Medical Facility at Terminal Island, San Pedro, California. Petitioner was actually transferred to Terminal Island after his so-called "Petition for Writ of Quo Warranto," in and by which petition he sought to have the action of the Adult Authority in revoking his parole and returning him to prison declared void as being in excess of jurisdiction, had been delivered to the Warden and after his petition for a writ of habeas corpus was filed in this Court.

Respondent contends that the writ should not issue for two reasons: First, that it is not a proper case for habeas corpus, and, second, that petitioner has been transferred from respondent's control to confinement outside of this appellate district since the petition for habeas corpus was filed, making the question moot.

As to respondent's first contention, what we have said in the opinion in Ex parte Robinson, Cal.App., 246 P.2d 982, applies with equal force to the instant proceeding.

[1, 2] As to respondent's contention that petitioner is no longer within the jurisdiction nor under the control of the respondent, we do not believe that it has merit. Petitioner was under the control of respondent when the petition was filed and we do not believe that his transfer to a State institution in another appellate district after the filing of the petition requires the dismissal of the petition. For it is not to be assumed that respondent would fail to comply with an order of this Court to permit petitioner to forward his said Petition for a Writ of Quo Warranto to this Court for filing. As stated in 13 California Jurisprudence, at page 257, section 33:

> "It is not essential to the issuance of the writ that the person illegally restrained be within the jurisdiction of the court. Thus, if the one having control of the person restrained has removed him without the jurisdiction, and there is reasonable grounds to believe that such prisoner may be produced, the one perpetrating the restraint may be imprisoned until such time as the prisoner is produced, or until it is demonstrated that production is impossible. Although it is probably essential to the jurisdiction of a justice of the district court of appeal that the one restrained or the one who restrains be within the jurisdiction, it has been intimated that the court, as distinguished from a justice thereof, may issue a writ where both the person restrained and the one who restrains him are outside the appellate district."

[3] In view of the foregoing, we conclude that the petitioner had the right to have his so-called Petition for Writ of Quo Warranto forwarded to the District Court of Appeal for filing and that any interference with that right to that extent unlawfully restrained him of his liberty so as to entitle him to the writ of habeas corpus.

Let the writ issue requiring the respondent Warden of Folsom State Prison to permit petitioner to forward his said Petition for a Writ of Quo Warranto to the District Court of Appeal for the Third Appellate District.

VAN DYKE, J., and PEEK, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

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112 Cal.App.2d 593

FREEDMAN et al. v. IMPERIAL CATTLE CO. et al.

Civ. 18941.

District Court of Appeal, Second District, Division 3, California.
Aug. 7, 1952.

Hearing Denied Sept. 25, 1952.

Action by Karl Freedman and another against Imperial Cattle Co. and others for injuries sustained when named plaintiff fell into unguarded screw conveyor pit on premises maintained by named defendant. The Superior Court of Los Angeles County, Daniel N. Stevens, J., entered an order denying motion for change of venue to Imperial County, and named defendant and another appealed. The District Court of Appeal, Vallee, J., held that whether stockholder and vice president of nonresident defendant corporation, residing in county of suit, was a necessary party to action so as to preclude change of venue to county of residence of defendant corporation was a question of fact for trial court.

Order affirmed.

1. Corporations 🔑52

The residence of a corporation is in the county in which its principal office is located.

2. Venue 🔑22(3)

If a resident of county in which action for personal injuries is brought is not a necessary party to action, his joinder as a party defendant cannot defeat right of codefendant corporation to have action tried in the county of its residence.

3. Venue 🔑22(3)

On motion for change of place of trial to county of residence of defendant corporation, court must determine from complaint whether a resident of county of suit named as a party defendant is a necessary party to action in order to enable plaintiff to obtain all the relief which is properly included in the prayer for relief made in complaint.

4. Venue 🔑**72**

On motion for change of venue, material allegations of complaint which are not controverted must be accepted as true.

5. Appeal and Error 🔑**912**
Venue 🔑**70**

Verified complaint is an affidavit or evidence proper to be considered in opposition to motion for change of venue and, on appeal from order denying a motion for change of venue, such complaint is deemed to establish all facts therein stated and which reasonably may be inferred from those stated.

6. Venue 🔑**72**

On motion for change of venue, trial court must determine whether, in joining a resident of county as a defendant, plaintiff had reasonable grounds for belief that he had a cause of action against such defendant, but court should not try disputed issues of fact going to the merits of the cause, upon conflicting affidavits, in order to determine whether a cause of action does in reality exist against resident defendant.

7. Appeal and Error 🔑**965**

Whether stockholder and vice president of nonresident defendant corporation, residing in county of suit, was a necessary party to action for injuries sustained by invitee, when he fell into unguarded screw conveyor pit on premises maintained by corporation in county of its residence, was a question of fact for trial court, whose determination in such respect could not be disturbed on appeal from order denying motion for change of venue to county of corporation's residence, in absence of abuse of discretion.

Hunter & Liljestrom, Los Angeles, for appellants.

Joseph Schecter, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from an order denying the motion of defendants Imperial Cattle Company, a corporation, and Adolph Weinberg, for an order changing the place of trial of the action from Los Angeles County to Imperial County.

The principal office of Imperial Cattle Company is in Imperial County. Weinberg is a resident of Los Angeles County. The remaining defendants reside outside Los Angeles County. The question is whether there is any substantial evidence to support the implied finding of the court that Weinberg is a necessary party defendant.

The action is for damages for personal injuries sustained in Imperial County. Epitomized, the complaint, which is treated as an affidavit for the purposes of the motion, alleges that: defendants maintained a building and premises in Imperial County in which they conducted a cattle and grain business; on the premises they maintained a screw conveyor in a pit; the pit was covered with loose, unsecured boards which had slippery grain lodged beneath them; some of the boards were defective; the conveyor was "unguarded"; safety orders of the Department of Industrial Relations require that "screw conveyors and pits and surrounding areas" be protected with guard rails, toe boards, wire mesh, and other safety devices; the screw conveyor and pit were in the exclusive control of defendants; defendants negligently allowed the area about and over the pit and the opening of the screw conveyor "to become in a state of disrepair" so that it did not adequately cover and safeguard the screw conveyor and pit; on July 30, 1951, plaintiff Karl Freedman, an invitee, at the direction of defendants, parked his truck over the screw conveyor and pit to load some sacks in the area; by reason of the negligent manner in which the screw conveyor and pit were covered plaintiff was precipitated into the pit causing severe injuries.

Two affidavits of Weinberg were filed in support of the motion. They state: he is vice president and a stockholder of defendant Imperial Cattle Co.; on the day of the accident he was not in Imperial County; he has no interest in or possession of any of the property of the corporation other than as a stockholder; he did not at the time of the accident or prior thereto have any part in the management or operation of the business of the corporation; he has no knowledge of the condition of the conveyor on July 30, 1951, or at any time prior thereto; "he has no knowledge of any dangerous condition existing in connection with said conveyor"; he has no knowledge of any hazard to plaintiff either on the date of the accident or prior thereto; "he knows nothing whatever about the operation of such conveyor, or similar type of equipment, and states that he has not seen such conveyor, or similar type of equipment, more than two or three times in his lifetime."

In opposition to the motion plaintiffs filed three affidavits made by their attorney. They state that after the complaint was filed the attorney had a telephone conversation with Weinberg in which Weinberg told him "that he had gone to Imperial County two or three years ago in 1948 or 1949 and had purchased the land, premises and the moving conveyor involved herein from the R. W. Morrison Estate in Imperial County. That as far as he knew, the land, premises and conveyor were in the same state at the time of purchase as they were on July 30, 1951, the date of Mr. Freedman's accident. That Mr. Weinberg was not in Imperial County on July 30, 1951, and knew nothing personally about the accident." One of the affidavits further states: "that the defendant Weinberg has been in the cattle and grain business for many years and knows that conveyors in the condition of the one involved herein are dangerous. That the hazard here was a constant and continuing one from the day that defendant Weinberg purchased the land and conveyor in 1949 until several weeks beyond July 30, 1951, when the conveyor was covered with steel wire mesh"; and that "the present Imperial Cattle Co., defendant herein, was purchased by the Imperial Land and Cattle Company, a copartnership, consisting of Adolph Weinberg, Etta Weinberg, Stafford Hannon and Fluvia Hannon, on or about November 25, 1949, from R. W. Morrison Estate, in Imperial County."

[1-6] The residence of defendant corporation is Imperial County, the county in which its principal office is located. 6A Cal.Jur. 272, sec. 140. If Weinberg is not a necessary party to the action his joinder as a defendant cannot defeat defendant corporation's right to have the action tried in the county of its residence. White v. Kaiser-Frazer Corp., 100 Cal.App.2d 754, 758, 224 P.2d 833, 836. "Where both resident and nonresident defendants are necessary parties, a change of venue will not be granted upon demand of the nonresident defendant. Freeman v. Dowling, 219 Cal. 213, 217, 25 P.2d 980. 'The test is to be made by ascertaining who are necessary parties to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain *all* the relief which is properly included in the prayer for relief made therein.' Freeman v. Dowling, supra, 219 Cal. at page 217, 25 P.2d [980] at page 981. (Italics added.) In determining a motion for a change of venue, the court must accept as true the material allegations of the complaint which are not controverted. Peterson v. Sherman, 68 Cal.App.2d 706, 711, 157 P.2d 863; Lachman Co. v. Central Cal. Berry Growers' Ass'n, 58 Cal.App. 748, 752, 209 P. 379. The verified complaint is an affidavit or evidence proper to be considered in opposition to the motion, Goes v. Perry, 18 Cal.2d 373, 378, 115 P.2d 441; Atwater v. Argonne Van & Storage Co., 74 Cal.App.2d 410, 412, 168 P.2d 776, and, on appeal from an order denying a motion for a change, is deemed to establish all facts therein stated and which reasonably may be inferred from those stated. Brainard v. Brainard, 82 Cal.App.2d 478, 480, 186 P.2d 990. Upon a motion for change of venue, the court should not try disputed issues of fact going to the merits

of the cause, upon the conflicting affidavits, in order to determine whether or not a cause of action does in reality exist against the resident defendant. California Collection Agency v. Fontana, 61 Cal.App.2d 648, 653, 143 P.2d 507. The real issue for determination of the trial court was whether plaintiff, in joining the resident party as a defendant, had reasonable grounds for the belief that he had a cause of action against the resident defendant. California Collection Agency v. Fontana, 61 Cal.App. 2d 648, 653, 143 P.2d 507." White v. Kaiser-Frazer Corp., 100 Cal.App.2d 754, 758, 224 P.2d 833.

[7] The question in the present case was one of fact for the trial court. In the absence of an abuse of discretion, we cannot disturb its determination. The court could reasonably have concluded from the complaint and the affidavits filed in opposition to the motion, and the inferences that may be drawn therefrom, that: the screw conveyor is a dangerous instrumentality; Weinberg has been in the cattle and grain business for many years; he, with others in a partnership, purchased the property, including the conveyor, in November, 1949; he is charged with knowledge of the safety orders of the Department of Industrial Relations which require that screw conveyors and pits be protected with guard rails and other safety devices; he knew that a screw conveyor in the condition of the one which caused the injuries is dangerous; the premises, conveyor, and pit were in the same condition at the time of the accident as they were at the time he purchased them and they were not protected as required; Weinberg, as an officer of the corporation, knew the condition of the conveyor and pit and permitted them to remain in that condition; an ordinary prudent person should have anticipated that danger to others was likely to occur from a screw conveyor and pit which were not protected as required by the safety orders.

Applying the test stated above, the trial judge was warranted in concluding that Weinberg is a necessary party defendant to enable plaintiffs to obtain all the relief which they seek; and that in joining him as a defendant, plaintiffs had reasonable grounds for the belief that they had a cause of action against the resident defendant.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

112 Cal.App.2d 599

SMITH et ux. v. FINLEY.

Civ. 8115.

District Court of Appeal, Third District, California.

Aug. 7, 1952.

Action by Gordon H. Smith, and wife, against Richard E. Finley, administrator of the estate of M. B. Finley, also known as Milton B. Finley, deceased, for injuries to Gordon H. Smith and injuries to plaintiffs' riding horses. The Superior Court, Lake County, Benjamin C. Jones, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Adams, P. J., held that cause of action for injuries sustained when decedent's automobile struck plaintiffs' riding horses being ridden by plaintiffs survived death of decedent, although accident occurred prior to enactment to survival statute.

Affirmed.

1. Abatement and Revival 🔑50

Cause of action for injuries sustained by one of the plaintiffs and by one of plaintiffs' riding horses when struck by decedent's automobile survived death of decedent although accident occurred prior to enactment of survival statute, in view of fact that death of decedent followed the enactment. Civ.Code, § 956.

2. Damages 🔑139

Award of $334 for injury to plaintiffs' horse which was struck by decedent's automobile based on evidence that horse was worth $400 before injury and $66 after injury for chicken feed was not excessive.

3. Evidence 🔑571(7)

In action against administrator for injuries to plaintiffs' riding horse sustained when struck by decedent's automobile, in which defendant offered no evidence as to value of horse and veterinarian called by plaintiff testified that he had been appraising horses for 30 years, trial court did not err in accepting veterinarian's appraisal of horse's value.

4. New Trial ⚿108(5)

In action for injuries to plaintiffs' riding horse, motion for new trial based on defendant's affidavit alleging evidence as to extent of injuries that had not appeared at trial was properly denied.

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Lovett K. Fraser and Fredric S. Crump, Lakeport, for appellant.

H. G. Crawford, Lakeport, for respondent.

ADAMS, Justice.

Plaintiffs, who are husband and wife, brought this action against the Administrator of the Estate of M. B. Finley, Deceased, charging that decedent Finley had so negligently operated a motor vehicle as to cause it to collide with two riding horses on which plaintiffs were mounted and as a result plaintiff Gordon Smith was thrown to the ground, sustaining personal injuries, and one of the horses was injured. The accident occurred on August 8, 1949. Finley died December 23, 1949, and this action was commenced July 27, 1950. The case was tried by the court sitting without a jury and defendant's counsel conceded that the accident was due to negligence of decedent. He also conceded that Mr. Smith's testimony as to the amount of his expenditures was true. No testimony was presented by defendant. The court gave and entered judgment in favor of plaintiffs for $1,653.26 for personal injuries to Gordon H. Smith and his incidental expenses, and $334 for injuries to the horse. From that judgment this appeal was taken. On October 1, 1949, and before the death of M. B. Finley, Section 956 of the Civil Code came into effect. It provides:

> "A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, * * *."

[1] Appellant contends that since said section was not in effect *at the time of the accident* it is not applicable in this case. Respondents contend that since said section was in effect *at the time the tort feasor died* it is applicable. Both parties rely on Cort v. Steen, 36 Cal.2d 437, 224 P.2d 723. In that case an action against the administrator of the estate of the deceased tort feasor was commenced prior to the effective date of Section 956, supra. In the instant case the section became effective before the death of the tort feasor. Therein lies the difference. While the opinion in Cort v. Steen does not in so many words make that distinction, we think that it is plainly inferable from the reasoning of the court. Plaintiffs concededly had a valid cause of action against decedent Finley. When Finley died, that cause of action survived against his administrator by virtue of Section 956, supra, which was then in effect. The trial court did not err in so holding.

[2, 3] Appellant also contends that the trial court committed error in allowing $334 as damages for injury to plaintiffs' horse. As hereinbefore stated, defendant offered no testimony whatever at the trial. Dr. Winteringham, a veterinarian whose qualifications were conceded by defendants, examined the animal after the accident and testified that its hip was injured, that it was still lame at the time of the trial and probably would not recover from the injury, and that its reasonable value before the injury was between $400 and $500, and its value afterward was probably only the value for chicken feed—approximately $66. The trial court took $400 as the value before injury, deducted the chicken feed value, and fixed the damages at $334. While defendant questioned the qualifications of Dr. Winteringham to evaluate horses, the latter testified that for approximately 30 years he had been making appraisals of horses for insurance companies, and had appraised horses even in Lake County, and we cannot say that the

court erred in accepting his appraisal of the horse in controversy.

[4] Defendant, on motion for a new trial, filed an affidavit to the effect that the horse was only slightly injured, had been used as a saddle horse ever since the accident, on trail rides and in a quadrille team, and that defendant had offered plaintiffs $150 for it which they refused to accept. But there was no such evidence at the trial and the court denied a new trial; and we cannot say that in so doing it abused its discretion.

Appellant also argues that his demurrers to the complaint should have been sustained, but his arguments thereupon are based upon the propositions hereinabove discussed, and require no further discussion.

The judgment is affirmed.

SCHOTTKY, J. pro tem., and VAN DYKE, J., concur.

112 Cal.App.2d 456

CRABBE v. MIRES et al.

Civ. 8127.

District Court of Appeal,
Third District, California.
July 30, 1952.

Suit by Arden Crabbe, doing business as Redding Tractor and Equipment Co., against Roy Mires and others, individually, and against the same persons, doing business as Crescent Gold Dredging Co., a copartnership for reasonable value of goods sold and delivered to defendants as actual partners and as ostensible partners, and upon an open book account, and upon an oral contract. The Superior Court, Shasta County, Curtess E. Wetter, J., entered judgment for plaintiff on all three counts, and Wallace Lynn and Stanley Rising appealed. The District Court of Appeal, Schottky, J. pro tem, held that testimony elicited from appellants on cross-examination as adverse witnesses concerning conversations between them and their codefendants leading up to agreement between them and their codefendants was not irrelevant, nor admitted in violation of parol evidence rule, but was admissible to show reasonable appearances upon which plaintiff acted.

Judgment affirmed.

1. Appeal and Error 🔑989

When a judgment is attacked as being unsupported by evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions reached by trial court.

2. Partnership 🔑35

Representations of act which lead others to believe one to be a copartner and to have assumed responsibility as such need not be actuated by actual intent to deceive, and it is sufficient if course of conduct is such as to induce a reasonable and prudent man to believe that which the conduct would imply.

3. Principal and Agent 🔑99, 123(1)

An agent's authority may be proved by circumstantial evidence, and it may likewise be implied from circumstances.

4. Principal and Agent 🔑120(2)

In suit for reasonable value of goods delivered against defendants who allegedly gave others ostensible authority to obtain goods on defendants' credit, cross-examination testimony of defendants concerning conversations they had leading up to their agreement with users of their credit, and testimony concerning conversations between plaintiff and such user, did not violate parol evidence rule, but was admissible to show reasonable appearances upon which plaintiff acted. Code Civ.Proc. § 2055.

5. Partnership 🔑49

In suit for goods delivered to defendants as ostensible partners in a dredging operation, letter, written by accountant for defendants who made credit arrangements, to defendants who actually operated dredging operation, in which former disclaimed any further responsibility for debts, was properly admitted as a declaration of all of defendants and to show that plaintiff acted reasonably in assuming existence of partnership.

6. Damages ⚿68

In suit against defendants as actual partners and as ostensible partners, upon causes of action for the reasonable value of goods delivered, and upon an open book account, and upon an oral contract, where there was a finding in favor of plaintiff on all three causes of action, it was not error to allow plaintiff interest on the damages. Civ.Code, § 3287.

◆

John G. Evans, San Francisco, for appellants.

Carr & Kennedy, Redding, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff commenced an action to recover for certain equipment and dredging supplies delivered to and used by a gold mining dredge operated in Trinity County. The action was against defendants individually and also against defendants doing business as Crescent Gold Dredging Co., a copartnership. Plaintiff's complaint contained three causes of action. The first was for the reasonable value of goods sold and delivered to defendants as actual partners and also as ostensible partners; the second was upon an open book account; and the third was upon an oral contract. Only the defendants Lynn and Rising have appealed from said judgment.

The facts in the instant case are quite similar to those involved in Gerlinger Foundry & Machine Works, Inc. v. Crescent Gold Dredging Co., 108 Cal.App.2d 185, 238 P.2d 608 (hearing denied) and McKee v. Mires, 110 Cal.App.2d 517, 242 P.2d 954, both decided recently by this Court. Appellants refer to these cases in their brief and state that:

> "The factual situations are almost identical and many of the legal issues therein are involved in the present appeal, as all three cases stem out of the operation of said mining claims and dredge by the defendants Mires and Garner."

The principal contention of appellants is that the findings and judgment are not supported by the evidence either upon the theory of actual partnership or ostensible partnership. The Court not only found that appellants were copartners with defendants Mires and Garner in the operation of said dredge but also found that all of said defendants "by their spoken and written words and conduct represented themselves and consented to each other representing themselves to various creditors and to plaintiff as partners in an existing partnership, and in reliance thereon plaintiff, on the faith of such representations gave credit to Roy Mires, J. H. Garner, Wallace Lynn and Stanley Rising under the belief that there was an actual and apparent partnership, and it is further true that said representations were made and consented to be made by all of said defendants in a public manner."

[1] We have read the record carefully and, bearing in mind the familiar rule that when a judgment is attacked as being unsupported by the evidence the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions reached by the trial court, we are satisfied that the record amply supports the judgment.

The testimony of plaintiff, concerning the sale, is that Mires made the credit arrangements with him; stating they had new capital put up by Lynn and Rising to enable the dredge to be repaired and operations continued; that Mires stated there would be a new company by the name of Crescent Gold Dredging Co. formed, but did not specify the form of organization thereof (corporation or partnership).

There was no specific representation this company was already in existence, the plaintiff testifying he apparently assumed it was in view of the deposit being in the name of the Crescent Gold Dredging Co. Concerning his telephonic inquiry of the Anglo Bank in San Francisco, for the credit information he was interested in, to wit, the money available to pay for Mires' proposed purchase, plaintiff told the bank's agent, DeMartin, that he was about to give $1,000 credit to Crescent Gold Dredging Co. and DeMartin told him that there was a substantial sum on deposit to that account and that in his (DeMartin's) opinion it was a safe risk.

Appellant Rising testified that Lynn had authorized Mires to make purchases within limitations; Lynn stated he was active in arranging the details of transferring the Mires and Garner gold license to the Crescent Gold Dredging Co.; Lynn purchased a tank for the dredging operations; Rising personally went to Redding to arrange credit with Standard Oil and Orris McKee, a fuel dealer; and Mires received a letter from the appellants stating they no longer would be responsible for any debts of the dredging deal.

[2] We believe that the following language of the Court in Bedell v. Morris, 63 Cal.App. 453 at page 455, 218 P. 769, at page 770, is applicable:

> "* * * Representations or acts need not be actuated by the actual intent to deceive; it is sufficient if the course of conduct is such as to induce a reasonable and prudent man to believe that which the conduct would imply. The proposition is well supported by decisions and learned text-writers. Seymour v. Oelrichs, 156 Cal. 782, 166 P. 88, 134 Am.St.Rep. 154; Carpy v. Dowdell, 115 Cal. 677, 47 P. 695; Dickerson v. Colgrove, 100 U.S. 580, 25 L.Ed. 618 [see, also, Rose's U.S. Notes]; 2 Pomeroy's Equity Juris. (4th Ed.) p. 1645. It does not seem to be questioned but that James and Rueger [plaintiff's assignors] extended further credit to the company in view of the fact that Jacob C. Morris was identified with the business. They so testified, and we have nothing in contradiction thereof. This being so, the only question remaining is whether or not the acts and conduct of Jacob C. Morris were sufficient to lead James and Rueger to believe he was a copartner and assumed responsibility as such. This was a question of fact to be determined by the trial court upon the hearing."

[3] And as this Court said in Gaine v. Austin, 58 Cal.App.2d 250 at page 261, 136 P.2d 584, at page 590:

> "An agent's authority may be proved by circumstantial evidence (MacDonnell v. California Lands Inc., 15 Cal.2d 344, 347, 101 P.2d 479; Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 704, 92 P.2d 812; Smith v. Schuttpelz, 1 Cal.2d 158, 161, 33 P.2d 836); and it may likewise be implied from circumstances. Robinson v. American Fish etc. Co., 17 Cal.App. 212, 217–219, 119 P. 388; Anglo-Californian Bank v. Cerf, 147 Cal. 393, 399, 81 P. 1081.
>
> "As to the ostensible agency of Torp, section 2300 of the Civil Code provides that 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him'; and under section 2317, 'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.'"

See also Gerlinger Foundry & Machine Works, Inc. v. Crescent Dredging Co., and McKee v. Mires, supra.

Appellants contend also that the Court erred in admitting certain evidence and denying motions to strike some. The first of this testimony is that of appellants Lynn and Rising as witnesses under Code of Civil Procedure, section 2055. The testimony was of conversations had during the negotiations leading up to the option agreement. This evidence was offered by respondent to show that Mires went to Redding immediately after the execution of the agreement to make certain arrangements and Rising knew that Mires and Garner Co. had lost its credit and needed funds; "that arrangements were made to permit him to go back and to make new purchases and to refer the creditors to this new company and new arrangement, and we want to show the knowledge on the part of Lynn and Rising, first of the condition of this company as a basis for the credit arrangement.”

[4] Appellants contend that this evidence was irrelevant and also that its admission violated the parol evidence rule. However, we believe that respondent is correct in his contention that this being a case of ostensible authority, these conversations of Mires and Rising in connection with purchases and negotiations for the re-establishing of the dredging operation were admissible to show the reasonable appearances upon which respondent acted. We believe also that conversations between defendant Mires and respondent were properly admitted for the same reason.

[5] Appellant next contends that a letter from Andrews, the accountant, to Mires, in which the appellants disclaimed any further responsibility for debts on the dredging deal after date, was improperly admitted because it was hearsay as to appellants and no foundation had been laid to show the authority of Mires, Andrews, or the bank employee to bind appellant.

We believe that the letter was properly admitted as a declaration of all the defendants and also to show the respondent acted reasonably in assuming the existence of a partnership. Furthermore the testimony of appellant Lynn states Andrews was authorized to write the letter.

[6] Appellants' final contention is that the allowance of interest upon respondent's claim was error, stating that respondent sought recovery on the basis of reasonable value. They cite Continental Rubber Works v. Bernson, 91 Cal.App. 636, at page 638, 267 P. 553, at page 554, which does not support their contention, as it states:

> “When damages are capable of ascertainment by calculation, or by reference to well-established market values, together with computation, interest is allowable from the time the damages fall due.”

As hereinbefore stated, there were three causes of action, the first being for the reasonable value, the second upon an open book account, and the third upon an oral contract, and the Court found in favor of respondent on all three. There was no error in the allowance of interest. Civil Code, section 3287.

In view of the foregoing, we are satisfied that the record fully supports the conclusions of the trial court that no prejudicial error was committed, and that the judgment should be and it is hereby affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

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112 Cal.App.2d 566

SMITH v. McLAREN.

Civ. 8259.

Sac. 6314.

District Court of Appeal,
Third District, California.

Aug. 6, 1952.

Rehearing Denied Aug. 29, 1952.

Hearing Denied Sept. 25, 1952.

Action by Helen Matthews Smith against Mel McLaren. From an adverse judgment of the Superior Court, Sonoma County, plaintiff appealed. The District Court of Appeal, Adams, P. J., in ruling on defendant's motion to dismiss the appeal, held that plaintiff's time for perfection of appeal had expired after seven months delay in depositing fees for preparation of the record.

Motion granted.

1. Appeal and Error 🔑395

Appellant's failure to pay fees to clerk of Superior Court for preparation of record on appeal to District Court of Appeal before lapse of seven months from date of filing notice of appeal was not justified by alleged delay caused by respondent's filing of two motions in Superior Court to dismiss appeal. Rules on Appeal, rules 1–5; Const. art. 6, § 4; Code Civ.Proc. § 453.

2. Appeal and Error 🔑356

Proceedings to perfect appeal in District Court of Appeal are not stayed by motion to dismiss in Superior Court. Rules on Appeal, rules 1–5; Const. art. 6, § 4; Code Civ.Proc. § 453.

3. Appeal and Error 🔑436

Trial Court is without power to strike out notice of appeal to District Court of

Appeal. Rules on Appeal, rules 1–5; Code Civ.Proc. § 453.

Charles A. Christin, San Francisco, for appellant.

Hoffmann & Erickson, Oakland, for respondent.

ADAMS, Presiding Justice.

On May 26, 1952, respondent filed in this Court a notice of motion to dismiss the appeal of Helen Matthews Smith. Said notice was accompanied by a certificate of the Clerk of the Superior Court of Sonoma County dated March 25, 1952, in which it was set forth that notice of appeal to this Court was filed October 27, 1951; that notice to prepare the clerk's and reporter's transcripts was filed November 26, 1951; that no stipulation on agreed statement, notice of intention to propose a settled statement, or to propose a narrative statement had been filed, and no order extending time for preparation of the record had been filed; that on November 6, 1951, plaintiff and cross-defendant [appellant] was duly notified to deposit fees for the preparation of the record, but that no such fees had been deposited; that no proceeding for the preparation of a record on appeal was pending in the superior court, and that the time to institute any such proceeding had expired.

Affidavit of service of said notice of motion by mail was attached thereto.

On June 4, 1952, appellant filed herein a "Response to Motion to Dismiss Appeal and Motion for Relief Under Appellate Rule 53(B)".

The matter was argued before us on June 5th and submitted.

Appellant admits that the allegations of the certificate of the Clerk of the Superior Court are true, but in response to the motion to dismiss and in support of her motion for relief, alleges that her delay was caused by the filing by defendants in the superior court of two notices to dismiss the appeal, and a series of continuances granted thereon "thereby holding up and delaying the perfection of the appeal." She further asserts that on May 23, 1952 "never having been advised that the said motions, or either of them, had been disposed of" her counsel mailed to the county clerk a check to cover the estimated cost of preparing the record on appeal.

A certificate of the Clerk of the Superior Court dated May 29, 1952, was attached to appellant's opposition, from which it appears that the motions in the superior court were based upon the ground that the Notice of Appeal was "irrelevant, redundant, immaterial, prejudicial, and sham", and that the moving parties were relying upon Section 453 of the Code of Civil Procedure and upon the fact that appellant's notice of appeal improperly stated that it was made to this Court instead of the Supreme Court, the proceedings being equitable in nature. The clerk's certificate also sets forth that in the letter with which the check to cover costs of appeal was transmitted appellant's counsel advised that:

> "It is my opinion that during the pendency of these motions which sought to dismiss the appeal, all proceedings pertaining to the perfection of the appeal were stayed.
>
> * * * * * *
>
> "It is apparent that to proceed with the preparation of the Reporter's and Clerk's transcripts would be futile and of no avail in the event that the Court should hold that the appeal should be dismissed."

From the foregoing it is apparent that appellant filed her notice of appeal on October 27, 1951, but did not deposit the costs until May 26, 1952—a delay of seven months; and the question before us is whether appellant's counsel was justified in believing, if he did so believe, that the filing by respondent of the notices in the trial court stayed the preparation of the record on appeal, and now justifies us in excusing him from failing to pay the costs of the record within the time provided by law.

[1–3] We are of the opinion that we are not so justified. Counsel for appellant is a lawyer of wide and extended experience. A casual inspection by him of Section 453 of the Code of Civil Procedure would have demonstrated that it was not authority for defendant's motions in the trial court, that under Section 1 of the Rules of Court and Section 4 of Article VI of the Constitution of California, cited by respondent in his points and authorities filed in the trial court, appellant's statement that he was appealing to this Court instead of to the Supreme Court could not and would not affect the efficacy of the notice of appeal, that the trial court was without power to strike out the notice of appeal, and that, by failing to conform to the provisions of the Rules on Appeal (Rules 4 and 5) he was jeopardizing the interests of his client and leaving the door wide open for the motion to dismiss now before us.

The appeal is dismissed.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

112 Cal.App.2d 598

WILSON et al. v. DAY.

Civ. 18992

District Court of Appeal, Second District, Division 3, California.

Aug. 7, 1952.

Action involving real property by A. Wilson, and another, against Myrtle F. Day. The defendant filed a cross-complaint alleging grounds for appointment of a receiver. The Superior Court, Los Angeles County, Frank G. Swain, J., appointed R. E. Allen, as receiver. The Superior Court approved the receiver's account and application for attorney's fees, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that the interim order approving receiver's account was not appealable.

Appeal dismissed.

Appeal and Error 🔑101(2)

Interim order approving receiver's account and application for attorney's fees was not appealable.

Myrtle F. Day, in propria persona.

Kenny & Morris, Los Angeles, for respondent R. E. Allen.

SHINN, Presiding Justice.

Appellant, Myrtle F. Day, was a defendant in an action involving real property. She filed a cross-complaint alleging grounds for the appointment of a receiver, and upon her application respondent R. E. Allen was appointed receiver and thereafter duly qualified and acted as such. His first account and report as receiver was filed and approved. Thereafter, appellant Day, with court permission, sued Allen and others in the United States District Court for damages claimed to have arisen in part through the failure of Allen to perform his duties as receiver. Allen employed attorneys to represent him in the action and it was eventually dismissed by the court. In his next account and report Allen asked for an allowance of attorney's fees in the sum of $250 for defense of the action in the Federal court. His account and application for attorney's fees were approved. Myrtle F. Day gave notice of appeal from the order and contends that attorney's fees for services rendered to Allen individually were improperly allowed. Respondent Allen makes the point that the order is not appealable. No judgment has been rendered in the principal action, nor has any final account of Allen been presented.

An interim order approving an account of receiver is not appealable. Rochat v. Gee, 91 Cal. 355, 27 P. 670; Illinois Trust & Sav. Bk. v. Pacific R. Co., 99 Cal. 407, 33 P. 1132; Title Ins. & Trust Co. v. Calif., etc., Co., 159 Cal. 484, 114 P. 838; Free Gold Mining Co. v. Spiers, 135 Cal. 130, 67 P. 61.

The appeal is dismissed.

WOOD and VALLÉE, JJ., concur.

112 Cal.App.2d 558

PHELPS et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 8064.

Sac. 6207.

District Court of Appeal, Third District, California.

Aug. 6, 1952.

Rehearing Denied Aug. 30, 1952.

Hearing Denied Sept. 25, 1952.

Action, by Eugene D. Phelps, and others, against Pacific Gas and Electric Company, to quiet title to and to recover possession of a mining claim, together with damages for trespass thereon, wherein defendant answered that land was occupied and used by it in operation of power plant furnishing electric power for public use, and prayed that, if plaintiffs' rights were found to have been invaded, compensation therefor be fixed. The Superior Court, Butte County, J. O. Moncur, J., entered judgment in favor of plaintiffs and defendant appealed. The District Court of Appeal, Peek, J., held that as between plaintiffs who claimed the land according to an original survey made in 1875, and defendant which claimed the land according to a resurvey made in 1941, a decision in a former appeal between the parties established as the law of the case that the respective rights of the parties were to be determined by reference to the survey of 1875.

Judgment affirmed.

1. Courts 🔑99(1)

As between plaintiffs who claimed land according to original survey made in 1875, and defendant, which claimed same land according to 1941 resurvey ordered by General Land Office, decision, in former appeal by parties, established as law of case that their respective rights were to be determined by reference to survey of 1875.

2. Mines and Minerals 🔑49

Where plaintiffs and their predecessors in interest had been in actual, exclusive and adverse possession of a mining claim continuously for more than 40 years and had been engaged in mining upon claim since 1933, they had title to claim, regardless of alleged deficiencies in original and amended notice of claim.

3. Eminent Domain 🔑293(1)

In suit to quiet title to mining claim on which defendant public utility had located power plant, where area taken by defendant was described in detail by defendant's pleadings, requesting court to fix compensation for any invasion of plaintiff's rights, and record conclusively showed that area taken was within claim, and judgment purported only to compensate plaintiffs for area taken according to survey upon which defendant relied, plaintiffs' claim was sufficiently described and established to enable court to fix compensation.

4. Appeal and Error 🔑1046(1)

Where court took under advisement defendant's motion for jury trial on issue of realty title, for which plaintiffs had waived jury, unless plaintiffs stipulated they would not request jury on issue of damages if trial of same were necessary, and neither party thereafter requested jury, entire trial proceeded in accordance with defendant's expressed desires and court did not commit prejudicial error in not allowing trial on damages to proceed before a jury.

5. Eminent Domain 🔑302

In suit against public utility to quiet title to realty, where defendant prayed that court fix compensation for any invasion of plaintiffs' rights found, award of damages in amount of value of property as of December 4, 1950 had it remained as it was in 1940 when defendant took possession, but with interest thereon from time of taking possession, was proper.

◆

Robert H. Gerdes and W. R. Dunn, San Francisco, Loyd E. Hewitt, Yuba City, Frederick W. Mielke, Jr., San Francisco, for appellant.

Clewe, Martin & Blade, Oroville, Sterling Carr, San Francisco (Charles L. Gilmore, Sacramento, of counsel). for respondents.

PEEK, Justice.

This controversy arises out of a dispute between plaintiffs and defendant concerning title to a certain placer mining claim located on the Feather River in Butte County. In 1942 plaintiffs instituted an action against defendant to quiet title to and recover possession of the claim in question, together with damages for trespass thereon. Defendant likewise sought to have its title quieted. Upon the issues so joined the cause proceeded to trial, resulting in a judgment for defendant, which was reversed by this Court on appeal. 84 Cal.App.2d 243, 190 P.2d 209, 211 hearing in Supreme Court denied. Thereafter plaintiffs amended their complaint and defendant by its answer alleged that the land was then occupied and used by it in the operation of a power plant which furnishes electric power for public use and prayed that if the rights of plaintiffs were found to have been invaded that the court fix the compensation therefor. The cause was again tried, at the conclusion of which judgment was entered in favor of plaintiffs, and defendant has now appealed.

The pertinent facts as stated in the former appeal are as follows:

> "The plaintiffs as copartners doing business under the firm name and style of Hatetna Mining and Exploration Company are the successors in interest to a certain mining claim known as the Boulder Bar Placer Mining Claim located and filed by one Louis Lammet and one David Gramps in 1898. * * The action was dismissed in so far as it involved lands outside the boundaries of section 27 as described in the above mentioned resurvey of that section approved in 1941.
>
> * * * * * *
>
> "The controversy respecting the disputed title to the property in question arose out of the following factual situation: Section 27 together with other portions of Township 23, was officially surveyed in 1875 by one E. A. Von Schmidt. The field notes of this survey were incorporated into a plat conformable thereto and approved by the United States Surveyor General for California on November 24, 1875. By that plat section 27 was shown to be located in the mountains to the east of the Feather River, and according to the field notes made by Von Schmidt in laying out the section on the ground, neither the western nor the northern boundaries thereof touched upon said river.
>
> "Thereafter in 1880 the United States granted and patented all of said section 27 to the Central Pacific Railroad Company, to whom defendant is successor in interest.
>
> "In 1898, as above stated, presumably in reliance upon the survey of 1875, plaintiffs' predecessors located said mining claim on land believed to be outside and to the west of the western boundary of said section 27 and on unsurveyed public land.
>
> "In 1936, the defendant, in connection with a contemplated power project, requested a resurvey of section 27, and in 1938 the General Land Office ordered the same to be made, naming surveyors Wilson and Forrest to resurvey portions of Township 23, including section 27, and to extend the official survey into the remaining unsurveyed portions of said township. These surveyors proceeded, or attempted, to retrace the lines called for by Von Schmidt in his notes, but were unable to find many of the monuments or corners which Von Schmidt stated that he set. According to plaintiffs, if such monuments as wooden stakes were set they probably had been destroyed by various fires which had occurred subsequently in that vicinity.
>
> "According to the field notes and the official plat approved on March 17, 1941, Wilson and Forrest, in reestablishing the boundaries of section 27, found the same to extend over the North Fork of the Feather River and to include substantially all of the plaintiffs' mining claim. It is to be further noted that the topography called for in the resurvey of the western and northern boundaries of said section and in particular the northwest corner thereof is entirely different from that called for in the Von Schmidt field notes."

The defendant again contends, as it did on the first appeal, that the United States is the real party in interest or at least an indispensable party in an action to establish its title and oust one who claims public domain as included within a patent, and that the trial court had no jurisdiction over the action. It is further contended that, since plaintiffs failed to exhaust their administrative remedies by appeal from the adverse decision of the Land Department, no remedy was available to them in the lower court. In this connection, appellant argues that the trial court was without jurisdiction to "review, reverse or annul" the findings and decision of the Land Department.

After examination of the contentions set forth above it is apparent that all were decided adversely to appellant on the former appeal. It was there held that (Headnote 3): "Parties who held land under a government patent with description thereof in accordance with an official government approved original survey, were not bound by a resurvey ordered by the General Land Office which established different boundaries for such patented land subsequent to issuance of the original patent." In commenting upon this holding we stated at page 247 of 84 Cal.App.2d, at page 212 of 190 P.2d: "Both respondent [defendant] and appellants [plaintiffs] have urged in their own favor the previously mentioned rule that an official government survey may not be collaterally attacked. However, respondent [defendant] insists that by virtue of said rule plaintiffs are bound by the resurvey of 1941 which reestablished the boundaries of section 27. Obviously such argument is not valid for it wholly disregards the fact that respondent's [defendant's] title is derived from a patent to land described and delineated by the Von Schmidt Survey of 1875 and not the resurvey of 1941. The present case is thus similar on its facts to Gleason v. White, supra [199 U.S. 54, 25 S.Ct. 782, 50 L.Ed. 87], wherein it was held that a patentee who took his land with reference to an original but erroneous survey could not recover from a subsequent patentee who took under a resurvey which included, as being within the section, a tract of land lying to the east of the section as originally surveyed. To hold otherwise, it was said, would allow the first patentee to profit by a mistake of the government of which he must have been cognizant."

As to the contention that the plaintiffs are asserting interests adverse to the United States, and that they are bound by the determination of the Land Department respecting the resurvey of 1941, we further stated on the former appeal at page 249 of 84 Cal.App.2d, at page 213 of 190 P.2d:

> "Respondent [defendant] also asserts that appellants [plaintiffs] by failing to appeal from the order of the Land Department dismissing their protest to the survey of Wilson and Forrest, abandoned such protest and likewise thereby failed to exhaust their administrative remedies and consequently they are now precluded from attacking said survey. However, the point is immaterial here for the reason that appellants [plaintiffs] are neither attacking the resurvey nor the right of the government to make it.
>
> "As above stated, the right of the government to resurvey its lands and make corrections of former surveys is unquestioned. The present issue is one of title solely as between plaintiffs and defendant, and the conclusion herein reached is entirely consistent with a concession that Wilson and Forrest in their corrective survey placed the west line of section 27 where it should have been placed by Von Schmidt but in fact was not."

[1] The decision in the former appeal clearly established as the law of the case that the respective rights of the parties were to be determined by reference to the Von Schmidt survey of 1875. In this connection the opinion states at page 249 of 84 Cal.App.2d, at page 213 of 190 P.2d:

> "The respondent [defendant] further contends in support of the judgment that its predecessor in interest having been granted section 27 of Township 23, it took whatever might later be found to be included within that section by a survey, and that land may be so granted by township

> and section which at the time of the grant was unsurveyed public land. Reliance is placed upon numerous cases including [citing cases]. Such cases, however, are not in point. In the first place respondent's [defendant's] argument assumes that the section in question was not surveyed at the time of the original grant to the railroad company, and, secondly, the factual situation here is entirely dissimilar to cases wherein the land in question had never been surveyed, either correctly or incorrectly at the time of the grant and the grantee contracted to take a particular section, the extent of which was to be later ascertained by a survey. In the present case the property granted and patented to the railroad had been surveyed prior thereto and the patent designated land with reference to the survey and the approved plat of 1875. The railroad did not take unsurveyed land by section and township. It took a particular parcel of land with reference to an approved survey of the United States government.
>
> "The conclusion is inescapable that the boundaries of section 27, in so far as the title of the respective parties to the land in controversy is concerned, were established by the survey and approved plat of 1875, and the conclusion of the trial court that the survey of Von Schmidt was fraudulent cannot be supported."

It is also contended by defendant (appellant) that the evidence is insufficient to show that a valid mining claim was established in 1898 by respondents' predecessors in interest. It is argued that the description is insufficient; that there is no competent evidence that the original claim was posted on the ground or that the claim was monumented, and that the amended notice of claim which attempted to more fully describe the claim was ineffectual because it was recorded after the Power Site Withdrawal Order covering the area in dispute.

[2] This contention is without substance. The record discloses that in 1898 respondents' predecessors in interest recorded Notice of Location of the claim in question. It is unnecessary to discuss the question of whether or not their acts were sufficient since the trial court found that:

> "Plaintiffs and their predecessors in interest were in the actual, exclusive and adverse possession of said mining claim continuously for more than 40 years prior to the filing of the Complaint herein, and ever since June 20, 1898, or thereabouts, have claimed to own and were the owners of the same and of the right to the sole and exclusive possession thereof against the whole world save with respect to the interest of the United States of America.
>
> "Ever since May 20, 1933, or thereabouts, and until defendant herein took possession of said premises, plaintiffs and their predecessors in interest engaged in the business of mining upon said mining claim."

These findings which are not here disputed sufficiently established respondents' title to the claim. Hess v. Moodey, 35 Cal.App.2d 401, 95 P.2d 699; Lind v. Baker, 31 Cal.App.2d 631, 88 P.2d 777; McLean v. Ladewig, 2 Cal.App.2d 21, 37 P.2d 502; 17 Cal.Jur. p. 410.

[3] As to the remaining portion of said contention it is argued that the boundaries of respondents' claim were not sufficiently described or established and as a result the area for which the court fixed compensation cannot be determined. This argument is likewise without merit. The record conclusively shows that the area taken by appellant for power purposes was within the claim. All that the judgment purports to do is to compensate plaintiffs for the area taken lying within Section 27 according to the 1941 survey upon which defendant has relied. In fact, the area so taken is set forth and described in detail by appellant's pleadings.

[4] It is next contended that the trial court erred in refusing defendant's request for a jury trial. The record does not support such a contention. It shows that

when the cause was set for retrial plaintiffs requested a jury. Some time thereafter plaintiffs filed a proper notice of waiver of such request, and served defendant with a copy of such notice; however, the clerk of the court did not give defendant notice of such waiver as required by Section 631 of the Code of Civil Procedure. At the commencement of the retrial on the issue of title defendant's counsel stated that a jury trial was demanded on all issues unless plaintiffs' counsel would stipulate that a jury would not be requested on the trial of the later issue of damages in the event it became necessary to try the same. Plaintiffs did not so stipulate and defense counsel thereupon demanded a jury trial. The court in ruling upon such motion stated that the same would be taken under advisement to be determined in the event such situation later developed. The cause then proceeded on the sole issue of title. In its order fixing date for the trial on the issue of damages the court concluded with the statement that either party could, within the period stated therein, demand a jury and deposit fees for the same in accordance with such order. Defendants made no request in accordance therewith, nor was the request renewed when the trial was resumed. It is therefore apparent that the entire trial proceeded without a jury in accordance with appellant's expressed desires. Hence, we find no merit in the contention that the court committed prejudicial error in not allowing it to proceed before a jury.

[5] Defendant's final contention is that if plaintiffs were entitled to anything it was the value of what was taken at the time of the taking, plus severance damages. Therefore, it says the court erred in fixing the value of the property as of December 4, 1950 had it remained as it was in 1940 and awarding interest thereon from the last-mentioned date. This contention is likewise without merit.

In the case of Los Angeles County etc. v. Hansen, 48 Cal.App.2d 314, 318, 119 P.2d 734, 736, the court, in reversing a judgment in favor of the district for the reason of the trial court's failure to award interest from the date of the taking, concluded with this order:

> "The trial court is directed to add to the judgment heretofore returned a finding and order that the defendants are entitled to interest at the rate of 7 per cent per annum upon the respective amounts found by the jury as the market value of the respective parcels of land or of defendants' interest therein sought to be condemned and the respective amounts found by the jury as severance damage, from the dates on which possession was taken of the respective parcels to the date of the payment of the awards."

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

112 Cal.App.2d 520

MORAN v. BROMLEY.

Civ. 19029.

District Court of Appeal, Second District, Division 1, California.

Aug. 5, 1952.

Action by Margo Moran, formerly known as Margo Tyler against Elmer P. Bromley, as executor of the estate of Leland M. Woods, deceased, to recover for money advanced to decedent and for furniture sold to decedent. From an adverse judgment in the Superior Court of Los Angeles County, Otto J. Emme, J., the defendant appeals. The District Court of Appeal, White, P. J., held that the findings of the lower court were sustained by the evidence.

Judgment affirmed.

1. Appeal and Error ⚷989, 996

When findings of court or verdict of jury are attacked as unsupported by evidence, power of appellate court begins and ends with a determination, whether there is any substantial evidence contradicted or uncontradicted, supporting conclusions of the trier of fact, and when contrary inferences might reasonably be deduced from evidence presented, reviewing court cannot substitute its deductions for those of the trier of fact, and rule equally applies in reviewing findings of a judge or when considering verdict of jury.

2. Appeal and Error ⚿996

That different conclusions might reasonably be drawn from evidence by different minds does not prevent trial court's findings of fact from being conclusive.

3. Appeal and Error ⚿994(1), 995

Appellate court cannot evaluate evidence or determine credibility of witnesses.

4. Executors and Administrators ⚿221(6)

Evidence sustained finding that decedent was indebted to plaintiff for moneys loaned to decedent in connection with purchase of real property.

5. Payment ⚿65(6)

Burden of proof of payment is upon party asserting it.

6. Appeal and Error ⚿996

Where evidence is susceptible of conflicting interpretations, inferences drawn by trial court may not be disturbed on appeal.

7. Appeal and Error ⚿169

An issue raised for first time on appeal will not be considered.

8. Executors and Administrators ⚿221(6)

In action on claim against estate of decedent for money advanced to enable decedent to purchase realty, evidence did not establish that trial court erred in failing to allow a credit to estate for the property received by plaintiff when the realty was sold.

9. Executors and Administrators ⚿221(4)

Evidence sustained finding that estate of decedent was indebted for $500 for furniture sold to decedent by plaintiff.

◆

A. G. Ritter and H. E. Lindersmith, Los Angeles, for appellant.

Guy E. Ward, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Upon this appeal from a judgment for plaintiff in a suit upon a claim against the estate of Leland M. Woods, deceased, the sole question presented is the sufficiency of the evidence to support the findings of the trial court, before whom the cause was heard without a jury.

The substance of plaintiff's complaint was that plaintiff advanced sums of money to the deceased to enable him to purchase a residence in Palm Springs and that deceased agreed to reimburse plaintiff for the money so advanced. In another cause of action claim was made for $500.00 as the purchase price of furniture sold by plaintiff to the deceased. A copy of the creditor's claim filed in the matter of the estate of said deceased was annexed to the complaint. The court found all the allegations of plaintiff's complaint to be true and directed judgment to be entered accordingly.

Appellant urges that the court erred in finding that the decedent became indebted to plaintiffs in the sum of $9,536.15 for moneys loaned to decedent (in connection with the purchase of the Palm Springs property); that the court erred in failing to allow a credit of $1,000.00 for certain San Bernardino property received by plaintiff when the Palm Springs property was sold; and that the court erred in finding that the estate was indebted in the sum of $500.00 for furniture sold by plaintiff to decedent in his lifetime.

[1–3] When the findings of a court or the verdict of a jury are attacked as unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions of the trier of fact, and when contrary inferences might reasonably be deduced from the evidence presented the reviewing court is without power to substitute its deductions for those of the trier of fact. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183. This rule is equally applicable in reviewing findings of a judge as it is when considering the verdict of a jury. Pfingst v. Goetting, 96 Cal. App.2d 293, 296, 312, 215 P.2d 93. Appellant's counsel argue most ably and earnestly in an effort to persuade this court that the evidence presented by plaintiff lacks that substantiality required to support the findings of the trial court in her favor. They succeed, however, only in pointing out discrepancies and inconsistencies which might conceivably have warranted the drawing of inferences contrary to those drawn by the trier of fact. Assuming that different conclusions might reasonably be drawn from the evidence by different minds, the trial court's findings of fact are conclusive, Vosburgh v. Meda, 61 Cal.App. 2d 396, 143 P.2d 41. It is beyond the function of the appellate court to evaluate evidence or determine the credibility of witnesses. Seidenberg v. George, 76 Cal.App. 2d 306, 172 P.2d 891.

James Bryson Amos, a loan officer of the Bank of America, testified that plaintiff and decedent came to the Palm Springs office of the bank and plaintiff applied for a personal loan of $6,000.00; that decedent stated that the loan was to be used in connection wtih the purchase of a home by decedent in Palm Springs; that because Mr. Woods, the decedent, was under a restraining order in a domestic relations proceeding he could not execute the note, and that Miss Tyler, (plaintiff and respondent) would execute the note; that the loan was to be repaid from the Samaritan Institute owned by decedent; that decedent would repay the funds as soon as the litigation with his wife was settled; that he would then repay from his own funds or the funds of the Samaritan Institute. Irene C. Comstock, an escrow officer of the Bank of America, Palm Springs Branch, identified the escrow instructions for the purchase of the property and testified that decedent said that the property was being taken in Miss Tyler's name but would later be changed to the correct vestee, and that at a later date when the Samaritan Institute was to take title all the money that had been put in was to be returned to her (plaintiff). Testimony more or less corroborative of the foregoing testimony that the plaintiff was to be repaid her advancements was given by three real estate brokers and by the husband and wife, who were the sellers of the Palm Springs property.

In addition, one Belmont San Chez, a close friend of decedent, testified that decedent attempted to sell him the property but declined to accept the witness' offer because he could not accept such a price inasmuch as plaintiff had advanced the original money and would have to be repaid; that decedent frequently stated that plaintiff had advanced the money and that decedent would have to repay her; that decedent attempted to borrow money from the witness for the purpose of repaying plaintiff; that the witness aided decedent in securing a loan upon decedent's promise to use the money to repay his obligation to plaintiff, but that decedent failed to do so.

[4] With respect to the principal issue, that is, whether the plaintiff in advancing various sums in connection with the purchase of the Palm Springs property was merely lending money to the decedent and had no real interest in the property herself, appellant submits that the surrounding circumstances and the conduct of the parties strongly indicate that plaintiff was engaged in some real property investment of her own and that the "gratuitous statements of the deceased as to his intentions in the matter should be considered wholly insufficient in establishing an agreement on his part with the plaintiff." Further it is pointed out that the declarations against interest of the deceased must be viewed with caution, and that subsequent conduct of the parties after the deceased was no longer under a restraining order in a divorce proceeding can be logically explained only upon the theory that deceased was assisting plaintiff in purchasing the property by advancing and loaning sums to her to enable her to maintain the payments on the first and second trust deeds. The argument is futile. The trial court drew its inferences upon the testimony of numerous witnesses as to the declarations of the decedent and rejected whatever possible contrary inferences might logically be drawn from the manner in which the transaction was handled. The evidence presented by plaintiff as to the declarations of decedent was sufficient to support the findings. Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706; Wright v. Best, 19 Cal.2d 368, 121 P.2d 702. The strength or weakness of the testimony, the credibility of the witnesses, and all questions of the value and effect of evi-

dence, as well as the inferences to be drawn therefrom, were for the trier of fact to determine, and this court may not, regardless of what it might have done if sitting as a trial court, disturb the findings of that tribunal, founded as they are upon substantial evidence.

The creditor's claim filed by respondent contained the allegation that "on or about December 17, 1949, the time said real property was sold, this claimant and the said Leland M. Woods, deceased, agreed that certain real property located in San Bernardino County, which was received as part of the purchase price on the sale of said property, would be taken in the name of this claimant in an amount of One Thousand Dollars ($1,000.00), and the said Leland M. Woods agreed that he would reimburse this claimant for all sums of money that she had invested in said property and which remained unpaid, after this credit." Appellant contends that it is apparent that the trial court failed to consider this item and allow a $1,000.00 credit in arriving at the amount of the judgment in the sum of $9,536.15. He presents in support of this contention a summary of the amounts advanced by plaintiff and payments made by the decedent, as shown by the canceled checks introduced in evidence. The creditor's claim contains the statement that decedent "paid to this claimant the sum of Twelve Hundred Eighty Dollars ($1,280.00), which is credited to the total sum advanced by this claimant of Ten Thousand Eight Hundred Sixteen and 15/100 Dollars ($10,816.15)", and concludes with a demand for the sum of $9,536.15 as the balance due the claimant. A series of checks written by decedent were introduced by plaintiff in the total sum of $1,110.25. It is argued that from these checks it appears clear that the $1,000.00 credit was not taken into consideration in the admission by plaintiff that she had received a total of $1,280.00 in payment upon the decedent's obligation.

However, while acknowledging that the estate was entitled to a credit of $1,000.00 for the San Bernardino property, the creditor's claim contains the statement that the sum of $9,536.15 is justly due, and "that no payments have been made thereon which are not credited and that there are no offsets to the same to the knowledge of the claimant." Some, but not all, of the checks before the trial court contained notations that they were payments with reference to the Palm Springs property. The defense introduced no evidence that all of such checks were in payment of money due the claimant for her advances on the Palm Springs property. The record as presented to this court contains no reference to the issue of whether the credit for the San Bernardino property had been allowed or not, either at the trial, during argument, or upon motion for a new trial.

[5–8] The burden of proof of payment is upon the party asserting such payment, Roesch v. De Mota, 24 Cal.2d 563, 150 P.2d 422; Lloyd v. Kleefisch, 48 Cal.App.2d 408, 120 P.2d 97; Frank v. Repp & Mott, 70 Cal.App.2d 407, 161 P.2d 279; and where, as here, the evidence is susceptible of conflicting interpretations, the inferences drawn by the trial court may not be disturbed on appeal, Golden Gate Motor Transport Co. v. Klatt, 134 Cal.App. 510, 25 P.2d 483; Taylor v. Humbird, 85 Cal.App.2d 40, 191 P.2d 788; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Whitham v. Whitham, 127 Cal.App. 481, 15 P.2d 1105. Further, as heretofore noted, the record presented for review fails to disclose that the issue under discussion was raised in the court below. It is settled that an issue raised for the first time on appeal will not be considered, Hayward Lumber & Inv. Co. v. Ford, 64 Cal.App.2d 346, 353, 148 P.2d 689; MacKenzie v. Angle, 82 Cal.App.2d 254, 263, 186 P.2d 30; Campbell v. Birch, 19 Cal.2d 778, 122 P.2d 902. For each of the reasons stated, appellant's contentions in this regard may not be sustained.

[9] With respect to appellant's final contention, that the court erred in finding the estate indebted in the sum of $500.00 for furniture sold to decedent, while the record contains testimony by an accountant formerly in the employ of decedent to the effect that a certain check for $330.00 marked "equipment account" was issued in payment of furniture sold by the claimant to decedent, this witness was unable to state

whether the check was payment in full or what the purchase price of the furniture was. Under the familiar rules hereinbefore cited, the determination of this matter was for the trier of fact.

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

PEOPLE v. COSTA. *

Cr. 2347.

District Court of Appeal, Third District, California.

Aug. 4, 1952.

Rehearing Denied Aug. 14, 1952.
Hearing Granted Sept. 3, 1952.

The Court of San Joaquin County, Thomas B. Quinn, J., sitting without jury, convicted defendant of manslaughter for death which resulted from automobile accident, and defendant appealed. The District Court of Appeal, Peek, J., held that evidence as to defendant's having been speeding at remote prior time and place and of his having a probationary driver's license, the limitation of which had expired, was not relevant to determination of whether conduct at time and place of accident was grossly negligent.

Judgment reversed.

1. Criminal Law 🔑338(1)

Any evidence in order to be admissible must be relevant to the issues to be determined.

2. Criminal Law 🔑371(1)

Where an offense is of such nature that proof of act with which defendant is charged is not in itself proof of required criminal intent, evidence of other offenses of similar nature committed by defendant is admissible for purpose of proving intent.

3. Homicide 🔑34

Intent to kill is not an element of the crime of involuntary manslaughter. Pen. Code, § 192, subd. 3(a).

4. Homicide 🔑74

Gross negligence, like ordinary negligence, is not absolute but always relates to some circumstance of time, place or person, and likewise is determined by trier of fact from consideration of those factors.

5. Criminal Law 🔑369(3)

In prosecution of automobile driver for involuntary manslaughter, evidence as to driver's having been speeding at a remote prior time and place and of his having a probationary driver's license, the limitation of which had expired, was not relevant to determination of whether his conduct at time and place of accident was grossly negligent. Pen.Code, § 192, subd. 3(a).

6. Criminal Law 🔑1169(1)

Although a conviction will not be reversed merely because of error in admission of evidence, even convincing proof of defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice.

7. Criminal Law 🔑1186(4)

If it cannot be said that, in absence of the error complained of, a different verdict would have been improbable, the erroneous ruling constitutes a miscarriage of justice, within meaning of constitutional provision for the setting aside of judgments and the granting of new trials. Const. art. 6, § 4½.

8. Criminal Law 🔑1169(1)

In prosecution of automobile driver for involuntary manslaughter, even if evidence properly introduced were sufficient to support judgment, conviction would not be sustained where case was closed and evidence improperly admitted might have been determining factor in the conviction. Pen. Code, § 192, subd. 3(a).

9. Criminal Law 🔑260(11)

In prosecution of automobile driver for involuntary manslaughter, with court as trier of facts rather than jury, fact that irrelevant evidence was admitted over objection showed that court, at least to a degree, considered it material to the issues presented, and in such case, conviction would be reversed. PenCode, § 192, subd. 3(a).

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* Subsequent opinion 252 P.2d 1.

Smith & Zeller, Stockton, for appellant.

Gail A. Strader, Dep. Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal from a conviction of the crime of manslaughter following a trial before the court sitting without a jury.

A detailed summary of the evidence shows that during the early morning hours of Sunday, October 14, 1951 the defendant Costa, accompanied by three other young men, drove from Lodi to Stockton for the purpose of attending a party, and on the way Costa stopped and purchased a half case of beer. Shortly after the purchase of the beer and approximately a half hour before the accident Costa was stopped for speeding by a highway patrolman at a point more than 12 miles from the scene of the accident. Defendant was not given a citation. The officer stated that at the time he noticed that Costa had a probationary license; that he didn't want to give defendant a citation without being definite as to his speed; that he reprimanded Costa and warned him that if he got a citation he woud lose his license. The officer further testified that he pursued Costa for approximately 4 miles and that his speed on the Stockton-Lodi Freeway was as high as 70 miles per hour, but that on the side road where he was stopped it was 55. The officer further testified that he noticed that Costa had been drinking from the odor on his breath, but not enough to cause him to be examined. Costa, being unable to find the house where the party was held and after being so stopped, continued on his way back to Lodi. All of this testimony was objected to by defendant, but his objections, as well as his motion to strike, were denied by the court. Just prior to the fatal accident he passed another highway patrol car at a speed estimated by the officers as between 80 and 90 miles per hour. The patrol car was parked approximately 100 to 150 feet west of the freeway. The officers immediately gave chase and testified that they had reached a point approximately a quarter of a mile or more to the rear of the Costa car when the accident occurred. They both testified that from the point where they first saw Costa to the scene of the accident he passed three or four cars, each time driving from the right-hand lane to the passing lane, and again returning to the right-hand lane after passing the cars; that they were driving in the passing lane at all times, their top speed during this time was 92 miles per hour.

Officer Sked, the driver of the police car, did not testify at the trial. However the record of the preliminary hearing was introduced in evidence and hence was before the court. His testimony was that when he first saw defendant's car approximately 2 miles from the accident it was going 80 to 85 miles per hour; that he immediately gave chase from a point from where their patrol car was parked 100 to 150 feet west of the freeway, a four-lane divided highway; that they crossed the same and then turned north; that the police car reached a top speed of 90 to 92 miles per hour; that as he neared the Costa car he saw two sets of tail lights—one set in the right lane and those of Costa in the passing lane; that he was too far away to see the relative positions of the two cars ahead; that when they were approximately one-quarter of a mile behind the Costa car he saw one set of tail lights suddenly veer to the left; that he didn't see where the lights came from; that after he arrived at the scene of the accident he talked to Costa who stated he had consumed a couple of cans of beer and that he guessed he was going too fast.

The testimony of Officer Marshall, who was riding with Sked, was substantially the same. However he likened the view of the cars ahead of them to a "triangle of three tail lights", one being in the right-hand lane, one in the passing lane and those of Costa immediately behind; that a car then moved, blotting out one set of tail lights and the next instant a set of tail lights went off the road in a sharp curve; that he couldn't identify the lights of the jeep; that at that time they were slowly gaining on Costa; that he and several bystanders helped right the jeep; that Marino, the driver of the jeep and victim of the accident, was unconscious, as were the three passengers; that about 5 or 10 minutes later Marino regained consciousness, said he was the driver and when the officer asked, "What happened?" he replied "The man hit us in the rear."

One of the passengers in Costa's car was asleep when the accident occurred and had no knowledge of any of the facts.

A second passenger was not called.

The testimony of the third passenger, a member of the armed forces, appears by way of deposition. He testified that he was 5 feet 4½ inches in height; that he was sitting in back, on the right-hand side; that he observed the speedometer most of the time and that it showed a speed of 90 miles per hour; that he first saw the jeep when it was about 40 yards away and directly in front of the Cadillac; that the jeep was not going very fast; that it was passing the car on the right; that he could only see the top of the jeep; that it was directly in front of Costa; and that the jeep did not change its position in the lane from the time he first saw it until the accident. On cross-examination, when he was asked if following the accident he had discussed "the accident with the Highway Patrolmen, either Officer Stone or any other officer?", he replied, "No, sir". After further cross-examination he said that he believed he did talk with an officer who was in the court room and to some of the men in his company at Fort Ord. Later in his examination he admitted talking to some one from the district attorney's office; and also stated that he had talked with highway partolmen after the accident.

Costa, who testified in his own behalf, concurred with much of the other testimony. However he placed the speed of his car at about 70 to 75 miles per hour. Regarding the actual happening of the accident, his testimony was that as he approached a cross street known as Armstrong Road he looked to the right and left for cross traffic; that he then proceeded to pass the car on his right; that he looked at the car on his right; that when he again looked to the front he saw the jeep for the first time; that the jeep was then proceeding on an angle across the passing lane; and the left front portion of his car hit the left rear portion of the jeep. A statement of Costa's given to highway patrol officers about an hour after the accident was substantially the same as that which he gave at the trial.

None of the three passengers in the jeep were called nor were any of the occupants of the third car. Although nothing appears in the record concerning the persons in the jeep, the officers stated that the other car drove away before its occupants could be questioned or the car identified.

Two main contentions are made by defendant. However, since it appears the judgment must be reversed because of prejudicial error in the admission of certain evidence over defendant's timely objections thereto, it becomes unnecessary to discuss his remaining arguments.

It is his contention that the testimony of Officer Nicol should have been excluded as being "incompetent, irrelevant and immaterial and remote", that its admission was highly prejudicial to appellant's cause in that it could have no other effect than to create a feeling that appellant was a person who habitually drove fast and often while drinking.

Specifically, Officer Nicol testified that "I had just had another violator stopped when I first observed him." His testimony continued: "I asked him why he was speeding and he couldn't give me any reason just stated that he realized he was wrong and that he shouldn't have been doing that and I asked him for his driver's license which he showed me and I noticed that it was a probationary license and I didn't want to prosecute the man unfairly by issuing him a citation without being definite as to his speed so I reprimanded him for driving like that and warned him that he had a probationary license and that if he got a citation or was in violation of the law that he would lose his license and he assured me that he would drive more carefully in the future, and I released him on that basis." He concluded his testimony with the observation that Costa had been drinking lightly, but "not enough for me to cause him to be examined or anything."

Defendant also contends that the evidence as to his probationary license, particularly that elicited from himself upon cross-examination, should have been excluded. This testimony was to the effect that at the time of the accident he had what he termed a "conditional license", the condition being that he not drive while drinking. The condition imposed thereon, however, had expired on August 8, 1950, over a year prior to the accident. Appellant, merely by directing a letter to the Department of Motor Vehicles, requesting issuance of a regular license, could have discontinued using this license marked "Probationary". This however he had not yet done.

In reply to such contention respondent argues that such prior acts were relevant for the purpose of showing the "state of mind" of appellant at the time of the collision, "to wit, his gross negligence and disregard of the welfare and safety of others on the highway."

[1] It is axiomatic that any evidence in order to be admissible must be relevant to the issues to be determined.

[2] In People v. Coltrin, 5 Cal.2d 649, 656, 55 P.2d 1161, 1164, the court in discussing the admission into evidence of prior criminal acts said:

"* * * where an offense is of such a nature that proof of the act with which the defendant is charged is not in itself proof of the required criminal intent and where additional proof of such intent is necessary to prove the crime charged, evidence of other offenses of a similar nature committed by the defendant is admissible for the purpose of proving intent." See also People v. Clapp. 67 Cal.App.2d 197, 153 P.2d 758 (murder); People v. Collins, 80 Cal.App.2d 526, 182 P.2d 585 (abortion and murder); People v. Jackson, 36 Cal.2d 281, 223 P.2d 236 (murder); People v. Thompson, 85 Cal.App.2d 261, 192 P.2d 802 (embezzlement).

[3] Therefore, since the intent to kill is not an element of the crime of involuntary manslaughter, Penal Code, Sec. 192, subd. 3(a); People v. Barnett, 77 Cal.App.2d 299, 175 P.2d 237; People v. Miller, 114 Cal. App. 293, 299 P. 742, the admission of such evidence in the present case had no basis whatsoever.

[4] Gross negligence like ordinary negligence is not absolute but always relates to some circumstance of time, place or person and likewise is determined by the trier of fact from a consideration of those factors. Malone v. Clemow, 111 Cal.App. 13, 18, 295 P. 70.

[5] We are unable to see how the evidence as to appellant's having been speeding at a remote prior time and place (on the facts here it must be said to be remote) and of his having a probationary driver's license, the limitation of which had expired, is relevant to a determination of whether his conduct at the time and place of the accident was grossly negligent.

[6] While it is true a conviction will not be reversed merely because of error in the admission of evidence, but "Even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice." People v. Gilliland, 39 Cal.App. 2d 250, 265, 103 P.2d 179, 187. In that case the court, in discussing what constitutes a "miscarriage of justice" as used in Article VI, Section 4½, of the Constitution, said:

> "We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. [Citation] The phrase 'miscarriage of justice' as used in the constitutional provision has no hard or fast definition, and as was said in People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975, 'does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. * * *
>
> "* * * While deviation from the prescribed rules of law governing trials may result in justice for the particular defendant who is before the bar, it is dangerous to the community and its cit-

izens. As was said by Chief Justice Hughes of the United States Supreme Court not so long ago, 'In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interest or privilege.' When, as here, we are unable to say 'whether appellants would or would not have been convicted but for the errors of the court,' we must direct a reversal. [Citation] We do not regard the evidence in this case as sufficient to put into operation the saving grace of section 4½ of article VI of the Constitution. Even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice."

In People v. Newson, 37 Cal.2d 34, 45, 230 P.2d 618, 624, the court said:

> [7] "If it cannot be said that, in the absence of the error complained of, a different verdict would have been *improbable,* the erroneous ruling constitutes a miscarriage of justice, within the meaning of the constitutional provision." (Emphasis added.)

In People v. Reese, 65 Cal.App.2d 329, 337, 150 P.2d 571, 576, this court said:

> " 'In a close case where the evidence is sharply conflicting, substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal.' "

[8] Even though we assume that the evidence properly introduced would be sufficient in the present case to support the judgment, yet here, as in People v. Burness, 53 Cal.App.2d 214, 222, 127 P.2d 623, 626, "we are unable to conclude that defendant would have been convicted had the error not occurred." It can not be denied that the case is close and hence the evidence improperly admitted may have been the determining factor in swinging the scales against appellant.

[9] We do not overlook the fact that here the court was the trier of fact rather than a jury. However, in the absence of anything to the contrary in the record, the admission over objection of the evidence here under attack shows that the court, at least to a degree, considered it material to the issues presented. Such being the case, the judgment must be reversed. Grace v. Carpenter, 42 Cal.App.2d 301, 108 P.2d 701. To hold otherwise would be to sanction one rule of evidence for those who would demand a jury trial and to sanction an entirely different rule to the prejudice of all who would prefer to have their cause heard before the court.

The judgment is reversed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

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112 Cal.App.2d 462

PEOPLE v. WALKER.

Cr. 915.

District Court of Appeal,
Fourth District, California.
July 30, 1952.

Rehearing Denied Aug. 8, 1952.

Hearing Denied Aug. 28, 1952.

Defendant was convicted in the Superior Court of Riverside County, Russell Waite, J., of two murders, a kidnapping, and an assault with intent to commit rape, and he appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that the evidence sustained the conviction.

Affirmed.

1. Homicide 🔑250
Kidnapping 🔑5
Rape 🔑53(2)

Evidence supported conviction for murder of two people, kidnapping, and assault with intent to commit rape.

2. Criminal Law 🔑126(2)

Denial of change of venue to one charged with murder and rape and other crimes, which change was sought on ground of alleged impossibility of fair trial because of unfavorable publicity, was not error.

3. Indictment and Information ⚷130

Charges of rape of one woman and assault with intent to commit rape of another, and of kidnapping the two women, were of the same class of crimes so as to be chargeable in one indictment. Pen.Code, § 954.

4. Indictment and Information ⚷130

Both rape and murder are forms of assault and both are offenses against the person, and therefore they may be charged in one indictment. Pen.Code, § 954.

5. Indictment and Information ⚷130

A joinder of distinct offenses in one indictment is permissible where there is a common element of importance in their commission. Pen.Code, § 954.

6. Indictment and Information ⚷130

Count charging murder of man and woman and kidnapping of the woman and assault with intent to rape her and count charging assault of a different man with deadly weapon, and kidnapping of different woman and rape of different woman had a common element in that accused was armed with the same gun and the gun was used in each set of offenses, and in that in each instance a woman was kidnapped and a common intent was clearly disclosed, and therefore joinder of both sets in same indictment was not improper. Pen.Code, § 954.

7. Indictment and Information ⚷95

Where common element of multiple, distinct offenses was that accused was armed with the same gun, allegation of such fact in indictment charging accused with all of the crimes was not objectionable. Pen.Code, § 954.

8. Criminal Law ⚷865(1), 1174(1)

Where remark made by court considered as a whole constitutes merely an explanation of reasons for detaining jury, the importance of the case, and the desirability for careful and dispassionate discussion and consideration of all issues to end that verdict one way or the other should be reached, without in any way indicating that it should be a verdict of guilty, there is no coercion or reversible error.

9. Criminal Law ⚷1174(1)

Statement by court in explaining reason for detaining jury for further deliberations that court feared, from jury foreman's report that jury stood eleven to one, that one person was unwilling freely and fairly to discuss the matters with other jurors, and that the evidence was such that twelve reasonable minds should be able to agree one way or the other, did not require reversal of conviction, where court did not express its view of the evidence.

10. Criminal Law ⚷878(1)

Refusal to accept verdict on one count of indictment was proper where no finding had been made upon one issue involved in such count.

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Crispus A. Wright, John W. Preston, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Dep. Atty Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in Count I with the murder of Richard Cook; in Count II with the murder of Doris Cook; in Count III with the kidnapping of Doris Cook; in Count IV with assault with intent to commit rape on Doris Cook; in Count V with assault with a deadly weapon upon James Hicks; in Count VI with the kidnapping of Betty Maund; and in Count VII with the rape of Betty Maund. It was also alleged, as to each count, that he was armed with a pistol, being the same one in each instance, and that each was a different offense of the same class as each of the others, and connected in its commission with each of the others.

A motion for a change of venue was denied. A jury found the defendant guilty on the first four counts, recommending life imprisonment on the murder charges, and failed to agree on the other three counts. He has appealed from the judgment and the order denying his motion for a new trial.

The general facts brought out in evidence will be briefly stated. About midnight on

February 23, 1951, James Hicks and Betty Maund drove to a park in Riverside County, where they parked. Shortly thereafter, the appellant appeared with a pistol in his hand. He struck Hicks on the head with the gun, knocking him down, and causing the gun to discharge. He then dragged Betty Maund into his car and drove to another place where he raped her. The next morning the officers found an expended .45 calibre pistol shell at the place where Hicks had been attacked.

The scene of the crime charged in the first four counts is in a hilly section southerly from Riverside and westerly from March Field, through which several narrow crooked roads run. South of March Field, Cajalco Road runs westerly from Highway 395. A few miles westerly from Highway 395 a small road runs northerly from Cajalco Road, leading to Arlington, and a few miles farther west another road runs northerly leading to Riverside via Lake Mathews.

About 11:03 A.M. on March 26, 1951, a Mr. and Mrs. Arthur drove westerly on Cajalco Road and turned northerly on the road to Arlington. After proceeding a quarter of a mile they saw a tan colored car parked across the road, with the hood up and the appellant standing there. He tried to stop them but Arthur passed on the shoulder and went on. About 11:20 A.M. a green Ford, in which Mr. and Mrs. Cook and their baby had been traveling, was found on the north side of Cajalco Road between the Arlington road and the road to Lake Mathews. The body of Richard Cook, still warm, was on the ground and the baby was on a blanket at the side of the car. The left rear fender of the Ford had a brown smear on it, its left running board had been scraped its full length, and its front fender was damaged with the fender brace broken loose. A part of a broken bolt, with the nut on it, was found near by. Marks on the ground showed that another car had turned around in front of the Ford, which was faced west, and had then proceeded in an easterly direction.

The autopsy surgeon testified that the death of Richard Cook was caused by a bullet which had gone through his body, piercing the heart; that the entrance wound was 5/16 inch in diameter; that an opening that size would admit a missile 45/100 inch in diameter because the skin was elastic and would contract; that the exit wound was larger, with a margin of bruises and tears around it; and that death would occur within three or four minutes.

About 4:00 P.M. on March 26 some officers found a tan Oldsmobile parked in a service station and repair lot in Riverside. Its right front fender and bumper were damaged, with the bumper torn loose and hanging out of place. There was a broken bolt in the bumper which fitted the other part found at the scene of the crime, and it had spots of green paint smeared on it. In the trunk of the car they found a .45 calibre pistol in a bag of clothing.

The officers, with an M. P. from March Field, went to a nearby cafe where they saw the appellant facing the front window. The M. P. went in and told the appellant the officers wanted to talk to him. The appellant went out the back door, but an officer drew a gun and stopped him as he was running away. He was taken back to the service station where he admitted that the Oldsmobile and the pistol belonged to him, and that he had left the car there to be repaired. When asked about the damage to the car he said it had been in an accident in Hollywood a few days before. About that time, and later that night, the appellant denied that he had been in the Cajalco area on that day, saying that he had been in Riverside until about noon, when he returned to the Base and later returned to Riverside. When told that a bolt had been picked up on Cajalco Road at the scene of a collision where the body of a man was found, which fitted the broken one on his bumper, he replied that he had not been in that area on that day.

The appellant was in the Air Force and stationed at March Field. On the afternoon of March 27, he told the officers that he had left March Field at about 10:00 A.M. on March 26; that he went down Highway 395 and turned to the west on Cajalco Road; that he collided with a Ford as he came around a curve; that he did not stop; that in his mirror he saw a young man alight from the Ford and stand in the road; and that he continued on westerly, going on to Riverside and then back to the Base, arriving there about noon. When asked why he had run at the time of his arrest he said he did not like policemen.

On the morning of March 28, the body of Doris Cook, with blood on her green sweater and other clothing, was found in a gully ³⁄₁₀ of a mile south of Cajalco Road and about eleven miles east of the place where Richard's body was found. There were multiple scratches and bruises on her body. The autopsy surgeon testified that her death was caused by a bullet wound; that the entrance and exit wounds measured ⅜ of an inch in diameter without stretching the skin; that she might have survived up to a half an hour; and that the condition of her body was consistent with her death about the middle of March 26. He expressed the opinion that the bullet causing the missile tract through her body was slightly less than ½ inch in diameter, and that she was lying on her face when the wound was inflicted. The surface of the ground near the body had been disturbed, and there were signs that she had crawled or been moved some distance. About 226 feet away a .45 calibre shell was found, and eight feet from it a bullet with its point slightly imbedded in the ground. Tire tracks were found 69 feet from the body, which matched the markings left by the tires of the appellant's car.

A special agent of the FBI, specializing in the examination of firearms, testified that he had examined the shell found at the scene where Hicks had been hit over the head with a gun and the shell found near Doris Cook's body, examining them in connection with the pistol found in appellant's car. They were both .45 calibre and identical in all respects to the cartridges found in appellant's gun. Basing his opinion on a comparison of the microscopic markings found on these two shells with the markings from a cartridge which he fired from appellant's pistol, which were identical in all respects, he expressed the opinion that they had been fired from the appellant's gun to the exclusion of all other weapons. He also compared markings on the bullet found near Doris Cook's body with those on a bullet fired from the appellant's gun, and identified it as having been fired from appellant's pistol.

Another special agent of the FBI, a chemist specializing in hair and fiber examinations, made a microscopic examination of fibers which he removed from Doris Cook's green sweater and compared them with a green fiber found in the appellant's car. They were found to be similar in all observable characteristics and could have been from the same source. He also made a microscopic examination of a long hair found in appellant's car and compared it with a hair removed from Doris Cook's head. The hairs were similar in all respects and could have been from the same person.

The distance between the place where the body of Richard Cook was found and the main gate of March Field, going by the place where his wife's body was found and thence along Cajalco Road and Highway 395, was 17.9 miles and took 28 minutes to cover at 45 miles per hour. The distance between the same two points, going past Lake Mathews and along Victoria Avenue into Riverside, and thence out Highway 395 along the route the appellant said he traveled, was 23.9 miles and took 32 minutes at the same speed. A witness testified that about 1:00 P.M. on March 26 he was driving north toward Riverside on Victoria Avenue; that he saw a brown Oldsmobile car proceeding ahead of him at 45 or 50 miles an hour; that he followed close behind this car for three or four miles and when he turned off it was still going north on Victoria; and that the right front fender of the brown car was damaged and the front bumper was sticking out ahead of the car. The following day he identified the appellant's car as the one he had seen on Victoria the day before.

The appellant testified that on the night of February 23, he had been out with a girl; that he took her home around 11:00; that he then went to an eating place where he met some people with whom he went to a night club in San Bernardino; and that he stayed there until 2:00 A.M.

He testified that on March 26, he left March Field after 10:00, went down Highway 395, and turned west on Cajalco Road; that he turned off on Arlington Road but soon decided it did not lead to Lake Mathews; that he tried to turn his car but it stalled; that he lifted the hood and straightened some wires; that he saw a car coming from Cajalco Road, put up his hand for the car to stop but the driver did not stop; that he waited about five minutes and went back to Cajalco Road and turned west on that road; that he tried to pass a green car and collided with it; that he did not stop because he had recently gotten a ticket for driving without a license; that he looked in his mirror and saw a young man get out of the car; that he kept on driving and turned right on the road to Lake Mathews; that after he passed the lake he drove along Victoria Avenue into Riverside, and then over to and down Highway 395 to March Field, arriving there about 12:00 o'clock; that he got his lunch and did several things at the Base, leaving there sometime after 12:30; that he drove up Highway 395 to Riverside and left his car at this garage to get the bumper fixed; that he went to a court and paid a fine for driving without a license; that a little later he and a friend went back to the garage and then to the cafe where he was arrested; that when he saw the officers he went out the back door because he had been in an accident without stopping, and thought if he got to the Base he would be under military law; that he walked but did not run; and that he told the officers the car and the gun belonged to him. He denied that he had committed any of the crimes with which he was charged.

The appellant produced an expert witness who is a surgeon with experience in removing projectiles from bodies. In response to hypothetical questions he expressed the opinion that the bullets causing the death of Richard and Doris Cook had been of a medium calibre, larger than a .22 and smaller than a .45.

It is first contended that the evidence is insufficient to support the judgment. It is argued that the testimony of the ballistic expert is not conclusive; that certain facts are consistent with his innocence, including his failure to show any nervousness, his leaving his car and pistol where they could easily be found; that no motive appears since he did not know the victims; and that it was impossible for him to have committed these crimes since he appeared at March Field about 11:40 A.M. and Richard Cook must have been murdered after 11:10 A.M.

These arguments rest on conflicting evidence or inferences and are not controlling. The evidence as to the time element is far from sufficient to show that the appellant could not have committed these crimes. The appellant testified that he arrived at March Field "approximately about a quarter to twelve, or close to 12." Three soldiers testified they saw him approaching the main gate from the direction of Riverside. One said "It was around quarter to twelve to twelve o'clock." Another said "Between 15 to 12:00 and 12:00 o'clock." The other said "approximately twenty minutes to twelve," but his explanation as to how he fixed the time clearly showed that it was much later. None of these witnesses had a watch, and it is significant that none of them saw the damaged condition of appellant's car, which was so obvious to others. No impossibility appears even if these witnesses were to be believed.

That these witnesses may have been mistaken as to the day on which they saw the appellant thus approaching the entrance to March Field about 12:00 o'clock is indicated by their failure to see the damage to his car, and by other evidence. There is strong evidence that his damaged car was seen about 1:00 P.M. coming from this general area and proceeding along Victoria toward Riverside. The appellant admits that he followed that course into Riverside after colliding with the Cook car. The evidence fails to sustain the contention that it was impossible for the appellant to have committed these crimes.

[1] A motive clearly appears, and there is strong evidence that appellant's gun was used, and the evidence indicates that Doris Cook had been in his car. He tried to stop a car in which a woman was riding, on a

lonely road, a few minutes before the first of these crimes was committed. He admits that he was at the scene of that crime, and involved in an incident which appears to have been closely connected with it, within a very few minutes of the time it was committed. He tried to run away when told the officers wanted to talk to him, and he repeatedly denied that he had been in the area involved until that fact was thoroughly established. It cannot be held that the evidence is insufficient to support the judgment.

[2] It is next contended that the court erred in denying a motion for a change of venue. Appellant's affidavit in support of the motion alleged, on information and belief, that he could not have a fair trial in that county because of the great newspaper publicity given to alleged details concerning the crimes charged; that public sentiment and feeling had been aroused against him; and that the sheriff's office had inspired this adverse sentiment against him by giving alleged facts to the press. It stated that he believed the people of the county were prejudiced against him because the circumstances surrounding these crimes would naturally induce excitement, and all of the purported victims were members of the Caucasian race; that the people of the county generally believed he was guilty of some or all of the offenses charged; that the sheriff's office believed he was guilty and the deputy sheriffs would not believe his denial of guilt; that statements damaging to him had been furnished to the press by the officers, which he had no opportunity to refute; that prejudicial matter had been published by the press of Southern California; and that such prejudicial influences had been brought to bear on the general public in the county to an extent which made a fair trial impossible. Newspaper articles were attached, the last of which was published nearly three months before the trial.

Five affidavits were filed in opposition to the motion. These support the ruling made, and it would serve no useful purpose to summarize them. The court's conclusion is also supported by the proceedings in the empanelment of the jury. Prior to the trial, the appellant's challenge to the entire regular jury panel was sustained. His counsel agreed that a special venire of 80 persons should be summoned by an elisor, appointed without objection, and that the elisor should summon further persons if that became necessary. Of the 80 persons thus summoned the court excused 33 for valid reasons, seven because they were opposed to the death penalty. A further panel of 40 persons was later called. When the jury was completed, ten of whom were on the original special panel, the appellant had used only 14 of his 20 peremptory challenges, and his counsel announced that he was satisfied with the jury as then constituted. No error or abuse of discretion appears in this connection. People v. Yeager, 194 Cal. 452, 229 P. 40.

[3-7] It is next contended that the court erred in overruling a demurrer to the indictment on the ground that the last three counts were improperly joined with the first four counts. It is argued that a joinder of the two sets of crimes was not permissible under section 954 of the Penal Code, since the offenses were neither of the same class nor connected together in their commission. It is further argued that the allegation in each count that the offenses were committed by the use of the same gun resulted in prejudice.

The charge of rape of Betty Maund and of assault with intent to commit rape of Doris Cook clearly belong to the same class of crimes, and the same is true of the charges of kidnaping the two women. Both rape and murder are forms of assault and both are offenses against the person. Moreover, a joinder of distinct offenses is permissible if there is a common element of importance in their commission. People v. Scott, 24 Cal.2d 774, 151 P.2d 517. Such a common element here appears in that the appellant was armed with the same gun and the gun was used in each set of offenses. We think a further common element may properly be said to appear in that in each instance a woman was kidnaped and a common intent is clearly disclosed. It may be said here as was said in People v. Thorn, 138 Cal.App. 714, 33 P.2d 5, 15, approved in People v. Duane, 21 Cal.2d 71, 130 P.2d

123: "The Legislature, it seems to us, meant by the use of the words, 'the same class of crimes or offenses,' in such section, offenses possessing common characteristics or attributes, and it would seem that the different offenses set out in the information here do have many attributes in common." As one of the common elements of substantial importance the allegation as to each count, that the appellant was armed with the same gun, was a proper allegation of a material fact and did not constitute prejudice of which the appellant is entitled to complain. We regard the principles set forth in People v. Duane, 21 Cal.2d 71, 130 P.2d 123, as applicable here, and no reversible error appears in this connection.

It is next contended that the court erred in failing to enter the verdict on one count first brought in by the jury, and in coercing the jury and denying a motion for a mistrial based on such coercion.

The jury retired at 12:30 P.M. on August 3, 1951. It returned at 5:35 P.M. and requested the reading of certain evidence, which was done. It returned at 10:32 P.M. and reported that it was unable to agree. The court refused to discharge the jury, saying the case had been a protracted one and that he felt more time should be given in deliberation and discussion, in an attempt to reach a verdict. On August 4, at 4:40 P.M., the jury was called into court and the judge asked whether or not it believed further deliberation to be useless. The foreman replied that an agreement had seemed unlikely "until a few minutes ago", but that it was now thought that a ground of agreement had been reached. At 9:35 P.M. the jury reported that it had made no progress since it was last in court, and that it had stood 11 to one since early the previous afternoon. No statement was made as to how many favored conviction. The court then said:

> "Well, I hesitate very much to require you to deliberate further, ladies and gentlemen. *I fear*, from the state of the case, and that situation which the foreman has described, *that there is apparently one person in your group who is perhaps unwilling freely and fairly to discuss the matter with the other jurors, as the Court instructed should be done.* I know that probably all of you, including the alternates, will consider me somewhat of a tyrant, and considerably unfair if I require deliberation further. But you should understand, and I know that you do, that this matter is of tremendous importance to all concerned, and I know I speak for all counsel in the case when I say that nobody wants to see this matter have to be retried.
>
> "As you know, we have had 74 witnesses here in some 18 trial days. We have had 110 exhibits. There has been a lot for you to discuss.
>
> "*I feel that the evidence is such that 12 reasonable minds should be able to agree, one way or the other, upon that evidence.* I hesitate very much to require you to deliberate further, but I do feel that you should retire for the night, and attack the problem anew tomorrow morning. If at that time I may be of any further assistance to you, I shall certainly be glad to do so.
>
> "*I only want you to understand that I am not trying to be mean to you; I am only trying to see that some verdict in this case is reached.* I think both sides of the case are entitled to have a verdict if it is humanly possible to reach a verdict in this case.
>
> "I would therefore ask you to retire for the night. I know you have had a long, hard day. I wouldn't require you to deliberate any further this evening. But tomorrow morning, it may be that something can be accomplished.
>
> "I think, in view of the tremendous amount of time, energy and effort, and everything else that has gone into this case, that we should expend every effort to arrive at a solution. Therefore, I shall ask that you retire for the night, and we will get together again tomorrow and see if we can arrive at something." (Italics ours.)

The jury then retired and returned on August 5, at 12:25 P.M. announcing that it had reached a verdict on one count. The court examined that verdict, and pointed out that no finding had been made upon one issue involved in that count. The foreman stated "We voted we couldn't agree on it." The court returned the verdict to the jury, stating that he thought they should deliberate further on that question, and that it would ask it to also deliberate further as to the other issues submitted to it. The jury again returned at 4:07 P.M. and reported that it had reached a verdict on four counts and that it felt that further deliberation on the remaining counts would be of no avail. Verdicts of guilty on the first four counts were entered, with separate verdicts finding that the appellant was armed in each instance. The jury was polled on the first verdict on the first count, and polling was waived on the other verdicts.

The appellant argues that the italicised portion of the judge's remarks placed the one juror under a pressure amounting to coercion and reversible error, citing People v. Kindleberger, 100 Cal. 367, 34 P. 852; People v. Conboy, 15 Cal.App. 97, 113 P. 703; People v. Carder, 31 Cal.App. 355, 160 P. 686; People v. Blackwell, 81 Cal. App. 417, 253 P. 964; People v. Talkington, 8 Cal.App.2d 75, 47 P.2d 368; People v. Walker, 93 Cal.App.2d 818, 209 P.2d 834; People v. Crowley, 101 Cal.App.2d 71, 224 P.2d 748. The respondent relies on People v. Miles, 143 Cal. 636, 77 P. 666; People v. Rhodes, 17 Cal.App. 789, 121 P. 935; People v. Piscitella, 90 Cal.App. 528, 266 P. 349; People v. Finkelstin, 98 Cal.App. 2d 545, 220 P.2d 934; People v. Lammers, 108 Cal.App.2d 279, 238 P.2d 667.

The distinction between such cases as People v. Kindleberger, where the remarks of the judge were such as to indicate his opinion on the question of guilt, and cases where the remarks made gave no intimation as to how the judge viewed the evidence, is pointed out in People v. Miles, 143 Cal. 636, 77 P. 666, 667. It was there said: "In the Kindleberger Case this court held that the remarks of the trial judge indicated that he viewed the evidence as pointing to defendant's guilt. No such inference can be drawn from the remarks of the court in the present case. No intimation whatever was given as to how the court regarded the evidence; its whole purpose was to require a reasonable effort on the part of the jury to come to some conclusion one way or another, and not cause a mistrial."

[8] When the remarks made, considered as a whole, constitute merely an explanation of the reasons for detaining a jury, the importance of the case, and the desirability for a careful and dispassionate discussion and consideration of all of the issues to the end that a verdict one way or the other should be reached, without in any way indicating that it should be a verdict of guilty, there is no coercion or reversible error. People v. Lammers, 108 Cal.App.2d 279, 238 P.2d 657.

[9] Here, the way the jury stood was not revealed and there was no intimation as to which way the judge viewed the evidence. The trial had taken 18 days, there were many witnesses and many exhibits, and there were many separate issues calling for a large number of verdicts. The large number of issues and the mass of material naturally called for an unusual amount of analysis and consideration, the judge properly urged that sufficient time be taken to carefully consider the entire matter, and the time devoted to that purpose was not unduly excessive. His remarks clearly showed that he was explaining to the jurors why he detained them, and impressing upon them the importance of the case and the extent of the issues and evidence which would naturally require a free and fair discussion and deliberation. He suggested that "perhaps" one juror had been unwilling to discuss the matter freely and fairly, explained at some length why he felt that further deliberation was advisable, and suggested that they get a night's rest before beginning such further deliberation.

The jury had reported that it was unable to agree after only eight hours of deliberation. Nearly a day later it reported that a ground of agreement might have been reached. A few hours later, it reported no progress, at which time the remarks complained of were made. The jury reported some progress at noon the next day, and reached a verdict a full working day after the court's remarks were made. There is nothing to indicate that a verdict was finally reached because of coercion on the part of the court, rather than because of a full and free discussion and deliberation of the problem, as urged by the court. It does not appear that one juror was coerced, or that he changed his vote from innocent to guilty. It would seem much more probable from the record that the one juror converted the other eleven from their former insistance on the death penalty. Assuming that one or two of the court's remarks had better been left unsaid, they were not sufficient under the circumstances to require or justify a reversal.

[10] There is no merit in the contention that the court erred in refusing to enter the verdict on one count which was first brought in. It clearly appeared that the jury had not agreed on all elements of that one count. Appellant's further contention that the court erred in denying his motion for a new trial is based upon matters already covered and cannot be sustained.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

112 Cal.App.2d 420

THOMSON et al. v. L. C. RONEY & CO., Inc. et al.

Civ. 19014.

District Court of Appeal, Second District, Division 2, California.

July 25, 1952.

Hearing Denied Sept. 18, 1952.

Proceedings on a petition filed by Walter P. Thomson and Walter P. Thomson, doing business under the fictitious firm name and style of Texas Tank Company, for an order to show cause why the court should not add to the files and records of an action previously tried between the petitioner and L. C. Roney & Company, by inserting as a judgment debtor the name of Southwestern Development Company, the alleged alter ego of the initial defendant. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered an order granting the relief sought, and the Development Company appealed. The District Court of Appeal, Fox, J., held that the evidence sustained the finding that the Development Company was in fact the alter ego of the initial defendant.

Affirmed.

1. Judgment 🔑304

Power of court to correct clerical errors in final judgment may not be used as springboard to rectify its judicial errors.

2. Judgment 🔑310

There was no abuse of discretion in adding corporation's name as judgment debtor to final judgment previously rendered against initial defendant, notwithstanding fact that connection between two corporations had not been developed at original trial, where evidence on petition for order to show cause established that added judgment debtor was merely alter ego of initial defendant.

3. Judgment 🔑324

Liberality with which court permits amendments of judgments where record itself clearly reflects clerical error should apply equally to use of extrinsic evidence to clarify name of real defendant.

4. Judgment 🔑324

Where court may with propriety amend judgment, evidence dehors record is admissible, upon proper notice to adversary party, in order to make judgment speak truth.

5. Judgment 🔑310

Where court had jurisdiction over defendant, it had jurisdiction to make its judgment reflect defendant's true name.

6. Judgment 🔑324

Where question arose as to identity and character of defendant upon whom judgment was binding, court possessed power to adopt suitable procedure for purpose of determining that question, and properly exercised that power by taking evidence, after proper notice, in order to determine true name of defendant. Code Civ.Proc. § 187.

7. Corporations 🔑1

Separate personality of corporation is but statutory privilege and must not be employed as cloak for evasion of obligations, and therefore, where injustice will result from strict adherence to doctrine of separate corporate existence, court will look behind corporate structure to determine identity of party who should be charged with corporation's liability.

8. Corporations ⚿1

Evidence sustained finding that corporation sought to be added as judgment debtor had in fact been alter ego of initial defendant against which judgment had been rendered.

9. Corporations ⚿1

Corporations cannot escape liability by mere change of name or shift of assets when and where it is shown that new corporation is, in reality, but a continuation of old. Civ.Code, § 3440.

10. Corporations ⚿1

The elements requisite to establishment of alter ego relationship are (1) control of one corporation by other; (2) use of one corporation as an instrumentality or business conduit of other; and (3) promotion of injustice through preservation of separate corporate identity.

11. Corporations ⚿1

Alter ego relationship may exist independent of fraudulent purpose, and where recognition of separate character of entities will result in probable fraud, promote confusion or serve to accomplish an injustice, law will strip corporation of its separate existence and place responsibility on party actually liable for obligation through application of alter ego doctrine.

Franklin W. Peck, Los Angeles, for appellant.

Freda B. Walbrecht and Holbrook & Tarr, Los Angeles, for respondent.

FOX, Justice.

Southwestern Development Company, a corporation, appeals from an order adding its name as a judgment debtor to a final judgment previously rendered against the initial defendant, L. C. Roney, Inc., a corporation.

In July, 1949, plaintiff commenced an action against defendant L. C. Roney, Inc., and others for the recovery of money arising out of certain business transactions dating from July, 1946. Judgment in plaintiff's favor for $6,002.26, plus interest and costs, was entered against L. C. Roney, Inc., on March 23, 1951. No appeal was taken and the judgment became final.

Thereafter plaintiff obtained an order for examination of L. C. Roney, Inc., as a judgment debtor pursuant to which Edward D. Neuhoff, secretary of the judgment debtor corporation, was examined on June 8, 1951. Mr. Neuhoff's examination disclosed the following: all the outstanding shares of defendant L. C. Roney, Inc., had been owned by the Southwestern Development Company since December, 1946; A. B. Ruddock and Edward D. Neuhoff were respectively president and secretary of both corporations; the members of the board of directors of both corporations were substantially identical; on August 31, 1948, L. C. Roney, Inc., had transferred all its assets to the appellant Southwestern Development Company, which, on the following day, filed a certificate that it was conducting business under the fictitious firm name of L. C. Roney, Inc. On the basis of this information, plaintiff filed with the trial court a petition for an order to show cause why the court should not add to the files and records of the action previously tried, and to the judgment therein, the name of appellant as a judgment debtor. Appellant filed petitions for a writ of prohibition in the District Court of Appeal and the Supreme Court upon the ground that the trial court lacked jurisdiction of the subject matter and was without power under the circumstances to modify its final judgment. Both petitions were denied.

Plaintiff's order to show cause was heard on November 19, 1951, at which time plaintiff introduced a transcript of the testimony given by Mr. Neuhoff on June 8, 1951, and additional testimony was received. The evidence showed that on November 20, 1945, appellant Southwestern Development Company purchased 80 percent of the stock (2,000 shares) of L. C. Roney, Inc., and acquired the remaining 20 percent (500 shares) on December 5, 1946, all of which it still retains. Appellant is a family corporation with 9,000 shares of stock outstanding with a par value of $100, of which A. B. Ruddock owned 4,999 shares, Billings Kirk Ruddock and Merritt Kirk Ruddock owned 2,000 shares each, and a single share was owned by Margaret Kirk Ruddock. The 500 shares of stock in L. C. Roney, Inc., acquired in December, 1946, were purchased by A. B. Ruddock and assigned to the Southwestern Development Company, although no authorization for the transaction appears in the minutes of the Southwestern Development Company. At the time of the original trial the directors of the Southwestern Development Company were A. B. Ruddock, Billings K. Ruddock and Edward D. Neuhoff, and its officers consisted of A. B. Ruddock, president, Billings K. Ruddock, vice president, and Edward D. Neuhoff, secretary and treasurer. At the time of the transfer of assets by L. C. Roney, Inc. to the Southwestern Development Company on August 31, 1948, A. B. Ruddock, R. N. Jones and Edward D. Neuhoff served as officers and directors of the Southwestern Development Company and occupied the same positions as officers and directors of L. C. Roney, Inc.

Subsequent to the time that Southwestern Development Company became the majority shareholder in L. C. Roney, Inc., it made loans to L. C. Roney, Inc., of large sums of money to enable the junior corporation to carry on its business operations as manufacturers of liquified petroleum gas equipment. The minute book of L. C. Roney, Inc., disclosed resolutions were passed in 1946 authorizing the borrowing of $348,000 from the Southwestern Development Company. However, the evidence does not disclose the existence of any resolution in the minutes of meetings by the directors of the Southwestern Development Company authorizing the making of loans to L. C. Roney, Inc. On August 9, 1948, an agreement of sale was executed between L. C. Roney, Inc., as seller and the Southwestern Development Company as buyer wherein it is recited that in partial cancellation of an indebtedness to buyer of $577,652.20 (plus interest of $31,275.14), which sums were advanced by buyer to seller for operating expenses and in consideration of buyer's agreement to discharge an indebtedness of $130,000 owed by L. C. Roney, Inc., to the Security-First National Bank of Los Angeles, L. C. Roney, Inc., agreed to sell all of its assets to the Southwestern Development Company as of August 31, 1948. The value of the seller's assets was listed at $705,000. This agreement was signed by A. B. Ruddock in behalf of the Southwestern Development Company and by R. N. Jones and Edward D. Neuhoff for L. C. Roney, Inc. A notice of intended sale in compliance with section 3440 of the Civil Code was published on August 13, 1948, and the transfer of assets was consummated on August 31, 1948. On September 1, 1948, Southwestern Development Company filed a certificate that it was conducting a business under the fictitious name of L. C. Roney, Inc., and it has continued to operate the business so acquired from L. C. Roney, Inc., under that name as a division of its own operations. This phase of the Southwestern Development Company's operations was carried on at the same address as before, using stationery carrying the letterhead of L. C. Roney, Inc., and selling equipment and manufactured parts bearing the stamp "L. C. Roney, Inc." Mr. Neuhoff testified that the principal reason for the adoption of the fictitious name L. C. Roney, Inc., was to facilitate the use of the operating supplies and finished parts of the transferred business, which in large part bore the insignia of the predecessor corporation and which would entail substantial expense to change.

Plaintiff, who resided in Texas during the period involved in this action, had no actual notice of the transfer of assets or the filing of a certificate to do business under such fictitious name. Plaintiff had no business relations with L. C. Roney, Inc., after the transfer of the assets, although in all correspondence between the parties, L. C. Roney, Inc., used letterhead stationery identical with that used by Southwestern Development Company doing business as L. C. Roney, Inc., a fictitious firm name. On June 30, 1949, L. C. Roney, Inc., through R. N. Jones and Edward D. Neuhoff, filed with the Secretary of State a certificate of election to wind up and dissolve, with the written consent of the holder of all its stock, Southwestern Development Company, given through its officers R. N. Jones and Edward D. Neuhoff. When plaintiff instituted its action on July 27, 1949, against defendant corporation, its answer was filed by Mr. Neuhoff, who was also its attorney in addition to being an officer and director of both defendant and appellant and the answer was verified by A. B. Ruddock, president of both defendant and appellant corporations. Mr. Neuhoff testified that he was under a general retainer as counsel for the Southwestern Development Company, and that he expected the costs of the litigation would be subsidized by Southwestern Development Company. It was on the basis of these facts, none of which were before the court in the original trial, that the order of November 29, 1951 was made adding appellant's name to the judgment previously entered.

In challenging the validity of the trial court's order amending its earlier judgment, appellant urges: (1) the trial court acted in excess of its jurisdiction in adding the name of the Southwestern Development Company to a final judgment, and (2) no showing was made that would warrant a disregard of the separate corporate existence of L. C. Roney, Inc., and support a finding that it was the *alter ego* of appellant. We are unable to agree with these contentions.

[1–5] The rule is clearly established that the power of a court to correct clerical errors in a final judgment may not be used as a springboard to rectify its judicial errors. Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Barkelew v. Barkelew, 73 Cal.App.2d 76, 166 P.2d 57. But that principle is not here involved. The order here under consideration does not effect an enlargement of the original judgment nor is it a modification thereof to correct a supposed error of law. It is simply an amendment whose purpose is to designate the real name of the judgment debtor. Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 47 P.2d 530; In Mirabito v. San Francisco Dairy Co., 1 Cal.2d 400, 35 P.2d 513 (decided previous to the case last cited, which is an outgrowth of the same litigation), plaintiff recovered a judgment against a corporation known as the San Francisco Dairy Company for personal injuries sustained as a result of negligence by an employee. During the trial evidence was adduced that all the assets of the San Francisco Dairy Company had been acquired by the Dairy Delivery Company, which acknowledged that the San Francisco Dairy Company was merely a nonoperating subsidiary and constituted in effect merely a business name for the Dairy Delivery Company. The judgment was affirmed on appeal to the Supreme Court, which found also upon a review of the evidence that the San Francisco Dairy Company was the *alter ego* of the Dairy Delivery Company. When the plaintiff subsequently discovered that his judgment against the San Francisco Dairy Company was uncollectible due to lack of assets, he made a motion in the trial court for an order adding the name of Dairy Delivery Company to the judgment at a time when the statute of limitations had run in favor of that company, which motion was granted. Dairy Delivery Company thereupon moved for an order setting aside the order adding its name as a judgment debtor, and upon denial of this motion prosecuted an appeal. The court held the motion to add Dairy Delivery Company's name as a judgment debtor was properly granted, since it and the San Francisco Dairy Company were the same concern; "hence * * * the amendment did not add a new defendant to the judgment, but merely set forth the correct name of the real defendant. That a court may at any time amend its judgment so that the latter will properly designate the real defendants is not open to question." Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 57, 47 P.2d 530, 531.

Appellant endeavors to distinguish the Mirabito case, in which the relations between the two corporations were established during the trial and an express finding of an *alter ego* relationship made, by pointing out that in the original trial of the case at bar (1) no testimony was offered to indicate the existence of any relationship between appellant and L. C. Roney, Inc., and (2) no finding was made in the original proceeding that L. C. Roney, Inc., was appellant's *alter ego*. There is nothing in the language or the logic of the Mirabito decision which would limit its application solely to a situation where the connection between the two corporations is developed in the original trial. The limitation contended for by appellant would fetter the court's ability to do justice between the parties and award a premium to a litigant's capacity to conceal his real identity. The liberality with which a court permits amendments of judgments where the record itself clearly reflects a clerical error should apply equally to the use of extrinsic evidence to clarify the name of the real defendant. See Leviston v. Swan, 33 Cal. 480, 484; Boust v. Superior Court, 162 Cal. 343, 345, 122 P. 956. Where a court may with propriety amend a judgment, evidence dehors the record is admissible, upon proper notice to the adversary party, in order to make the judgment speak the truth. Scamman v. Bonslett, 118 Cal. 93, 97, 50 P. 272. See Freeman on Judgments (5th Ed.), vol. 1, p. 939. Since the court had jurisdiction over the defendant, it had jurisdiction to make its judgment reflect the defendant's true name. Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 59, 47 P.2d 530; Brum v. Ivins, 154 Cal. 17, 20, 96 P. 876. A question having arisen as to the identity and character of the defendant upon whom the judgment was binding the court possessed the power to adopt a suitable procedure for the purpose of determining that question. Code Civ.Proc., sec. 187.[1] Under the authority of this section the court properly exercised its power by taking evidence, after proper notice, in order to determine the true name of defendant.

[6–9] The question remaining for determination is whether the evidence taken at the hearing on the order to show cause supports the finding that the Southwestern Development Company was in fact the *alter ego* of L. C. Roney, Inc., and as such the real party who should be bound by the judgment irrespective of the name under which it was sued.

Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will look behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability. D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 420, 6 P.2d 251, 79 A.L.R. 329. Since the separate personality of a corporation is but a statutory privilege it must not be employed as a cloak for the evasion of obligations. The conditions which must be present before the corporate veil will be pierced are outlined in Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673, 676, where the court points out that before the obligations of a corporation can be regarded as those of another person, the following circumstances must appear: "First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." The second requirement suggested in Minifie v. Rowley, supra, is further refined in the following expression: "* * * where the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. (Citing cases.) It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. (Citing cases.) Here confusion would be promoted and an unjust result be accomplished if the maintenance of the two entities controlled by the same persons and having an identical name were permitted to frustrate a meritorious claim." Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 522–523, 203 P.2d 522, 527.

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[1] Section 187 reads: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

The evidence adduced at the hearing of November 19, 1951, clearly established the following significant facts: The Southwestern Development Company was a family corporation which since 1946 owned the entire outstanding stock of L. C. Roney, Inc.; an interlocking directorate existed between L. C. Roney and Southwestern Development Company, and the officers of both were identical; that A. B. Ruddock, the president of both corporations and a member of the family which owned the Southwestern Development, was vested with a blanket authorization to take unilateral action that would bind the Southwestern Development Company; large sums of money were furnished L. C. Roney, Inc., by Southwestern Development Company without security and apparently without the formality of a resolution authorizing such loans; and both corporations had the same attorney, who handled the initial phases of this litigation, preparing the answer to plaintiff's complaint, which was verified by A. B. Ruddock. When the assets of L. C. Roney, Inc., were sold to Southwestern Development Company the former corporation received no consideration other than the recited cancellation of debts allegedly owed to the parent corporation and the agreement to assume one particular obligation, and was left without assets and without the means of paying its debt to plaintiff. Following the shift of assets, the business of L. C. Roney, Inc., was carried on in identical fashion, with the same controlling personnel, using its former name as a fictitious firm style as a part of the operations of the Southwestern Development Company. These facts and circumstances furnish ample support for the finding of the trial court that defendant was but the *alter ego* of appellant corporation. There is substantial evidence of domination of defendant by appellant corporation. There is complete unity of ownership and interest. The testimony showing loans by Southwestern Development Company to L. C. Roney, Inc., without specific authorization by resolution of the directors of appellant corporation and in excess of the amount L. C. Roney, Inc., was authorized to borrow leads to a legitimate inference of some commingling of assets. Further, the attorney for both corporations was the same, and though the complaint was brought against L. C. Roney, Inc., the litigation was in effect carried through and subsidized by appellant corporation, which at all times was fully apprised and cognizant of plaintiff's claim and of the legal action it had taken against L. C. Roney, Inc. The collective weight of these facts clearly supports the finding that defendant corporation was merely an instrumentality through which appellant was transacting its own operations as a business convenience. "* * corporations cannot escape liability by a mere change of name or a shift of assets when and where it is shown that the new corporation is, in reality, but a continuation of the old." Blank v. Olcovich Shoe Corp., 20 Cal.App.2d 456, 461, 67 P.2d 376, 379. The foregoing recital contains all the elements requisite to the establishment of an *alter ego* relationship; control of one corporation by the other; the use of one corporation as an instrumentality or business conduit of the other; the promotion of an injustice through the preservation of the separate corporate identity. See Duarte v. Postal Union Life Ins. Co., 75 Cal.App.2d 557, 576, 171 P.2d 574.

[10, 11] Appellant argues that no fraud has been perpetrated on plaintiff by the conveyance of all the assets of L. C. Roney, Inc., to appellant for a recited consideration which left L. C. Roney, Inc., insolvent at a time when plaintiff's obligation was outstanding, nor was plaintiff misled by appellant's continuation of the defendant's business under an identical fictitious name. It is unnecessary to decide whether this type of transaction or conduct constituted an actual or constructive fraud on plaintiff since an *alter ego* relationship may exist independent of fraudulent purpose. Where

the recognition of the separate character of the entities would result in probable fraud, promote confusion or serve to accomplish an injustice, the law will strip a corporation of its separate existence. Gordon v. Aztec Brewing Co., supra, 33 Cal.2d at page 523, 203 P.2d 522, and place responsibility on the party actually liable for the obligation through the application of the *alter ego* doctrine. Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 47 P.2d 530.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; EDMONDS, J., dissenting.

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112 Cal.App.2d 672

PEOPLE v. WELLS.

Cr. 4800.

District Court of Appeal, Second District, Division 1, California.

Aug. 14, 1952.

Defendant pleaded guilty to misconduct with a five-year-old girl, and was adjudged a sexual psychopath and was committed to a state hospital, and, after being returned from hospital, was placed on probation. The Superior Court of Los Angeles County, Philip H. Richards, J., terminated defendant's probation and pronounced judgment, and defendant appealed. The District Court of Appeal, Drapeau, J., held that Superior Court had right to terminate probation and to pronounce judgment when it appeared that defendant had again misconducted himself with children.

Judgment affirmed.

1. Criminal Law 🔑625

Where defendant, who pleaded guilty to misconduct with a five-year-old girl, was adjudged a sexual psychopath and was committed to state hospital, and after a year and a half in the hospital, he was returned to court and was granted probation, and thereafter defendant again misconducted himself with children, court had right to terminate probation and to pronounce judgment, and was not required to commit defendant again to a mental hospital under the sexual psychopathy law. Welfare and Institutions Code, §§ 5500 et seq., 5501(b, c); Pen. Code, §§ 288, 1203 et seq., 1203.2.

2. Criminal Law 🔑625

The sexual psychopathy law was enacted to protect children from degenerates, and to keep sexual perverts locked up until society can be reasonably assured that they will no longer be a menace to children. Welfare and Institutions Code, § 5500 et seq.

3. Criminal Law 🔑625

Sexual psychopaths are to be returned to society only when court is positively convinced that they are no longer dangerous to children. Welfare and Institutions Code, § 5500 et seq.

4. Criminal Law 🔑625

When a sexual psychopath is returned to superior court when Director of Mental Hygiene and superintendent of a mental hospital certify that he has recovered to such an extent as no longer to be a menace to safety of others, it becomes duty of judge to go on with the case, and it is within discretion of judge to send defendant to prison. Welfare and Institutions Code, §§ 5500 et seq., 5517.

Gladys Towles Root and Herbert W. Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant pleaded guilty to violation of Penal Code Section 288,—misconduct with a five-year-old girl. Also he admitted a prior felony conviction of burglary and grand theft, for which he served a term of imprisonment.

After taking his plea, the Superior Court suspended further proceedings, adjudged defendant a sexual psychopath, and committed him to a state hospital. Welf. & Inst. Code, div. 6, pt. 1, ch. 4.

After a year and a half in the hospital, defendant was returned to the Superior Court for further proceedings, and was granted probation.

After defendant was out on probation for a year and three months, he was returned to court, his probation was revoked, and he was sentenced to the penitentiary. He appeals from this judgment.

At the hearing on revocation of probation it appeared that defendant had again misconducted himself with children; this time with two little girls, one three years of age, the other five and a half years of age. At the hearing, a medical expert reported that defendant was "an aggressive type of sexual psychopath of long standing, who will undoubtedly repeat his offense against children, and represents a perpetual hazard to the community."

The only question on this appeal is whether the sexual psychopathy proceedings of the Welfare and Institutions Code should have been gone through with again?—Whether there should have been another hearing and commitment of defendant to a mental hospital before probation was revoked and judgment was pronounced for the offense to which he had pleaded guilty?

If this had been a prosecution for the two sex offenses last committed by defendant, subdivisions b or c of Section 5501 of the Welfare and Institutions Code would have applied.

[1] But this proceeding was to revoke probation. (Penal Code Sections 1203 et seq.) All the provisions of the sexual psychopathy law had been complied with. Defendant had been to the mental hospital and had been returned to the Superior Court. He had been granted probation and had violated the terms of the clemency extended to him. He had had his chance. So it was the right of the trial court under Section 1203.2 of the Penal Code to terminate defendant's probation and to pronounce judgment. It is proper to revoke probation when a defendant pleads guilty to a second offense committed during the time he is on probation. People v. Schwartz, 80 Cal.App.2d 801, 183 P.2d 59.

[2] Here we have a disheartening failure in the administration of the sexual psychopathy law. That law was enacted to protect children from degenerates, and to keep sexual perverts locked up until society could be reasonably assured that they would no longer be a menace to children. The primary purpose of the law was to protect society against the activities of sexual perverts. People v. Hector, 104 Cal.App.2d 392, 231 P.2d 916; People v. McCracken, 39 Cal.2d 336, 246 P.2d 913.

[3] It was never the purpose of the sexual psychopathy law to set up a legal by-pass whereby certain privileged perverts would be kept in mental hospitals for a short time and then turned loose. Sexual psychopaths are to be returned to society when, and only when the Superior Court is positively convinced that they are no longer dangerous to children.

It was thought that it would be more humane to confine sexual psychopaths in mental hospitals, rather than in prisons of maximum security. And that perhaps in such hospitals some cure might be worked in the malformed minds of these men. And, so far as this can be done without for one moment forgetting the primary purpose of the law, it is an advance in penology. (See "Sane Laws for Sexual Psychopaths," 1 Stan.L. Rev. 486.)

Therefore, the law provides that sexual psychopaths are to be returned to the Superior Court when the Director of Mental Hygiene and the superintendant of a mental hospital shall certify that in their opinion (a) the sexual psychopath has recovered to such an extent as to no longer be a menace to the safety of others, or (b) will not benefit by further care and treatment in the hospital and *is not a menace to the health and safety of others,* (emphasis added) or (c) has not recovered and is still a menace to the health and safety of others. (Sec. 5517, Welf. & Inst. Code.)

[4] When the sexual psychopath comes back to Superior Court it becomes the duty of the judge to go on with the case. It is within the discretion of the court to send the defendant to state's prison, even though the medical experts certify that he has recovered to such an extent as to no longer be a menace to the safety of others. Such discretion is to be exercised in view of the entire history of the case, and is properly committed to the conscience of the trial

judge. And if the judge feels that the defendant is still a menace to the health and safety of others, it is his duty to send him to state's prison; to temporize no longer with men who prey upon children.

In such cases as this trial courts must rely upon, and to some extent must be guided by, the opinions of medical experts. It is hard to understand how responsible officers of this state were willing to certify that this defendant, who admitted he had committed an abominable sexual crime, after only a year and a half in a mental hospital was no longer a menace to the health and safety of others.

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, Justice.

I concur in the judgment. I disagree with that portion of the opinion which intimates that these new psychopathic laws represent any advance in penology.

PACIFIC GAS & ELECTRIC CO. v. MINNETTE et al.

Civ. 8071.

Sac. 6203.

District Court of Appeal, Third District, California.

Aug. 12, 1952.

Rehearing Granted Sept. 11, 1952.

Action by Pacific Gas and Electric Company against Christino Minnette and others for a mandatory injunction requiring removal of garage building constructed beneath electric power lines in violation of restrictions contained in grants of easement to maintain such lines. The Superior Court, Solano County, Harlow V. Greenwood, J., gave judgment for plaintiff granting an injunction, and defendants appealed. The District Court of Appeal, Peek, J., held that under doctrine of balancing of the conveniences, the evidence did not warrant issuance of injunction.

Judgment reversed and cause remanded for purpose of determining amount of any damages sustained by plaintiff.

1. Injunction 🔑**1**

Injunctive relief is not a matter of right, but depends upon the circumstances of each case.

2. Easements 🔑**61(2)**

Equity will in a proper case award a mandatory injunction for protection of an easement, will enjoin a threatened interference, and will require repair of an injury already done or removal of an obstruction already erected, but each case is determined according to the particular circumstances and it rests in the sound discretion of court whether a mandatory injunction will issue.

3. Easements 🔑**61(2)**

To entitle complainant to a mandatory injunction for protection of an easement, the right must be clear and there must be a material interference with the right of owner of easement and the damages sustained must be more than merely nominal.

4. Easements 🔑**61(2)**

In determining whether to award a mandatory injunction for protection of an easement, court will consider the expense which will be occasioned to defendant if writ is granted, as against inconvenience to be suffered by complainant, if it is refused, and where removal of obstruction will bring no actual advantage, or expense entailed thereby will be entirely disproportionate to the benefit resulting, complainant will be relegated to his legal remedy.

5. Injunction 🔑**23**

Under doctrine of "balancing of the conveniences", equity may deny injunctive relief and relegate complainant to his remedy at law, if the benefit resulting from granting injunction will be slight as compared to the injury caused defendant thereby.

See publication Words and Phrases, for other judicial constructions and definitions of "Balancing of the Conveniences".

6. Easements ⚿61(9)

Under doctrine of "balancing of the conveniences", evidence did not warrant issuance of mandatory injunction requiring removal of garage building constructed beneath electric power lines in violation of restrictions of which defendants had no actual knowledge contained in recorded grants by defendants' predecessors in title of easement to maintain power lines across the land, where no showing was made that building materially interfered with use of easement, whereas granting injunction would result in total destruction of $14,000 building which was almost complete at time owner of easement requested stoppage of work on building.

◆

Leo C. Dunnell, William H. Herbert, Adey May Dunnell, Fairfield, Bradley & Millon, Vallejo, for appellants.

Robert H. Gerdes and W. R. Dunn, San Francisco, Burt D. Goodman, Fairfield, Frederick W. Mielke, Jr., San Francisco, for respondent.

PEEK, Justice.

The defendants have appealed from a judgment in plaintiff's favor granting a mandatory injunction requiring the removal of a garage building constructed beneath electric power lines of the plaintiff. The cause was before this court on a previous appeal. 92 Cal.App.2d 401, 206 P.2d 1138. It was there held that defendants' answer sufficiently alleged facts constituting a defense, and the judgment sustaining plaintiff's general demurrer to the amended answer without leave to amend was reversed. The present appeal is before this Court after a trial on the merits.

In 1917 the plaintiff acquired by grant from M. Dos Reis and A. Dos Reis an easement to maintain two electric power lines across the property of the grantors. The right of way thus acquired was 40 feet wide. In 1920 the same grantors conveyed a second right of way for a third line 25 feet wide and paralleling the first. Each grant was for fifty years, and each contained the following restriction: "The parties of the first part [Dos Reises] will not erect or construct or permit to be erected or constructed beneath said lines of poles and wires any buildings, structures or improvements, excepting from the above, however, roads and fences, it being understood that the parties of the first part shall have the right to farm said land as they may desire." The conveyances were recorded in 1917 and 1920 respectively. Pursuant to the rights acquired by the two grants, plaintiff constructed transmission lines across the Dos Reis property.

In 1945 the defendants Minnettes purchased a lot fifty feet wide and one hundred feet deep from the successors of Dos Reis. This lot originally formed a part of the Dos Reis ranch. The transmission lines in question crossed this lot. The record chain of title shows that the lot was first conveyed by the Dos Reises to the Vallejo Industrial Properties Company who transferred the same to S. and Louise Hommel, who in turn conveyed to the defendants. Only the first of these conveyances excepts therefrom the rights of way in question.

At the time defendants purchased the lot the property had been zoned for commercial uses by the County of Solano. Following a hearing before the County Planning Commission defendants were granted a use permit to build a garage, and construction was started in January, 1947. Upon the request of plaintiff work was stopped in June, 1947. The building, which is fifty-two feet wide and forty-two feet long and of concrete block construction reinforced with steel, was substantially complete at the time of plaintiff's request. Plaintiff by its action sought to compel the removal of the building. As previously stated, the order of the trial court sustaining plaintiff's demurrer to defendants' answer without leave to amend was reversed by this Court. 92 Cal.App.2d 401, 206 P.2d 1138. Upon retrial on the merits the trial court gave judgment for plaintiff as prayed. The court found generally in favor of plaintiff and in particular that defendants had expended approximately $9,000 in construction of the building and that it could not be removed without destruction.

Defendants make three main contentions on appeal: (1) That the findings do not support the judgment in that the evidence is insufficient to show that the right of way described in the grants crosses defendants' property; (2) that the right to enforce the easement against the erection of buildings under the power lines was waived and abandoned by plaintiff; (3) that the trial court abused its discretion in granting an injunction compelling the removal of the structure.

It appears unnecessary to discuss the first two contentions. The questions so raised are essentially predicated upon questions of fact which were either directly or inferentially determined against defendants, and therefore this Court, under the well-established rule, is bound by such determination. However, it appears that defendants' third contention is well founded, and hence we shall limit our discussion to that question.

[1–4] Injunctive relief is not a matter of right, but depends upon the circumstances of each case. The applicable principles are set forth in Clough v. W. H. Healy Co., 53 Cal.App. 397, 400, 200 P. 378, 379, as follows:

> "A court of equity will, in a proper case, award a mandatory injunction for the protection and preservation of an easement; will enjoin a threatened interference, and require a defendant to repair an injury already done or to remove an obstruction already erected. * * *; but it is not in every case of a permanent obstruction that such relief will be granted. Each case is determined according to the particular circumstances; and it rests in the sound discretion of the court whether or not a mandatory injunction will issue. To entitle the complainant to equitable relief the right must be clear, and an injunction of the character here in question will be denied when the obstruction does not constitute a material interference with the right of the owner of the easement, or where the damage sustained by him is merely nominal. The court will consider the expense which would be occasioned to the defendant if the writ be granted, as against the inconvenience to be suffered by the complainant if it be refused; and where the removal of the obstruction would bring no actual advantage, or the expense entailed thereby would be entirely disproportionate to the benefit resulting, the complainant will be relegated to his legal remedy for the vindication of his right."

[5] Thus, in Wright v. Best, 19 Cal.2d 368, at page 386, 121 P.2d 702, 712, the court, in commenting upon the equitable doctrine of the " 'balancing of the conveniences' " stated:

> "* * * Under this doctrine, a court of equity may deny injunctive relief and relegate the plaintiff to his remedy at law, if the benefit resulting to him from the granting of the injunction will be slight as compared to the injury caused the defendant thereby." See also Vesper v. Forest Lawn Cemetery Ass'n, 20 Cal.App.2d 157, 163, 67 P.2d 368; Lowe v. Copeland, 125 Cal. App. 315, 323, 13 P.2d 522; Rothaermel v. Amerige, 55 Cal.App. 273, 275, 203 P. 833.

[6] Applying the above principles to the present case it appears that the evidence does not warrant the issuance of the injunction. The defendants, as the trial court found, had no actual knowledge of the grants of easements containing the restrictions here in question nor did they wilfully or deliberately invade the rights of plaintiff. The plaintiff presented no evidence showing that the building materially interferes with its use of the easement, or that there is any interference with the actual transmission of electric power. At best it is only inferable that the building might hamper operations to a degree, such as are not rendered impossible by the existence of the building beneath the lines. Furthermore, although the evidence is not clear, it would appear that the wires nearest to the building, and hence the ones most likely to present problems, belong to a power company not a party to this proceeding. Again referring to the rule above stated, in considering the hardship of the parties, it appears that the granting of the injunc-

tion would result in the total destruction of a $14,000 building, certainly a substantial loss to the appellants, while the respondent would receive little, if any, benefit.

For the foregoing reasons the judgment is reversed, and the cause remanded for the sole purpose of determining the amount of damages, if any, sustained by plaintiff.

SCHOTTKY, Justice pro tem., and VAN DYKE, J., concur.

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112 Cal.App.2d 669

PEOPLE v. JENSEN.

Cr. 4790.

District Court of Appeal, Second District, Division 1, California.

Aug. 14, 1952.

Defendant was convicted in Superior Court of Los Angeles County, Philip H. Richards, J., of escape from jail, and he appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to support the conviction.

Affirmed.

Escape 🔑10

Evidence of officer that he arrested accused and put him in a cell, after which cell lock was broken and accused disappeared, was sufficient to support conviction for escape from jail.

◆

Howard T. Jensen, in pro. per.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DORAN, Justice.

As recited in respondent's brief, in three separate informations, "appellant was charged with a violation of the Dangerous Weapons' Control Law, Gen.Laws, Act 1970, § 1 et seq.; one count of grand theft and one count of a violation of Vehicle Code Section 503, both in connection with the taking of an automobile; and a charge of escape from jail. In each information it was also alleged that appellant had suffered a prior felony conviction in connection with which he had served a term of imprisonment in a federal prison. Appellant entered a plea of not guilty to each charge; denied the previous convictions; and the causes were submitted upon preliminary transcripts, trial by jury having been duly waived. Appellant was found not guilty of the grand theft count but guilty of all other charges including the prior conviction."

Appellant's position is stated as follows:

> "In opening brief it is evident the appellant is so confining himself to the conviction of escape and appellant so stipulates that the respondent is correct in implying the appellant is only attacking one cause upon appeal and has so designated this to be very clear in opening brief and contends that the judgment based upon same be reversed on the following reasons:
>
> "1. Insufficiency of the evidence.
>
> "2. Limitation of evidence and argument to relevant matters.
>
> "3. Prejudicial conduct on the part of the District Attorney resulting in a miscarriage of justice."

Appellant appearing in pro. per. argues that "Evidence to sustain a conviction against Appellant was determined by sole testimony of Officer K. Kendricts, whom stated he placed the Appellant under arrest at the Huntington Park Police Station, and placed him in a cell at thereof upon suspicion of a felony, upon which Officer K. Kendricts stated Appellant escaped. There was no booking slip presented to substantiate statement of the Appellant being incarcerated in this jail, and the only person who stated seeing appellant in custody upon the 3rd day of March, 1951, was Officer K. Kendricts, in testimony, Officer K. Kendricts stated the Appellant was never charged with a crime and when later arrested there was no charge they could place against Appellant." It should be noted that Officer Kendricts testified in part as follows:

> "Q. Did you have occasion to make an arrest involving this defendant on or about March 3, 1951? A. I did.
>
> "Q. And what was that arrest for? A. Suspicion, grand theft, auto.
>
> "Q. What did you do with the defendant after arresting him? A. I brought him to the station here in Huntington Park and booked him and put him in the cell downstairs.
>
> "Q. You delivered him to the custody of the jailer? Is that right? A. That is right."

Officer Kendricts' testimony in this regard was corroborated by Officer Smith, who testified as to appellant's arrest:

> "Q. Isn't it true that the books do not say anything about 'grand theft, auto'? A. I couldn't say.
>
> "Q. Who has them? A. I imagine they are downstairs in the records room.
>
> "Q. There was a record made? A. I read it on the daily blotter.
>
> "Q. And that was in the ordinary course of business? Is that correct? A. Yes, sir.
>
> "Q. And that was a police booking blotter? Is that correct? A. Yes, sir.
>
> "Q. And that record indicates the custody of the man, what he is being held for? A. Yes, sir.
>
> "Q. At the time? A. Yes, sir.
>
> "Q. And who booked him? A. Yes, sir."

The record reveals that the cell lock was broken and the prisoner disappeared.

That the evidence is sufficient to support the conviction there can be no question.

Other contentions of appellant as noted above lack support in the record.

Affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

In re LOS ANGELES COUNTY PIONEER SOC.

PEOPLE v. LOS ANGELES COUNTY PIONEER SOC. et al.*

Civ. 18920.

District Court of Appeal, Second District, Division 2, California.

July 25, 1952.

As Modified Aug. 12, 1952.

Rehearing Denied Aug. 21, 1952.

Hearing Granted Sept. 18, 1952.

Proceeding in the matter of the Los Angeles County Pioneer Society in process of voluntary dissolution by the People of the State of California against such society for appointment of a trustee to administer funds of such society as a charitable trust. The Superior Court, Los Angeles County, James H. Pope, J., entered judgment declaring the society to be a charitable corporation and appointing a trustee, and the society and one member thereof appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that the society was a charitable corporation.

Affirmed.

1. Appeal and Error ⚷76(1)
Judgment ⚷217

Fact that court labeled judgment "interlocutory" was not determinative as to its finality or its appealability.

2. Judgment ⚷20

The substance and effect of a decree, not its form or label, determines its definitive character.

3. Appeal and Error ⚷80(3)
Judgment ⚷217

The judgment is "final" and appealable where no further judicial action is necessary to complete adjudication of rights and obligations of parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

4. Judgment ⚷564(2)

Judgment determining that corporation was a charitable and benevolent corporation, and not a non-profit, private corporation, and that its assets were held in trust was a "final judgment", though labeled "interlocutory", and no appeal having been timely taken, appellate court was without power to announce a different judgment or otherwise interfere.

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* Subsequent opinion 257 P.2d 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

5. Charities 🔑39

Where express aims of corporation were to collect and preserve data bearing upon early history of Los Angeles County and California and customs of people in California, and to perpetuate memory of those who contributed to making of such history, it was a "charitable corporation", and its property constituted res of charitable trust which corporation was obligated to administer in interest of the trust. Civ. Code 1929, § 1313; Corporation Code, §§ 9000 et seq., 10200 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Charitable Corporations".

6. Wills 🔑432

Judgment in will contest attacking validity of bequest to corporation on ground that corporation was charitable and will had been made within 30 days of testator's death, wherein it was determined that corporation was charitable, was res judicata in action against corporation for appointment of trustee to administer trust. Civ. Code 1929, § 1313.

7. Judgment 🔑632

Party asserting plea of res judicata need not have been a party, or in privity with a party, to the earlier litigation.

8. Charities 🔑39

Where corporation had been adjudged a charitable corporation, its members, if they entertained contrary views, owed duty to public property to effect such change in corporation as would prevent deception, and not having done so, would not be heard some 30 years later to repudiate lofty principles enunciated in corporation charter.

9. Charities 🔑49

Where members of charitable corporation undertook to divert its assets by causing judgment to be entered repudiating trust and authorizing its dissolution, it became the duty of the Attorney General to proceed with such measures as would restore assets of trust to their original purpose, and Attorney General was authorized to intervene in dissolution proceeding.

10. Charities 🔑20(2), 24

Property that is consecrated to charitable uses is, in a measure, a part of the public resource of the state and is dedicated to the beneficial public purposes of the corporation, and such trust does not fail, nor is it extinguished by forfeiture or expiration of the charter of corporate trustee or by trustee's inability, failure or refusal to administer the trust res. Corporations Code, § 10206(c).

11. Charities 🔑43

In the event the trustee of a charitable trust abandons the trust or tends to divert trust sums to private uses, equity will prevent diversion and remove offending parties. Corporations Code, § 10206(c).

12. Charities 🔑49

Where majority of members of charitable corporation undertook to dissolve corporation and to distribute its assets among themselves, their acts were an effective renunciation of the trust and a hostile abuse of the corporation's benevolent purposes, and it became the duty of the Attorney General to prevent such spoliation. Corporations Code, § 10206(c).

13. Declaratory Judgment 🔑303

The Attorney General was an indispensable party in a declaratory action brought for purpose of despoiling treasury of charitable trust, and therefore judgment declaring corporation not to be charitable did not render corpus of trust estate free of its charitable nature where Attorney General was not a party to the action.

14. Charities 🔑43

Resolution of charitable corporations seeking appointment as trustee of another such corporation was some evidence which contributed to enlighten court as to likelihood that new trustee would deport itself in manner consistent with purposes of former trustee, but incorporation of resolution into order of appointment would not have been an appropriate addition to such order.

15. Charities ⚷43

In absence of proof showing that successor trustee of charitable trust was not competent properly to administer trust, court was powerless to disturb order appointing such trustee.

Morris Lavine, Los Angeles, for appellant Los Angeles County Pioneer Soc.

Ray Howard, Los Angeles, for appellant H. J. Lelande.

Lawler, Felix & Hall, Oscar Lawler, Los Angeles, for Historical Soc. of Southern California.

MOORE, Presiding Justice.

The Los Angeles County Pioneer Society brings this appeal from an order appointing Historical Society of Southern California as its trustee. Both are corporations and are respectively referred to herein as "Pioneer" and "Historical."

Pioneer was incorporated in 1910. Its membership having exceeded 600 finally dwindled to 58. All but three members favored its dissolution and a distribution of its assets. To that end, despite the resistance of the three objectors, Pioneer caused a declaratory judgment dated May 25, 1949 to be entered to the effect that its assets were subject to no trust and that the corporation might wind up its affairs and distribute its net assets ratably among its members. The objectors contended that Pioneer was a charitable corporation, that its assets constituted a trust fund for certain charitable uses, and that a new trustee should be appointed. That action was followed by a liquidation of its assets, after which the corporation published notice of intention to wind up its affairs and voluntarily dissolve. Thereupon, it initiated the instant proceeding for dissolution in order to distribute its money among its members.

After trial, but before judgment, with the consent of all parties, the court authorized the attorney general to proceed against Pioneer as a charitable corporation. To the ensuing petition in intervention on behalf of the People, Pioneer made answer denying the trust, but admitting its purpose to distribute the assets among the membership. Also, it pleaded affirmatively the declaratory judgment (May 25, 1949), that it had caused to be entered. Upon the evidence submitted, the court on May 19, 1950, made findings and entered judgment that Pioneer is a charitable corporation whose $95,000 are dedicated to charitable and benevolent purposes; that it had abandoned the trust by attempting wrongfully to divert trust assets in its keeping to the private use of its members and that a trustee be appointed to carry out the purposes of the trust.

No appeal having been taken from such judgment, pursuant to petition, on October 18, 1950, Historical was appointed by the court to be trustee of Pioneer. Upon respondent's acceptance of the office, the court ordered the trust fund to be transferred to the new trustee. Notwithstanding the appeal is from the order of October 18, not a single argument is presented against the propriety of respondent's appointment or as to its ability competently and faithfully to perform the duties of trustee.

[1–4] On the contrary, Pioneer's total effort has been directed to the task of upsetting the "interlocutory" judgment of May 19, 1950, from which no appeal was taken and which is, therefore, conclusive as to all matters thereby determined. The fact that the court labeled the May, 1950, judgment "interlocutory" is determinative of neither its finality nor its appealability. Peninsula Properties Company v. County of Santa Cruz, 106 Cal.App.2d 669, 678, 235 P.2d 635. The substance and effect of a decree, not its form or label, determines its definitive character. Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11. It is final if no further judicial action is necessary to a complete adjudication of the rights and obligations of the parties. Ibid. By virtue of the foregoing doctrine, the May judgment was final and therefore appealable. While certain "judicial action" was reserved with respect to the appointment of a new trustee, such reserved action did not concern the rights of the parties to the proceedings or relate to the issues determined by the judgment. That Pioneer was a "charitable and benevolent corporation" as declared in the "interlocutory" judgment, and not a nonprofit, private corporation as contended by Pioneer, and that its assets were held in trust for "charitable and benevolent purposes," were fully determined and adjudged on May 19, 1950. Inasmuch as that decree is final and conclusive this court is powerless to announce a different judgment or otherwise to interfere, even if persuaded so to do.

Appointment of Trustee Not Abuse of Discretion

In view of Pioneer's sober presentation of its attack upon the "interlocutory" judgment, it is deemed advisable to consider the appeal as an affirmative declaration that the court abused its discretion in appointing Historical as trustee of Pioneer's assets. Upon that basis only Pioneer's points are considered.

[5] Proceeding upon the hypothesis that it is a nonprofit corporation and not a charitable or benevolent corporation, Pioneer insists that the court below was without jurisdiction to order a delivery of its assets to respondent. Such hypothesis is based upon a mere assumption on the part of appellant, grounded wholly in error and is contrary to the pronouncement of the Supreme Court, to the provisions of the Corporations Code and to the practices of Pioneer in its activities with respect to its property. In 1921 a testamentary gift was provided for Pioneer by one Dol who died less than 30 days after the execution of his will. The bequest was held to be of a charitable and benevolent nature in violation of the Civil Code, section 1313. Estate of Dol, 186 Cal. 64, 198 P. 1039. The court observed in 186 Cal. at page 66, 198 P. 1039, 1040, that the purposes of Pioneer as evidence by its articles of incorporation are to collect and preserve data bearing upon the early history of Los Angeles County and upon the state of California, to collect and preserve articles, specimens and materials illustrative of the customs, manners and habits of the people in California; to perpetuate the memory of those who, by their sacrifice and heroism contributed to the making of the history of the state and county. The declared aims of Pioneer were "obviously purposes tending to the benefit of the public at large," and regardless of the charter provisions for Pioneer's members "to cultivate social intercourse and friendship among its members" such activities would not remove Pioneer from the charitable and benevolent class.

Inasmuch as Pioneer's operations, in the main, tended to benefit the public at large, it was governed by that portion of the Corporations Code, Title 1, Division 2, Part 3, sec. 10200 et seq. relating to charitable corporations, and not by Part 1, section 9000 et seq. relating to nonprofit corporations. By virtue of the fact that Pioneer was so governed, the property it acquired from its benevolently-minded donors constituted the res of a charitable trust which Pioneer was obligated to administer in the interest of the trust. Also, the fact that the members of Pioneer received some direct benefits as a result of its administering the trust res did not detract from the fact that the general public was at the same time benefited.

[6, 7] Pioneer protests the citation of Estate of Dol as authority that Pioneer is a charitable trust contending that such holding is not res judicata. Such contention is error. In the Estate of Dol the court was governed by Pioneer's Articles of Incorporation. All surplus vestments were stripped from its corporeal remains and the court found from the lineaments of its being that it holds property as a charitable trust. But, says Pioneer, the trial court did not have the benefit of the facts in evidence on the trial of the present contest; that the proof of the social activities of its members and of their freedom from charitable activities would have made a different judgment in the Estate of Dol. Such argument is based solely upon speculation and flies in the face of the final judgment which determined that Pioneer is a charitable corporation and that effectually its holdings constitute the corpus of a charitable trust. That pronouncement is binding upon this court. "There is no compelling reason

* * * for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation. * * * Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted." Bernhard v. Bank of America, 19 Cal.2d 807, 812, 122 P.2d 892, 894. The quoted language leaves no doubt that the holding in Estate of Dol, 186 Cal. 64, 198 P. 1039, is conclusive and binding upon Pioneer on the issue as to whether the assets of Pioneer are the res of a charitable trust.

[8] There is one more fact that affects the position of Pioneer in the present controversy. The final judgment of the Supreme Court in the Estate of Dol was June 6, 1921. Pioneer was thereby advised that the highest court of the state regarded it as a charitable corporation. Both the corporation and its members knew of that judgment and that it might be the inducing cause for strangers to make charitable contributions to Pioneer. If its members entertained contrary views they or their board of directors owed a duty to the public promptly to effect such a change in the corporation as would prevent deception. They will not now be heard to repudiate the lofty principles enunciated in their charter.

[9] The attorney general was authorized to intervene. The facts that Pioneer was a charitable corporation and its members undertook to divert its assets by causing a judgment to be entered repudiating the trust and authorizing its dissolution were cause for alarm. When those facts were brought to the attention of the attorney general, it became his duty to proceed with such measures as would restore the assets of the trust to their original purpose. Corporations Code, sec. 10207; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 142, 45 P. 270, 35 L.R.A. 269; 2 Perry on Trusts, 7th Ed., sec. 744.

[10–12] A charitable corporation is forbidden to take or hold property for any purpose other than charitable. Corp.Code, sec. 10206(c). Property that is consecrated to charitable uses is, in a measure, a part of the public resource of the state and it is dedicated to the beneficial public purposes of the corporation. Mormon Church v. U. S., 136 U.S. 1, 59, 10 S.Ct. 792, 34 L.Ed. 481. The trust does not fail; neither is it extinguished by forfeiture or expiration of the charter of a corporate trustee or by the latter's inability, failure or refusal to administer the trust res. People v. Cogswell, supra, 113 Cal. 141, 45 P. 270. In the event the trustee abandons the trust or attempts to divert the trust funds to private uses, equity will prevent the diversion and remove the offending parties. (Ibid.) Therefore, when a majority of the members of Pioneer undertook to dissolve the corporation and to distribute its assets among themselves, their acts were an effective renunciation of the trust and a hostile abuse of the corporation's benevolent purposes. Inasmuch as the corpus of the trust is a resource of the state the attorney general would have been derelict not to prevent the spoliation.

[13] Pioneer asserts that the judgment in declaratory relief was conclusive against the state as well as Historical; that the trust res was thereby freed from the trust, leaving nothing for a controversy with respondent or the state. As indicated above, such judgment was ineffective by virtue of the absence of the attorney general from the proceeding. By reason of the fact that that official was an indispensable party in an action brought for the purpose of despoiling the treasury of a charitable trust, 14 C.J.S., Charities, § 62 b, p. 528, the entry of such judgment was an idle act, see Mitau v. Roddan, 149 Cal. 1, 9, 84 P. 145, 6 L.R.A.,N.S., 275, and did not render the corpus of Pioneer's trust estate free of its charitable nature.

A separate appeal was filed by H. J. Lelande, a member of Pioneer and one of the original objectors to the corporation's proposed plan of dissolution. He appeals from the Order Appointing Trustee "insofar as it fails to define the powers and duties" of the new trustee. The answer to that appeal is not far to seek. At the time of the hearing for appointment of a trustee of Pioneer, after its benevolent aims had been rejected by its membership, the "Sons and Daughters of the Los Angeles Pioneers" also sought to be selected as Pioneer's trustee. As if to forestall the efforts of its active rival, Historical introduced in evidence a resolution of its board declaring that in the event it were designated as trustee of Pioneer, it would use the funds of the trust estate for the purchase of a site and the erection of a building which should provide offices for the Native Sons of the Golden West and the Native Daughters of the Golden West, both of which were supporters of the efforts of the Sons and Daughters of Los Angeles Pioneers. The resolution committed Historical to the policy of housing all three of the last named groups and of cooperating in arrangements for the community use of the proposed building.

[14, 15] When the hearing was finished and the order made appointing Historical as trustee, the provisions were included that the Pioneer assets be delivered to Historical to be used only for the charitable purposes outlined in Pioneer's articles of incorporation. Because the order made no reference to the resolution introduced into evidence by Historical, appellant Lelande contends that the court thereby abused its discretion. Such is not the law. The court had only to be reasonably satisfied of the benevolent, honorable and competent character of the membership of Historical and reasonably certain that it would administer the assets of Pioneer in accordance with the latter's declared plan. The resolution adopted by Historical was some evidence which contributed to enlighten the court as to the likelihood that the new trustee would deport itself in a manner consistent with purposes of Pioneer but the incorporation of the Historical resolution into the order of appointment would not have been an appropriate addition thereto. No proof having been cited to show that Historical is not competent properly to administer the trust, this court is powerless to disturb the order appointing Historical as trustee.

The order is affirmed.

It is further ordered, however, that with respect to the accounting necessary in connection with the dissolution, the Superior Court is directed to award to Historical Society and Harry J. Lelande court costs incurred by each of them, in both the Superior Court and on appeal, in the protection of said fund against the wrongful use thereof, and such costs may be paid therefrom notwithstanding the commitment of Historical Society to use the fund according to its resolution.

McCOMB and FOX, JJ., concur.